Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

GISSEL PACKING CO., INC., *et al*

and

No. 691

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner,

—v.—

GISSEL PACKING CO., INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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2.11.65	Charge filed with the Board in No. 9-CA-3472
5.12.65	Charge filed with the Board in No. 9-CA-3583
3.31.65	Complaint and notice of hearing issued in 9-CA-3472
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JOINT APPENDIX

Case No. 11,228

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC., RESPONDENT

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Fourth Circuit:

The National Labor Relation Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Gissel Packing Company, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns. The proceeding resulting in said Order is known upon the records of the Board as Case Nos., 9-CA-3472 and 9-CA-3583.

In support of this petition the Board respectfully shows:

(1) Respondent is engaged in business in the State of West Virginia, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on March 25, 1966, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid bearing Government frank, by registered mail, to Respondent's counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 27(7) of

this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

[JURAT dated February 23, 1967]

RESPONDENT'S ANSWER TO PETITIONER'S PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Fourth Circuit:

Respondent answers the Petition heretofore filed in this matter as follows:

1. Answering numbered paragraph (1) of said Petition, Respondent admits that it is engaged in business in the State of West Virginia, within this judicial circuit, and that this Court has jurisdiction of said Petition. Respondent denies that any unfair labor practices occurred.

2. Answering numbered paragraph (2) of said Petition, Respondent admits that the Board on March 25, 1966, stated its findings of fact and conclusions of law, issued an Order directed to the Respondent, and that the Board's decisions and order were served on Respondent. Respondent denies that "due proceedings" were had before the Board and that the Board "duly" stated its findings of fact and conclusions of law, within the meaning of due process of law as to each.

3. Respondent can neither admit nor deny numbered paragraph (3) of the Petition, inasmuch as it appears to be a statement of intention. Respondent does not deny, however, the validity of the procedure set out therein.

4. Respondent further says that enforcement of the Board's Order should be denied and an Order entered by this Court setting aside in whole the said Order of the Board on the following grounds:

(a) The Board's conclusions of law upon which said Order was based, are erroneous.

(b) So much of the Board's decisions and findings of fact has formed the basis for the Order are not supported by substantial evidence on the record as a whole.

(c) To route the proceeding in its entirety, the Board exhibited prejudice and bias against the Respondent an unmistakable partisanship in favor of the Food Store Em-

ployees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as is apparent from the record.

(d) The Order is ambiguous and conflicting within its self.

(e) Errors of commission and omission, prejudicial to the Respondent, were made by the Trial Examiner upon hearing of this matter.

(f) The Board, in its Order, considered and based certain findings upon testimony which was improper and should have been excluded.

(g) Errors apparent on the face of the record and to which objection was made to the Board in exceptions to the Trial Examiner's decision.

WHEREFORE, the Respondent prays this Honorable Court that it caused notice of the filing of the Answer to be served upon the Petitioner, that it make and enter a decree setting aside the Order of the Board and granting Respondent such other further relief as justice may require.

/s/ J.E. JENKINS, JR.
Of Counsel for Respondent

JENKINS, SCHAUB & FENSTERMAKER
500 Kelly-Hatfield Building
Huntington, West Virginia
Counsel for Respondent

[JURAT dated March 7, 1967]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[fol. 1] UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
NINTH REGION

Case No.: 9-CA-3472, 9-CA-3583

IN THE MATTER OF:

GISSEL PACKING COMPANY, INC.

and

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

Cabell County Court House
Huntington, West Virginia,

Wednesday, August 4, 1965.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m., EDST.

BEFORE:

ROSANNA A. BLAKE, ESQ., Trial Examiner

* * * *

[fol. 3] TRIAL EXAMINER ROSANNA A. BLAKE: On the record.

The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of Gissel Packing Company, Inc. and Food Store Employees Union, Local # 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Cases Numbers 9-CA-3472 and 9-CA-3583.

The Trial Examiner conducting this hearing is Rosanna A. Blake.

Will counsel and other representatives for the parties please state their appearances for the record?

MR. BAKER: For the General Counsel, Jack V. Baker, Cincinnati, Ohio.

MR. GUNNOE: For the Charging Party, Woodrow R. Gunnoe, Post Office Box 2751, Charleston 30, West Virginia.

TRIAL EXAMINER: For the Respondent?

MR. JENKINS: For the Respondent, John E. Jenkins, Jr., Post Office Box 1457, Huntington, West Virginia.

TRIAL EXAMINER: The official reporter makes the only official transcript of these proceedings and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted [fol. 4] either by way of stipulation or motion to the Trial Examiner for her approval.

All matter that is spoken in the hearing room while the hearing is in session is recorded by the official reporter unless the Trial Examiner specifically directs off-the-record discussion. In the evnet that any party wishes to make off-the-record statement, request to go off the record should be directed to the Trial Examiner and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The Trial Examiner will allow an automatic exception to all adverse rulings. Upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. If a copy of any exhibit is not available at the time the original is received it will be the responsibility of the party offering such exhibit to submit the copy before the close of the hearing. In the event such copy is not submitted and the filing thereof is not for good reason shown been waived by the Trial Examiner, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument

which shall be included in the stenographic report of the hearing. In the absence of a request the Trial Examiner may ask for oral argument if at the close of the hearing she believes that such argument would be beneficial to her understanding of the contentions of the parties and the factual issues involved.

Any party shall also be entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions or both with the Trial Examiner who before the close of the hearing will fix a time for such filing.

Are you ready to offer your formal papers, Mr. Baker?

MR. BAKER: Yes. The index and description of formal documents and the formal documents have been marked for identification as General Counsel's Exhibit 1 (a) through 1(n). The formal documents have heretofore been shown to the parties. At this time I move that they be received into evidence.

MR. JENKINS: No objection.

TRIAL EXAMINER: Received.

(Thereupon, the above-mentioned documents were marked General Counsel's Exhibts 1(a) through 1(n) for identification and received in evidence.)

TRIAL EXAMINER: Are you ready to proceed?

MR. BAKER: During the off-the-record session I asked counsel for Respondent whether he would be willing to amend his answer at this time to admit paragraph 1 of the complaint in Case No. 9-CA-3583, the service of the charge. It is denied in his answer for lack of knowledge.

[fol. 6] MR. JENKINS: The Respondent will admit that portion of paragraph 1 in the complaint in Case Number 9-CA-3583 with respect to the receipt or service by the Respondent of registered mail on May the 13th. We don't have any knowledge as to when this charge was filed by the Union and therefore we can't stipulate to it.

MR. BAKER: Did you not receive a copy of the charge with the filing date thereon up in the right-hand corner?

MR. JENKINS: This is a document prepared by the Union and I'm not prepared to say when they filed it

TRIAL EXAMINER: But you admit you have received this document?

MR. JENKINS: Yes, Your Honor.

MR. BAKER: The filing date, as a matter of fact, was put on in the Regional Office, Mr. Jenkins.

TRIAL EXAMINER: They have admitted receipt of it.

MR. JENKINS: Yes.

MR. BAKER: Also, I would ask if counsel would not admit that the Charging Party is a Union within the meaning of Section 2(5), and I note for the Trial Examiner from my own personal experience that this is, I believe, the third hearing that Mr. Jenkins and I have been involved in involving the same Union. Again, it's simply a matter of having not to unnecessarily put on proof of a matter that is patently in existence, and I would suspect in light of the past litigation and Mr. Jenkins' repre- [fol. 7] sentation of Respondents in those cases that he does in fact know that this organization is a Union within the meaning of Section 2(5), plus the Board in both of those cases has found the Union to be so.

MR. JENKINS: We will so stipulate.

TRIAL EXAMINER: Thank you.

MR. BAKER: So you would admit then paragraph 3 of both complaints. That's the stipulation.

TRIAL EXAMINER: Received.

MR. BAKER: I also would like at this time to move to amend the complaint to correct an obvious typographical error in Case Number 9-CA-3472, specifically paragraph 5, sub-paragraph (a), sub-paragraph viii, which reads: "During the first week of September 1965," and that date should be during the first week of February 1965, the exact date being unknown. It obviously could not be September 1965 at this date.

TRIAL EXAMINER: Any objection?

MR. JENKINS: Yes, yes, Your Honor, we oppose the amendment or in the alternative if Your Honor grants the amendment we ask a continuance of the hearing on that respect.

TRIAL EXAMINER: Well, I'm prepared to, if you'll tell me how much time you'll need, I'll entertain a motion.

MR. JENKINS: Perhaps after our first reces, I'll consult with my clients.

TRIAL EXAMINER: Very well.

[fol. 8] MR. BAKER: That concludes all the preliminary motions I would have, Your Honor.

There is one more. I note from the complaint in paragraph 4 of both complaints that the Respondent denies that K.H. (Charles) Gissel; Herbert Gissel; and Alfreda L. Closterman do not occupy the position set opposite their names, respectively, vice president; vice president; secretary-treasurer. Now, the General Counsel has in its position various documents on the letterhead of this Respondent wherein it lists K.H. Gissel, Vice President; Herbert Gissel—or K.H. Gissel, I assume it's Herbert Gissel; Vice President; and Alfreda L. Closterman as Secretary-Treasurer.

MR. JENKINS: Your Honor, to clarify our position, we do not deny that the respective parties there occupy the offices shown. What we deny is that at all times material in this complaint they were acting as agents on behalf of the Corporation.

TRIAL EXAMINER: Are you denying their supervisory part also?

MR. JENKINS: Correct.

TRIAL EXAMINER: Though you admit the title?

MR. JENKINS: Correct.

TRIAL EXAMINER: The question is whether they have the necessary authority?

MR. JENKINS: That's correct, yes, ma'm.

* * * *

[fol. 9] MR. JENKINS: I have some preliminary motions, Your Honor.

The Respondent with respect to the complaint in Case 9-CA-3472 makes the following motions:

Number 1, to dismiss Sections 5(a) i, ii, on the ground that it is barred by the statute of limitations.

* * * *

TRIAL EXAMINER: Motion is denied.

MR. JENKINS: Respondent would submit that no unfair labor practice findings be found with respect to conduct prior to a six months' period.

MR. BAKER: You did deny the motion?

TRIAL EXAMINER: Yes.

MR. JENKINS: With respect to Case 9-CA-3472, Respondent moves to dismiss Section 5(a) iii, on the ground that it does not charge an unfair labor practice or any violation of the National Labor Relations Act.

[fol. 10] In amplification of the motion I would say that the Respondent making a statement that it would give up its business and let the Union operate its plant is not a violation of any law.

TRIAL EXAMINER: All right.

* * * *

TRIAL EXAMINER: The motion is denied. You can argue it as an issue in briefs.

* * * *

MR. JENKINS: The Respondent moves to dismiss paragraphs 5(a) vi, vii, ix; and paragraph 5(b), on the ground that these charges do not constitute, even if true, unfair labor practices or a violation of any of the Federal labor laws. All of these pertain to Case Number 9-CA-3472.

[fol. 11] MR. BAKER: I oppose the motion.

TRIAL EXAMINER: Denied.

MR. JENKINS: The Respondent moves to dismiss the allegations contained in the complaint in Case Number 9-CA-3583, Section 5(b), (c), and (f) on the ground the alleged occurrences contained therein, even if true, do not constitute unfair labor practices or violation of any Federal labor laws.

MR. BAKER: Oppose the motion.

TRIAL EXAMINER: Denied.

* * * *

[fol. 12] SHERWOOD M. SPENCER

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

[fol. 13] DIRECT EXAMINATION

BY MR. BAKER:

Q Would you please state your name and address for the record? A Sherwood M. Spencer, secretary-treasurer of Local 347 of the Food Store Employees Union, Post Office Box 2751, Charleston, West Virginia.

Q Mr. Spencer, was there a Union campaign conducted under your general auspices or supervision at the Gissel Packing Company, Inc., in Huntington, West Virginia? A There was.

Q Do you recall approximately when that campaign began? A As near as I can approximate, the early part of 1965.

Q Pursuant to that campaign—

MR. JENKINS: Is Mr. Brooks a witness? Excuse me.

MR. BAKER: No, he isn't.

MR. JENKINS: All right.

Q (By Mr. Baker:) Pursuant to that campaign, Mr. Spencer, what action, if any, did you take relative to gaining recognition as the bargaining representatives for the employees involved? A After we received a majority of the authorization cards, I called a Mr. Gissel on the phone.

Q Do you remember which Mr. Gissel that was? A Only from my notes would I be able to tell you but I believe it was Mr. Charles Gissel.

[fol. 14] Q I see. All right. Did you manage to reach Mr. Gissel by telephone? A I did.

Q Was there a subsequent conversation with Mr. Gissel? Did you talk to him? A I did talk to him, yes, sir.

Q What was the substance of the conversation between you and Mr. Gissel? A I asked him whether he remembered me, the name. He said he had some recollection of it, he believed he did. I told him we represented a majority of the employees in his plant and asked for bargaining and recognition. Mr. Gissel told me that they had an attorney I would have to talk to. In fact, I believe he said they had two attorneys and I asked him who they were and one of them he said was Mr. Green, the other name he did not give me.

MR. BAKER: I would like to have these documents marked for identification as General Counsel Exhibit 2.

(General Counsel's Exhibit 2 was thereupon marked for identification.)

Q (By Mr. Baker:) Mr. Spencer, I show you what has been marked as General Counsel's Exhibit 2 for identification and ask you if you can identify it. It's a latter dated January 22nd, 1965, a copy of a letter. A Yes, I sent that to Mr. Charles Gissel.

[fol. 15] Q That letter was sent how? A Sent by certified mail under date of January 22nd, 1965.

MR. BAKER: Your Honor, I offer General Counsel Exhibit 2 into evidence.

I'm sorry, Mr. Jenkins.

(Document is handed to Mr. Jenkins by Mr. Baker.)

MR. BAKER: Mark this as General Counsel Number 3, please.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit Number 3 for identification.)

MR. JENKINS: No objection.

(Thereupon, the document heretofore marked General Counsel's Exhibit Number 2 for identification was received in evidence.)

Q (By Mr. Baker:) Would you state whether or not you subsequently received a reply thereto from Mr. Gissel —After you sent your letter would you state whether or not you subsequently received a reply thereto from Mr. Gissel? A I did.

Q I now show you what has been marked as General Counsel Exhibit 3 for identification and ask if you can identify that letter, which is a letter dated January 26th, 1965. A I did receive this letter, yes, sir.

Q The letter is over whose signature? A K.H. Gis-

[fol. 16] sel, parenthesis marked Charles.

MR. BAKER: I move that General Counsel Exhibit 3 marked for identification be received into evidence.

MR. JENKINS: No objection.
TRIAL EXAMINER: Received.

(Thereupon, the document heretofore marked General Counsel's Exhibit No. 3 for identification was received in evidence.)

MR. BAKER: May we have about two or three minutes, Your Honor?
TRIAL EXAMINER: All right.
(Short recess.)
TRIAL EXAMINER: On the record.
MR. BAKER: May I have this marked for identification as General Counsel's Exhibit 4?

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit No. 4 for identification.)

Q (By Mr. Baker:) I now show you what has been marked General Counsel's Exhibit 4 for identification and ask you if you can identify this document which is a letter dated February 10th, addressed to Mr. K.H. Gissel?
A Yes, I wrote this letter to Mr. Gissel.
Q Was it deposited in the mail in the ordinary course of business? A It was.
[fol. 17] MR. BAKER: Your Honor, I offer General Counsel's Exhibit 4 into evidence.
MR. JENKINS: I haven't seen it.
MR. BAKER: You haven't seen it? I'm sorry.

(Document handed to Mr. Jenkins by Mr. Baker.)

MR. BAKER: Would you identify this as 5, please?

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit No. 5 for identification.)

MR. JENKINS: No objection to Number 4.
TRIAL EXAMINER: It's received.

(Thereupon, the document heretofore marked General Counsel's Exhibit No. 4 for identification was received in evidence.)

MR. BAKER: Would you mark this General Counsel's Exhibit 6 for identification, please?

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit No. 6 for identification.)

Q (By Mr. Baker:) Did you subsequently receive a reply to your letter of February 10, 1965? A I did.

Q I show you what has been marked as General Counsel Exhibit 5 for identification and ask you if you can identify that, which is a letter dated February 12 and signed by Mr. Karl Gissel.

[fol. 18] MR. BAKER: I might ask counsel if Karl and Charles Gissel are one and the same person, Mr. Jenkins?

MR. JENKINS: Yes, they are.

TRIAL EXAMINER: Karl and Charles?

MR. BAKER: Karl is with a K, Your Honor.

THE WITNESS: Yes.

MR. BAKER: At this time I move that General Counsel's Exhibit 5 for identification be received.

Would you mark this as General Counsel Exhibit 7, please?

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit No. 7 for identification.)

MR. JENKINS: No objection to Number 5.

TRIAL EXAMINER: Received.

(Thereupon, the document heretofore marked General Counsel's Exhibit No. 5 for identification was received in evidence.)

Q (By Mr. Baker:) Mr. Spencer, I now show you what has been marked for identification as General Counsel Exhibit 6, a letter dated February 16, 1965, addressed to Mr. Carl—C-a-r-l Gissel, and signed by you. Can you identify that letter? A I did write the letter. I had written the letter, yes.

Q Was that letter deposited in the mail in the normal course of business? A It was.

[fol. 19] MR. BAKER: I, at this point, move that General Counsel's 6 for identification be received.

MR. JENKINS: No objection.

TRIAL EXAMINER: Received.

(Thereupon, the document hertofore marked General Counsel Exhibit No. 6 for identification was received in evidence.)

Q (By Mr. Baker:) Did you then subsequently receive a reply to that letter, General Counsel's Exhibit 6? A I did not.

Q I show you what has been marked for identification as General Counsel Exhibit 7 and ask you if you can identify that which is a letter dated February 17, 1965, again signed by Karl Gissel? A Yes, I did receive this.

MR. BAKER: I move that General Counsel's Exhibit 7 for identification be received in evidence.

MR. JENKINS: We have no objection to Number 7. If there's an extra copy of Number 7, I'd like to have it.

TRIAL EXAMINER: Received.

(Thereupon, the document heretofore marked General Counsel Exhibit 7 for identification was received in evidence.)

Q (By Mr. Baker:) Mr. Spencer, did you have any further contact or conversation, either by telephone or letters, with Mr. Gissel relative to your demand? A Not [fol. 20] that I remember.

Q Did at any time Mr. Gissel agree to meet with you and discuss the possibility of representation? A No, sir.

Q. Has your Union in the past had any representation proceedings with the Gissel Packing Company? A We have had.

MR. BAKER: Mark this as General Counsel Exhibit 8, please.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit No. 8 for identification.)

MR. BAKER: Your Honor, I have only one copy of this I notice at the moment. With Your Honor's permis-

sion I will have it duplicated and inserted in the file. I won't be able to do that until the hearing closes. I will have it done back at the office when the exhibits are returned. If it please the Trial Examiner the reporter could just insert the original in the original docket and leave a space so a duplicate may be inserted. I can then do that. But she may have custody of this until such time as it is returned to the office.

TRIAL EXAMINER: You have my approval.

MR. JENKINS: Your Honor, I would like, before determining whether we will object to Exhibt Number 8, I [fol. 21] would like to know the materiality of this exhibit.

TRIAL EXAMINER: I haven't even seen it.

(Document is handed to Trial Examiner by Mr. Baker.)

TRIAL EXAMINER: What is the materiality?

MR. BAKER: I think Your Honor will note that the first demand letter, which was the letter I believe of January the 22nd, it's a letter confirming a telephone conversation of the same date, wherein Mr. Spencer requested recognition and bargaining for the eligible employees at this plant. I don't believe the correspondence —perhaps I best not say at this time until I can at least interrogate Mr. Spencer with that one question and then I'll make my point.

Q (By Mr. Baker:) Mr. Spencer, during your telephone conversation of January 22nd, with Mr. Gissel, what did you say to him as you recall? This is the conversation preceding the first written document that you sent him concerning that conversation wherein you stated earlier that you had requested recognition. A It was a very short conversation. As I remember I asked him for —I told him we represented a majority of the employees. First, I asked him if he remembered my name. He said he had recollection and thought he did. And I asked for recognition and bargaining for the majority of the employees whom I told him we represented of the eligible employees. And he referred me to a lawyer. He first said [fol. 22] that he would I believe that he would call me back or I could call him back, and rather than that I

said, well, I had better put it in writing, "send it to you in writing so that you will have it as a matter of record."

Q That was the letter of January 22nd? A The first letter whatever it is.

TRIAL EXAMINER: General Counsel's Exhibit 2.

Q (By Mr. Baker:) After that time did you ever tell Mr. Gissel or his attorney exactly what employees you were requesting? A No, except eligible employees.

MR. BAKER: The materiality of this, what has been marked for identification as General Counsel Exhibit 8, Your Honor, which is a Decision and Direction of Election by the National Labor Relations Board, dated January 27, 1961, which involves this Respondent and this Charging Party, sets forth the unit, or an appropriate unit, and it's certainly pertinent to this hearing.

MR. JENKINS: We certainly object to that. This is an interesting observation by Mr. Baker in view of the fact that in the case of Logan Packing Company before the Board he took exactly the opposite position, namely, that a unit determined in approximately 1960 with the same Union involving another meat packing company in Huntington was not binding upon the Union or the General Counsel during the current year because they wanted to change the unit and he advanced the argument in [fol. 23] the Logal Packing Company case that any prior determination of the unit by the Labor Board back in either 1960 or '61 was immaterial to any issue between the Union and the Company in the current year. Therefore, adopting his own argument we object to the admissibility of this document.

And for the second place, this document contains other matters in here that aren't properly before Your Honor or the Board and if Mr. Baker disputes my statement as to his representation in the Logal case, I will be prepared to bring the record in, which has already been transcribed, to prove it.

TRIAL EXAMINER: Do you want to reply?

MR. BAKER: If I recall that case, which I don't think is before this Trial Examiner, it was a matter of route salesmen. The employer took the position, as I recall and I might well be wrong—

MR. JENKINS: You are. It involved the truck drivers. The same people who are driving—

MR. BAKER: I thought I said truck drivers. That's what I said Mr. Jenkins.

MR. JENKINS: Route salesmen.

MR. BAKER: At which time the Union in their demand in that case specifically excluded truck drivers in their demand for recognition, and I think it is clear under Board law that a production and maintenance unit, excluding route salesmen or driver salesmen or truck drivers, has often been more times than not found [fol. 24] to be appropriate one excluding such drivers. On the other hand, the Board probably has in many cases found an all-employee unit, production and maintenance employees including truck drivers to be an appropriate unit. And I think that in that case I gave the argument to Mr. Jenkins that either one of the units could be appropriate and that the Trial Examiner in that case was not bound by the Board's holding that in a prior hearing where it would appear that one or both of the parties wanted the drivers included and did so that the Trial Examiner in the instant case, the Logan case, was not bound by that, and I think that's probably equally true today. On the other hand, I think that where the Board has found a unit to be appropriate and that the Union in a subsequent demand is relying upon all eligible employees, that it can be reasonably inferred that the Union that was involved in the prior case was relying upon the Board's findings as to which unit was appropriate and was asking for that unit, and for that reason I think this document is pertinent and germane to this hearing.

TRIAL EXAMINER: It will be received. Needless to say receipt of a document is no indication of the weight I'll give it and the question of weight is certainly a matter for argument by counsel.

* * * * *

[fol. 25] MR. BAKER: I have no further questions.

MR. JENKINS: In order to protect the record because I think this is important, I will move to exclude General Counsel's Exhibit 8 on the ground of its lack of material-

ity; the fact that it has not been properly authenticated and that it contains information therein which has no bearing on any proper issue before the Trial Examiner.

TRIAL EXAMINER: The question of authentication, are you questioning that this is not in fact what it appears to be, a decision and direction of election?

MR. JENKINS: I am because I do not know, Your Honor. I have never seen the document until today.

TRIAL EXAMINER: As to the third point I might say that it has been offered for one purpose only, as I understand, the question of the unit description. All other information on it would be ignored if it was offered solely for that purpose. It has been received only for the purpose offered and any other information on there is utterly immaterial at this point.

Can you, Mr. Baker, authenticate this document?

But it does appear to be a formal document of the type issued by the Board and the names appearing thereon seem to be members of the Board on or about that time.

MR. BAKER: Your Honor, I can only state to this point as far as authenticity that it came from the files of [fol. 26] the Regional Office from the file of that case.

MR. JENKINS: My motion to strike on the grounds that this is not proper evidence.

TRIAL EXAMINER: You have the materiality question which you made before.

MR. JENKINS: Yes, Your Honor, and the authentication question, and I object to the statement of Mr. Baker as to where he got his evidence. He's not on the witness stand.

MR. BAKER: Your Honor, I think—

TRIAL EXAMINER: I think I can take official notice that if I had the right to the file, I suppose I could do that if necessary. It will be received. Again, it's a matter of argument as to the materiality and the question is one for argument.

* * * *

[fol. 27] CROSS EXAMINATION

BY MR. JENKINS:

Q How did the campaign begin early in 1965? A The campaign began in earnest by contact between representa-

tives of our staff and the employees of Gissel Packing Company. Contact was maintained for a much greater period of time with individuals of the Company.

Q The campaign began on what date in January? A I would not know.

Q Who instigated the campaign at that time?

MR. BAKER: I'm going to object as to the materiality. I don't know that that—On direct examination the only question asked was he aware that there was a campaign and from there on went into the demand for recognition. Now, such questions may be pertinent but I don't think they're pertinent from this witness. This is [fol. 28] certainly going beyond the scope of direct examination.

TRIAL EXAMINER: What is the materiality?

MR. JENKINS: I think the question that this witness was asked was the campaign began early in 1965 and apparently the General Counsel felt that was material to establish that, and I want to know what the circumstances were and who started it in order to—

TRIAL EXAMINER: What is the question as to who started it?

MR. JENKINS: The question is that he has testified that it began at that time and in order to cross-examine him to test the credibility of that I would like to know who started it and what the circumstances were to test the truth of his statement on direct examination that the campaign did begin in January, 1965.

TRIAL EXAMINER: I assume you that any liability for this Company will be dated from the date in the request so far as the bargaining goes. It will have no obligation to bargain until there is request to bargain. Are you objecting—

MR. BAKER: I'm objecting as to the materiality of the question plus the fact that I think he's exceeding the scope of the direct examination by a good deal, I realize that's a technical objection, but I see no materiality or relevancy in asking this witness who instigated, I believe were counsel's words, this campaign. Now, it may become material but I don't think it's material from this witness. [fol. 29] TRIAL EXAMINER: Overruled. He may answer.

MR. JENKINS: Now, may I have the question again.
TRIAL EXAMINER: Would you read it, please?

(Question read.)

THE WITNESS: I would say in any organization work—

MR. BAKER: Can you just answer names, Mr. Spencer, if you know names?

THE WITNESS: I would not at this moment know which of our representatives contacted or made the contact with the Gissel Packing Company employees first.

Q (By Mr. Jenkins:) Who are the representatives of your Union that have been involved in this campaign? A We have Mr. Gunnoe—

MR. BAKER: Object. I don't see the materiality again from this witness as to what representatives from the Union were involved in the campaign.

TRIAL EXAMINER: Are you questioning these gentlemen in fact were representatives of the Union?

MR. JENKINS: I'm questioning his statement that he doesn't know who they were and I'm going to try to get into that a little better to see how accurate his answer is.

MR. BAKER: I think, Your Honor, the witness' answer is he didn't know which or who first contacted.

TRIAL EXAMINER: Yes.

[fol. 30] MR. BAKER: Not that he didn't know but who the first one was.

TRIAL EXAMINER: You can ask another question. Go ahead.

MR. JENKINS: Now, will you ask him the question that we had before?

TRIAL EXAMINER: He said he didn't know who before was the first one.

MR. JENKINS: Yes, Your Honor, and I followed that up with the question that I believe was subject to Mr. Baker's objection.

MR. BAKER: The question was who are his representatives.

TRIAL EXAMINER: Very well. You can answer.

THE WITNESS: Mr. Gunnoe, Mr. Brooks.

Q (By Mr. Jenkins:) Has Mr. Brooks been involved with the campaign at Gissel? A I would not be certain

of that. We had other campaigns going on at this same time in Huntington and I would not know which of our representatives made contact with Gissel.

Q Was anyone involved with Gissel from your Union other than Brooks and Gunnoe? A Representatives from the International Union, yes; but not from our Union, Local Union.

Q Did anyone from the International Union in January contact employees of Gissel for the first time? A They very well could have.

[fol. 31] They stayed in Huntington, they were working for us at that time, yes.

Q Who were they? A Mr. Cass and we had two others but I could not tell you who the other two were at this time.

Q You're telling us that Mr. Brooks and Mr. Gunnoe here—they work under your direction and supervision, do they not? A Yes, they do.

Q And you do not know whether either of them or both contacted the employees of Gissel first in January, is that what you're saying? A I would not know, no, sir.

MR. BAKER: I'm not sure that I understand the question.

Just a moment, Mr. Jenkins. Are you asking the witness which person was the very first one?

TRIAL EXAMINER: So I understood.

MR. BAKER: Is that your question? Not whether they contacted them at all but which person was number one?

TRIAL EXAMINER: I understood the question to be who was the first Union representative who had contact with the employees or management at this Respondent, is that the question, Mr. Jenkins?

MR. JENKINS: Yes, ma'am.

MR. BAKER: Thank you.

Q (By Mr. Jenkins:) What employees were contacted? A I do not know.

[fol. 32] TRIAL EXAMINER: By the way, just for my information, how many employees are there, approximately?

MR. JENKINS: Approximately 35, Your Honor.

MR. BAKER: That's 35 in the eligible unit, is that correct?

TRIAL EXAMINER: I assume that's not office employees, secretaries, and so forth.

Q (By Mr. Jenkins:) Did you meet with these people, any of the employees at Gissel, yourself, in January? A I don't believe I did, no.

Q Who did from your Union?

MR. BAKER: I assume—That assumes a fact not yet in evidence, Your Honor.

TRIAL EXAMINER: He says he doesn't know.

Q (By Mr. Jenkins:) You don't know? A I don't know.

Q Now, when you asked Mr. Charles Gissel on the telephone if he remembered you what were you referring to? A If he remembered my name from the previous hearing.

Q Had you been involved in an election with this Company prevously? A Yes.

Q And what was the approximate date of that? A I would not know unless I could see that document that was introduced.

[fol. 33] Q You don't have any idea what year it was or anything? A I would not have.

TRIAL EXAMINER: Was it recently or considerably in the past?

THE WITNESS: As I remember it could have been three or four years.

TRIAL EXAMINER: But it was not in the last, say, 1965?

THE WITNESS: No, no, no.

Q (By Mr. Jenkins:) What was the result of that election? A We certainly must have lost the election but I would have no idea what the vote was.

Q Isn't it a fact that previous to that election you represented to the same Mr. Gissel at this same Company that your Union represented a majority of employees when in fact as a result of a Board conducted election the employees voted overwhelmingly against your Union?

MR. BAKER: Now, I object. This might well be two legitimate questions but to combine them the way Mr. Jenkins did is not a legitimate question, plus it calls for a conclusion that simply because employees voted against the

Union that the Union did not represent a majority at the time a demand was made. I think to that extent the question is objectionable.

TRIAL EXAMINER: Break down your question.

MR. JENKINS: Could the reporter read it back for me?

(Question read.)

[fol. 34] Q (By Mr. Jenkins:) I'll ask you the same question in two parts, Mr. Spencer. Isn't it a fact that before the last election held at this plant you represented to Mr. Gissel that a majority of the employees were represented by your Union? A We had a majority of employees signed on applications and I made that representation as a fact.

Q Right. Isn't it a fact that when the Board came in and conducted an election at this plant an overwhelming majority of these employees voted against your Union? A That is a fact which I also explained in my letter to Mr. Gissel in objection to another at this time.

Q So you had these facts in mind when you asked Mr. Gissel on the telephone if he remembered you, didn't you? A I had the facts in mind that the name he should have remembered from the election.

Q And the events surrounding the name? A I was only interested in if he know who I represented.

Q I didn't ask you what you were interested in but what your state of mind was at the time when you called him or do you remember?

MR. BAKER: I think I'm going to object. I don't know what the materiality of his state of mind—

TRIAL EXAMINER: I assume he was aware of the fact which he has conceded.

MR. JENKINS: I'll reframe it.

[fol. 35] Q (By Mr. Jenkins:) And you make the same representation to Mr. Gissel in this phone conversation involved in this case with respect to your representing a majority of the employees that you had represented in the last case, didn't you? A The intention was the same whether it was the same statement or not I don't know, but the intention was the same, yes, sir.

Q Now, Mr. Spencer, when you followed up this first phone conversation with your letter of January 22nd, Ex-

hibit 2, you received a letter dated January 26, Exhibit 3, from Mr. Gissel, did you not? A Yes. May I see it.

(Document handed to witness.) A (Continued) Now, what was the date?

Q The date of the Company letter to you I'm referring to was January the 26 of 1965, designated General Counsel's Exhibit 3. A Yes.

Q Now, in this letter of January the 26th, you were advised at that time with respect to the Company's contention as to an appropriate bargaining unit, now, I believe this is in the fourth paragraph of that letter, were you not? A It refers to truck drivers, yes, sir.

Q Now, in any subsequent letter of reply to the Com-
[fol. 36] pany did you ever state the position again of your Union on this point or reply to the letter of January 26th with respect to the appropriateness of the bargaining unit? A No, not to my recollection.

Q Now, in this same letter of January 26th, it was pointed out to you in the last paragraph thereof about the rights to seek a petition for an election to determine whether or not you really represented a majority of these employees, was it not? A I think the letter speaks for itself.

Q Right. I want to be sure that you read the letter and understood when you came in you—

MR. BAKER: Again, the letter is the best evidence. It really deson't make any difference what Mr. Spencer understood the letter to be.

MR. JENKINS: Very well. I'll accept his statement that it speaks for itself.

Q (By Mr. Jenkins:) Now, after receiving that letter or at anytime before or after you never did file a petition asking for an election to determine whether or not your Union really represented a majority did you?

MR. BAKER: Objection. It's immaterial.

TRIAL EXAMINER: Overruled.

THE WITNESS: We did not.

Q (By Mr. Jenkins:) And the reason you did not is
[fol. 37] because you had tried that route once before in an honest Board conducted election and lost and now you would try a different tact, wouldn't you? A The reason

we took this route was explained in a subsequent letter that all the interrogation, illegal interrogation that took place on the part of the Company prior to the election previously held taught us that we could never have a fair election at Gissel's again, yes, sir.

Q Now, the procedure which you are using of alleging threats and so forth like that is the same as you are using in all of your cases in this area, is it not?

MR. BAKER: Objection. It's immaterial. The only case under consideration here is Gissel Packing Company, Inc.

TRIAL EXAMINER: Sustained.

Was there any petition filed by the Company?

MR. JENKINS: No.

* * * *

[fol. 39] KARL H. GISSEL

a witness called by General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q Would you please state your name and address for the record? A Karl Gissel, 615 Jefferson Avenue.

Q Is it Karl H.? A Karl H.

Q Are you commonly known as Charles Gissel? A Yes.

Q Do you sign your name as such? A No.

Q You've never signed your name as Charles? A No. I sign my name as Karl.

Q Not even in parenthesis? A No.

[fol. 40] Q Do you normally sign correspondence that you send out? A No, sir.

Q Someone else signs your name for you? A No, sir.

Q You sign your own name? A Yes, sir.

Q I'll show you what's been marked for identification and received in evidence as General Counsel's Exhibit 3, which is a letter bearing the name K.H. Gissel, in parenthesis Charles. Is that your handwriting? A No. That's my handwriting here.

Q This is not your handwriting? A No. Everyone in the plant calls me Charles.

Q I see. You don't know who would have put that in the letter? A No. I'm called by Charles by everybody except people like you and the doctor and things like that.

Q Do you prefer that I call you Charles? A It makes no difference.

Q It would be much easier for me because I know you as Charles rather than Karl. What is your position with the Respondent herein? A I'm shipping clerk and buyer.

[fol. 41] Q Shipping clerk and a buyer? A (Nods.)

Q Do you have any duties as a supervisor? A Just in the shipping room.

Q Just in the shipping room? A And in the pickling room or the curing section.

Q What are your duties in the pickling room or the shipping room? A Well, I watch the boys in the curing room cure the bacon and hang it right and tell them when to cure it. In the shipping room I see that the orders are filled and see that I have stuff to fill them with.

Q Do you hire any people? A Yes.

Q Hire the employees? A I hire the employees for my departments.

Q Discharge them? A Yes, sir.

Q You have in fact discharged them? A I have my employees, yes.

Q You discharged Mr. Mount and Mr. Frye? I'm just looking for their first names. A No, sir, I did not discharge them.

Q Mr. Herbert F. Mount, Jr. and Jerry Lee Frye, you did not discharge them? A No.

[fol. 42] Q Who did? A They quit.

Q Sir. A They walked off the job.

Q I see. Well, they reported back to work, did they not, on Thursday morning? A After walking off the job for me and then going to work on another job, yes.

Q I see. You ordered them to leave the plant or that you would call the law, is that not correct? A After they got to raising hell, yes.

Q You told them that they were fired? A No, sir. I told them they had quit.

Q But they were ready—But they were there ready to go to work? A Ten minutes late.

Q You would not permit them to go to work? A No, sir, they didn't ask me to go to work; they just walked in.

Q And asked for their timecards, did they not? A They came in the office and asked what's the matter. I told them they had quit.

Q They asked for their timecards, did they not? A Yeah, they asked for their timecard and I told them they had quit; they walked off the job on Wednesday at 11:30, [fol. 43] and went to work on another job.

Q And then they wanted to go work and you ordered them to leave the plant, is that true? A I didn't order them until they got to raising hell.

Q You said you had the police on the phone at that time? A I would if they had started trouble, they were trying to start trouble.

Q Didn't you fire Elisha Watts? A No, sir, I had nothing to do with Mr. Elisha Watts.

Q Mr. Herbert Gissel fired him, is that correct? A I think he fired him on orders.

Q From whom? A From Mrs. Gissel because he came in the office and tore Mrs. Gissel up.

Q Who is Mrs. Gissel? A She's the president.

Q Is that your mother? A Yes.

Q What's her name, R.E. Gissel? A Yes.

Q And then pursuant to her orders Mr. Herbert Gissel fired Mr. Watts, is that correct? A From what I can find out. I wasn't there the day it happened in the morning. I came in after it happened.

[fol. 44] Q Where does Mr. Herbert Gissel work? A He works in the sausage room.

Q He's the supervisor of the sausage room? A Yes.

Q He can hire or fire employees in his department? A In his department.

Q He's also listed as a vice president of the Company, is that correct? A Yes. The whole family is.

Q Now, I believe you stated for the record you had approximately 35 employees. A Approximately, maybe 40, 35 to 40.

Q I see. Who is Mrs. R.E. Gissel? That's your mother, the president of the Company, is that correct? A Yes.

Q Who is E.W. Gissel? A That's my youngest brother.

Q Is he an officer in the Company? A Yes, sir.

Q What's his position? A He's in the slaughter house.

Q He's a vice president? A Yes, sir.

Q Who is H.I. Gissel? A Who? H.L.?

[fol. 45] Q I'm sorry, H.L. A H.L., that's Herbert.

Q He's a vice president? A Yes.

Q And K.H. is you? A Yes.

Q You're a vice president. Who is A.L. Closterman? A That's my sister.

Q What's her position with the Company? A Secretary-Treasurer.

Q Does she have the right to hire or fire or discipline employees? A Yes, sir.

Q And she did in fact write a letter to a Mr. Herbert Mount where—That's Alfreda L. Closterman? A Right.

Q Who is H.B. Martin? A Bookkeeper.

Q Bookkeeper? A Yes, sir.

Q Works in the office? A Yes, sir.

Q And Harriett Curtis? A Well, I expect you'd call her a clerk.

[fol. 46] Q Does she work in the office? A She works as one of them, yes.

Q And Edith Lewis? A That's my sister.

Q What does she do? A She works in the office.

Q Does she have a son by the name of Terry? A Yes, sir.

Q Does he work there? A Yes, sir, part-time.

Q Before or after school? A After school and sometimes in the summer.

Q Where is he going to school? A Huntington High School.

Q How old is Terry? A Seventeen, I believe.

Q Is he working there now? A Yes.

Q Edith Lewis is vice president, is she? A That's right.

Q Pardon? A That's right.

Q Does Edith have another son? A Yes, sir.
[fol. 47] Q What's his name? A Eddy.
Q How old is Eddy? A I believe he's 21 or 22.
Q Does he work at the plant? A Yes.
Q Regularly, full-time? A Yes.
Q What's his position? A He works and he's a sort of assistant foreman or, well, like that.
Q Assistant foreman? A Yes. I tell him what I want done and I go somewhere else and so something else.
Q And he sees that it's done? A Yes, sir.
Q Does he have a right to discipline employees if they don't obey his orders or your orders through him? A Yes, sir.
Q He can send them home? A Yes, sir.
Q He can fire one? A Well, I never gave him that privilege.
Q Does he have the authority to effectively recommend? If he told you that an employee had refused to [fol. 48] follow his orders and suggested that that employee be fired, would you act upon his recommendation? A I would check with the employee first. I'd talk to the employee before, he's been recommended before.
Q When he recommended that somebody be discharged did you in fact discharge him at his recommendation? A No, I talked to them and we straightened things out.
Q You didn't fire them? A No, I laid them off.
Q You've laid them off? A I laid a couple off, yes.
Q He recommended discharge and you would mitigate the penalty by just laying them off? No, we talked it over. We would talk together. He's got a hot temper and he recommended firing so I would talk to him and we would straighten it out and lay them off.
Q You talked to Lewis? A Eddy, yes.
Q You talked to him and straightened it out with him? A Yes, and then we would talk to the employee.
Q I see. Upon his recommendation you would then go to—Upon his recommendation that the employee be discharged the two of you would go talk to the employee, is that correct? A Yes.
Q Who is—it looks like L-e-o-r-i-s Gissel? A That's [fol. 49] my sister-in-law.

Q What position does she hold in the Company? A She doesn't hold any position. She's a foreman in the weiner skinning room and bacon slicing room.

Q She's a foreman just as you're a foreman and Herbert is a foreman? A In her department.

Q And has the same responsibilities? A In her department.

Q And has the same responsibilities as you do? A Yes.

Q As you occupy in your department? A Yes.

Q As far as you explained in your department? A Yes.

Q Who is Siddy Caldwell? A She's a girl that works in the bacon room or skinning room.

Q Is she any relation or relative of yours? A No, sir.

Q She's just an employee? A Just an employee.

Q What about Nell Charles? A She's an employee.

Q Works in what room? A With Siddy.

[fol. 50] Q In the bacon room? A Bacon room.

Q How about Evelyn Collins? A She works in the same room.

Q And Emogene Ellis? A Same room.

Q Just an employee? A Yes.

Q How about Alfreda Hutchison? A She's my niece.

Q What does she do? A She works in the same work.

Q Is she a supervisor? A When her mother isn't there.

Q Her mother is? A Leoris Hutchison.

Q She takes over when her mother isn't there? A Yes.

Q What authority does Alfreda have? A Well, she would probably have about the same authority as her mother would, when her mother isn't there.

Q She could hire and fire and so forth? A I think so, yes.

Q How about C.P. Adkins? A C.P., I don't know his [fol. 51] position from his name.

Q Cordell? A I don't know initials, C.P.

Q Could it be Cordell? Do you have a Cordell? A Yes. It's possible. We have a Cordell Adkins.

Q What does he do? A He works in the boning room.

Q Just an employee? A Yes.

Q How about K.R. Adkins? I believe he's—that's Kenneth or Kenny? A He's an employee.

Q And L.W. Bailey? A He's an employee.

Q Do you know what he does? A He works in the sausage room.

Q How about D.F. Billups? A Offhand I don't know that one.

Q J.J. Bonham? A He works in the slaughter house, in the boning room.

Q What does he do? A An employee.

Q Just an employee. I.H. Caldwell? A He's an employee.

[fol. 52] Q George Collins? A Employee.

Q R.L. Curry? C-u-r-r-y? He may be gone now. A I don't remember.

Q Ronnie Curry, I believe his name was, or goes by the name of Ronnie? A I can't place that one.

Q Do you know an Earl Fortner? A He works in the sausage room. He's an employee.

Q Francis Fortune? A He's an employee.

Q And L.R. Hutchison? A That's my niece's husband.

Q What does he do? A He works in the sausage room.

Q As what? Is he a foreman? A He's sort of assistant.

Q What rights or responsibilities does he have? A He takes over when my brother Herbert isn't there.

Q Does he have the same authority that Herbert has, would you say, when Herbert's not there? A I don't know. I don't know if Herbert gave him that authority or not.

Q Is Herbert absent a good deal? A Not too often, no.

[fol. 53] Q How much of the time would you say Herbert wasn't there? A Oh, he's there most of the time. Maybe once a month he'll take a day off or evening off or something.

Q And then L.R. Hutchison would be in charge? A Yes.

Q He'd run the place? A Uh-huh.

Q What about—it looks like I.R. Hysell? A Lawrence?

Q I can't see. It's I. or something Hysell. A It would be L.

Q It might well be L. A Yeah, that would be Lawrence, I expect.

Q What is he? A He works in the pickling room. He's an employee.

Q He's an employee. What about R.H. Hysell? A He's an employee.

Q And J.K. Johnson? A Employee.

Q D.C.Kidd? That's Donald. A He was an employee.

Q He's not there now? A No.

Q Was he fired or discharged? A No, he quit.

[fol. 54] Q Do you know when he quit? A Oh, I believe approximately two months.

Q Two months ago. A (Nods.)

Q Sometime in April or May, maybe June? A April, I believe. I'm not sure.

Q What about H.C. Lewis? A H.C.? Let's see, I named Eddy Lewis and Terry Lewis, haven't I?

Q Yes. A I don't know offhand unless it would be either Terry or Eddy. I know their initials are not that. Harold C.?

Q Harold C., is it? A It would probably be Terry.

Q That's Terry? A His name is Harold.

Q I see. He's a high school boy? A Yes.

Q Has he worked there after school, you say, or does he just work in the summer? A Sometimes he works in the summer. This is the first time he's worked most the time. He came after school and worked an hour or so, sometimes.

Q What would he do? What does he do? A Help fill [fol. 55] orders or he would clean up. Come in around four and work till five.

Q How many days a week? A Well, we try to get him in five but he would only come in one or two. Just like any other kid.

Q Just like any kid that's part of the family? A Yes.

Q Thank you, sir. C.F., I guess, or C.E. McComas, Jr.? It looks like C.F. McComas, Jr., Carl McComas? A Oh, he's an employee.

Q And E.B. Maynard, I guess this is. A He's an employee.

Q E.B. Maynard, Jr.? A Uh-huh.

Q Donald Meadows? A He was an employee.

Q He was discharged? A No he quit. He walked off.

Q When was that? Do you recall? A No. I believe, I think I was on my vacation when he quit.

Q When were you on your vacation? A In June.

Q In June? A Uh-huh.

[fol. 56] Q J.T. Mollohan? A That would be Tommy Mollohan.

Q Well, there's a W.R., and a J.T. A Well, it's Tommy. Tommy hasn't been there for six, seven, eight months, I believe.

Q Was he on January 22nd, 1965? A I could not say.

MR. BAKER: May I have this marked for identification General Counsel's Exhibit 9, please?

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit No. 9 for identification.)

Q (By Mr. Baker:) I'll show you what has been marked as General Counsel Exhibit 9 for identification and ask you is this a list of everyone on the payroll as of January 22nd, 1965? A There may be one or two—this Robinson I can't place him.

Q Do you know, just from viewing this list, does it appear to be a list prepared by you and submitted perhaps to Mr. Jenkins or prepared in your office? A It might have been prepared by the office, yes.

Q Do you have some sort of a—I don't know if that's an Addressograph. A Yes, we have an Addressograph.

Q With your name? Would—A Yes.

[fol. 57] Q —this material sometime indicate your name? A Yes.

Q Addressograph machine? A Yes.

Q Would you say that's an Addressograph plate imprint? A I don't know. I don't see the Addressograph number.

Q But you do have such? A Oh, we have one, yes. We have for addressing to customers.

MR. BAKER: Your Honor, at this time, I move that General Counsel's Exhibit 9 be received into evidence. I still think—

TRIAL EXAMINER: It's a list of employees on the payroll as of a certain date?

MR. BAKER: As of January 22nd.

MR. JENKINS: No objection.

TRIAL EXAMINER: It will be received.

(Thereupon, the document heretofore marked General Counsel's Exhibit No. 9 for identification was received in evidence.)

MR. BAKER: I think the record should indicate a little more the names become—or some of them are not legible and apparently the list does include everyone on the payroll.

TRIAL EXAMINER: Very well. Let's move along as fast as we can.

MR. BAKER: Yes, ma'am.

Q (By Mr. Baker:) Tommy Mollihan you say is an [fol. 58] employee? A He isn't now; he was, but when he quit I don't know. I'd have to look the record up on that.

Q Well, you have no reason to doubt I assume that as of January 22nd he was on the payroll, of the date of this list? A I wouldn't say until I looked the record up.

Q What about W.R. Mollihan? A He's still there.

Q He's an employee? A Yes.

Q What does he do? A He's the foreman of the boning department.

Q Foreman of the boning department? A Yes.

Q R.D. Moore? A He's an employee.

Q There's W.D. and R.D., I think. A Both employees.

Q What department do they work in? A One of them —let's see. Give me the initials again.

Q R.D. and W.D. A W.D. is working in the boning and slaughter house department. Now, he was in my room until this week. And Rush, or R.D., is, well, I don't know what you'd call him. We use him for everything.

He's not a maintenance man. He fixes things. He's not a mechanic. He helps the mechanic. He helps in the ship-
[fol. 59] ping room. He helps wherever a man is needed.

Q Is he a relative by any chance? A No.

Q Sort of jack of all trades? A Yes.

Q How about Dewey Parsley, Jr.? A He was in the slaughter house, in the cutting room, but I think he quit last week.

Q Last week? A Uh-huh.

Q How about Curtis Queen? A He's a butcher.

Q What about P.D. Rowe? A He was in the boning and killing floor. He quit Monday.

Q Monday? A Uh-huh.

Q J.M. Vance? A He's in the slaughter house; sometimes the cutting room.

Q Elisha Watts? A He was in the boning room and slaughter house and he's not there.

Q He's the one that Mr. Herbert Gissel discharged on orders, I believe? A He is the one that was discharged. Now, I wouldn't say Herb did it because I wasn't there.
[fol. 60] Q R.B. Simon? A He works with me in the shipping room.

Q Is he a foreman and a supervisor? A He's a supervisor.

Q He has the same authority you do? A Yes, he and Eddy both.

Q Eddy who? A Lewis.

Q Oh, I see. All right. What about J.I. Ellis? A Ellis? Would that be John?

Q J.I., it could be John. It's the only Ellis that's here. A If it's John he was a truck driver but he hasn't been there, he walked off, oh, I don't know, five, six, seven weeks ago. He just didn't show up any more.

Q How about R.B. Lewis? A R.B.?

Q That's Terry's brother, isn't it?

TRIAL EXAMINER: Is this he?

THE WITNESS: R.E., isn't it? That's Roman.

Q (By Mr. Baker:) R.E., is it? A Probably Roman Edward. That's Edward's name.

Q He's a supervisor in the shipping room, too? H.F.

Mounts, Jr., that's Herbert Mounts, isn't it? A That's right.

[fol. 61] Q One of the alleged discriminatees involved in this case? A Yes.

TRIAL EXAMINER: You skipped Mr. Frye.

MR. BAKER: I'm sorry.

TRIAL EXAMINER: Maybe you wanted to, I don't know.

Q (By M. Baker:) J.L. Frye is also the other discriminatee, alleged discriminatee here? A Yes.

Q J.P. Robinson? A Oh, I know who he is, yes, he worked—John—I think he worked about two months, then he got to the place you couldn't count on him any more and then he just didn't show up.

Q But he was working there on January the 22nd? A I think so, yes.

Q S.H. Rowe? A He's an employee. He's still there.

Q What department is he in? A He works in my department.

Q J.B. Scott? A He was an employee. He isn't there any more.

Q And Clifford Carley? A He's a sales supervisor.

Q Sales supervisor? A Yes.

Q Over the route salesmen, drivers, and so forth. He [fol. 62] can hire and fire, I take it? A Yes.

Q W.W. Boyer? A He's a one of the salesmen out of the truck.

Q N.A. Gibson? A He was a peddler.

Q He's quit? A Yes. he quit.

Q When did he quit? A About three or four weeks ago.

Q J.B. Harless? A He's a peddler.

Q And T.I. Jordan? A He's a car salesman in Logan.

Q What? A Car salesman. He sells from a car.

Q From a car— A He's not selling cars.

Q —meats out of a car? A Right.

Q He goes and takes orders nad someone else delivers it, is that right? A That's right.

Q What about C.R. Kitchen? A He was a peddler.

[fol. 63] Q Let's go back here to Jordan. You say he's a car salesman? A He takes advance orders.

Q Does he ever do any work in the packing house? A No. He lives in Logan.

Q Lives in Logan? A Yes.

Q He stays there all the time? A Yes.

Q He just calls on customers as a salesman, is that correct? A That's right.

Q And takes orders and sends them in and they're delivered? A Yes.

Q How is he paid, do you know? A He's salary and commission.

Q What about these peddlers that you talked about, how are they paid? A Salary and commission.

Q Same as this man? A Right.

Q Same as Jordan? Does Jordan ever have to make deliveries himself? A Not unless the truck breaks down or a customer asks for a special delivery or something, we'll ask him, but I don't believe he's ever done one yet.

Q What about D.R. Kitchen? A He was a peddler.

[fol. 64] Q Peddler. Is he the one that's quit? A Well, they asked him to quit.

Q He was fired? A Yes.

Q When did that happen? A Oh, I' say a month or so ago.

Q All right. And E.M. Osborne? A He's a peddler.

Q C.F. Sprigle? A He's a car salesman in Charleston.

Q He's like Mr. Jordan? A Right.

Q In Charleston? A Right.

Q He lives there? A Lives there.

Q How often does Jordan or Sprigle come into the plant? A Whenever we call them in. We talk to them on the phone every day.

Q How often would you call them into the plant? A Once every month or two months.

Q How about I.E. or L.E. Turpin? A He's a peddler.

Q Now, he makes deliveries, all these peddlers actually [fol. 65] drive the truck, carry the meat in; get into the plant every night and load their own trucks and so forth, is that correct? A They take orders and sell it right off the truck.

Q They're actually peddlers, then? A That's what I said, peddlers, I'm calling them peddlers.

Q Well, that was my mistake. They go out with a load of meat and peddle it? A Right.

Q If they sell out they come back and get more? A That's right.

Q Who loads their trucks? A We help them. They get in the truck and we'll bring all the stuff to them so they can place it where they want it and see that they don't get short.

Q And you say they don't take advance orders or they do take some? A They take a few but most the time they're selling right off the truck. They take advance orders, we fill the advance orders and put it right on their truck.

* * * *

[fol. 67] MR. BAKER: The two witnesses in the hearing room are Herbert Mounts and Jerry Lee Fye who are the alleged discriminatees and, of course, as such are permitted to remain in the hearing room under Board Law.

MR. JENKINS: We object to this. These people are not parties to this proceeding and we think it's very highly improper for one of them to sit in here and listen to evidence about this case.

TRIAL EXAMINER: They'll be allowed to remain.

* * * *

WOODROW R. GUNNOE

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q Mr. Gunnoe, I show you what has been marked as General Counsel's Exhibit 10A through 10F for identification, which purport to be applications for Food Store Employees Union, Local 347, and ask if you can identify these documents?

(Thereupon, the above-mentioned documents were marked General Counsel's Exhibits 10A through 10F for identification.)

A Yes, these are documents, applications for Food Store Employees Union that were signed in my presence. [fol. 68] Q I'll ask you specifically the document signed by Jessie J. Bonham—is that correct? A That's right.

Q —signed on or about January 21st, was that signed in your presence? A That was signed in my presence.

Q On the date indicated? A On the date indicated.

Q That's General Counsel Exhibit 10A. General Counsel Exhibit for identification 10B, Donald F. Billups, signed on or about January 20th, 1965, was that document signed in your presence? A Yes, it was.

Q General Counsel Exhibit 10C for identification, Samuel Henry Rowe, dated 1/21/65, was that document signed in your presence? A Yes, it was.

Q General Counsel Exhibit 10D for identification, signed by Lewis E. Turpin—Durpin is it? A Turpin, I think.

Q —dated 1/20/65, was this document signed in your presence? A Yes, it was.

Q By Mr. Turpin? A By Mr. Turpin.

[fol. 69] Q General Counsel Exhibit 10E for identification, signed Dewey Parsley, Jr., lated 1/22/65, was that document signed in your presence? A Yes, it was.

Q And General Counsel Exhibit 10F for identification, Sylvana F. Anderson, dated 7/2/65, was this document signed in your presence? A Yes, it was.

MR. BAKER: At this time I offer General Counsel's Exhibits 10A through 10F into evidence.

MR. JENKINS: We don't have a copy of 10F here.

MR. BAKER: Probably not. That was the 7th month, and probably wasn't a duplicate of that. I'll show you the original in you like.

(Document handed to Mr. Jenkins.)

MR. JENKINS: Why would we get a copy of all the ones that were signed in January and not get a copy of the one that was signed in July without a tender of a copy?

MR. BAKER: On, contrary to the implication of Mr. Jenkins there's absolutely nothing sinister involved there. Madam Examiner, it just so happens the copies were furnished the Regional Office at the time the charges were

filed. This copy has been given to the General Counsel since that time.

MR. JENKINS: Why wasn't it submitted for inspection is what I'm talking about before it was offered?

[fol. 70] MR. BAKER: Well, Mr. Jenkins, I didn't realize there wasn't a copy there. There was absolutely nothing sinister. This is the original and you may inspect it at your leisure.

(Document handed to Mr. Jenkins.)

MR. BAKER: And if I have said before, Your Honor, I'm going to say it again, I resent all the innuendo—

TRIAL EXAMINER: Mr. Baker, let's proceed.

MR. BAKER: I want this in the record. Mr. Jenkins does this constantly.

TRIAL EXAMINER: Let's try this lawsuit.

MR. BAKER: —my ethics as an attorney and I don't like it.

TRIAL EXAMINER: Let's try this lawsuit.

MR. JENKINS: Your Honor, we object to General Counsel's Exhibits 10A through F. Their materiality is not shown. They are not properly authenticated. There is an additional ground for objection with respect to 10F. This is some document that apparently was taken on July the 2nd of 1965, I can't see what bearing that could possibly have on this case.

MR. BAKER: Since the Trial Examiner made her decision based upon the time of the demand it's very obvious there was no effort, as a matter of fact, I didn't see the document until I had it identified, there is no intent here nor any effort to get into evidence evidentiary documents that would purport to show something that they aren's. It's clear that this was signed on July the 2nd. It's dated as such.

[fol. 71] TRIAL EXAMINER: Is it necessary to offer?

MR. BAKER: I'm not certain that the majority isn't going to stand or fall on it, true. There are numerous cases, though, where the refusal for recognition has been so blatant that the Board has accepted that type of authorization card. However, I will withdraw General Counsel 10F.

TRIAL EXAMINER: Your offer 10A through 10E will be received.

(General Counsel's Exhibit 10F for identification was withdrawn.)

(Thereupon, the documents heretofore marked General Counsel's Exhibits 10A through 10E for identification were received in evidence.)

MR. BAKER: I have no further questions of Mr. Gunnoe.

MR. JENKINS: No questions.

TRIAL EXAMINER: You're excused. Thank you.

MR. JENKINS: Could I have a copy?

MR. BAKER: This is all we have.

MR. JENKINS: This is the only copy?

MR. BAKER: That's the only copy I have.

MR. JENKINS: All right.

MR. BAKER: It would be possible to get other copies. I just don't have them.

MR. BAKER: Call Mr. Carlton Cass.

By the way, I may have neglected something. I would [fol. 72] like to have Mr. Gunnoe back on the stand just for a moment.

TRIAL EXAMINER: Yes. Mr. Cass, will you step out, please.

MR. BAKER: Pardon me?

TRIAL EXAMINER: Will you ask Mr. Cass to step in the hall?

MR. BAKER: It's really immaterial.

TRIAL EXAMINER: You're still under oath.

THE WITNESS: Yes.

MR. BAKER: I'd just like to ask Mr. Gunnoe's address, and position with the Union.

TRIAL EXAMINER: All right.

THE WITNESS: My name is Woodrow R. Gunnoe, home address, 1019 Smithfield Street, Parkersburg, West Virginia; business address is Post Office Box 2751, Charleston 30, West Virginia. My position is business representative for the Food Store Employees Union, Local 347.

Q (By Mr. Baker:) Mr. Gunnoe, in your position as business representative, would you state whether you participated in the organizing campaign at Gissel Packing Company, Inc.? A Yes, I did.

Q Was it in that capacity that these documents you identified were received? A Yes.

Q Received by you? A That's true.

[fol. 73] MR. BAKER: That's all.

CROSS EXAMINATION

BY MR. JENKINS:

Q Mr. Gunnoe, when did you first begin the campaign at Gissel? A Campaign was begun around the 12th or 13th of January, 1965.

Q On behalf of your Union who was in charge of the campaign? A Mr. Spencer is in charge of all operations. As far as organizing is concerned, there were four of us working on the campaign, actually there was no one in particular in charge of it.

Q Were you in on the planning of the campaign and the details of it? A Yes, basically so.

Q Who were the four people that you referred to? A Jack Brooks, business representative from Charleston; Carlton Cass, International representative from Elkland, Pennsylvania; Jess Spitzer from New Market, Virginia, also an International representative.

Q There has been testimony in this case about activities between this Company and your Union back in either 1960 or '61. Did you participate in those?

MR. BAKER: I'm going to object. I think it's certainly beyond the scope of direct and immaterial at this time.

[fol. 74] TRIAL EXAMINER: Overruled.

THE WITNESS: At that time I did not participate in the organization.

Q (By Mr. Jenkins:) Were you an employee of this same Union at that time? A No, I was not.

Q When did you go to work for the Food Store Employees Union? A December the 11th, 1963.

Q When you say that the campaign began on January the 12th and the 13th of this year, what do you mean by that? Specifically what happened on those—at that time or what started to happen at that time? A We started contacting employees, attempting to sign them up on Union application cards.

Q And there was none of this activity began before this date, is that correct? A Well, there had been some ground work laid perhaps a week or two beforehand where we had got some names through maybe shop stewards out of stores or something such as this but as far as actual campaign beginning it was around that time that it actually began.

Q Who was responsible for initiating the interest of your Union in the Gissel plant in January of '65 here? A I would say no one individual. There had been, we had had a few contacts from employees of Gissels, though not direct contacts, they had talked to our shop stewards in the stores, stuff such as this.

[fol. 75] Q Was this about the time that you began in January? A We began in January but the contacts, original amount of contacts were perhaps six months before or something such as this.

Q But nothing formally began, no formal contacts with the Union until January, is that right? A Around sometime during the middle of January, the 12th, 13th.

MR. JENKINS: I believe that's all I have.

MR. BAKER: I have nothing further.

(Witness excused.)

CARLTON M. CASS

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q State your name and address for the record? A My name is Carlton M. Cass, Elkland, Pennsylvania.

Q By whom are you employed, Mr. Cass? A By the International Union, Amalgamated Meat Cutters and Butcher Workmen of North America.

Q In your capacity as a—What is your capacity with the Meat Cutters? A Organizer.

Q I assume your capacity as an organizer is organiz-
[fol. 76] ing, is that correct? A Yes.

Q Have you been involved in any organizing campaigns in Huntington, West Virginia area? A Yes, sir.

Q What was your most recent organizing campaign? A Well, the most recent was the Gissel Packing Company.

Q What did you do as an organizer in that campaign? A Contacted the employees of Gissel Packing and get them to sign application cards for the Local Union.

Q And you did that here? A Yes, sir.

MR. BAKER: Mr. Jenkins, I have seven. Would you mind counting those?

MR. JENKINS: Why don't you just let me see the originals? That will help.

(Documents handed to Mr. Jenkins.)

MR. BAKER: If you want to follow I'll leave the duplicates there.

Q (By Mr. Baker:) Mr. Cass, I'll show you a document that's marked General Counsel Exhibit 10G for identification and ask you if you can identify that document?

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10G for identification.)

A Yes, sir.

[fol. 77] Q How can you identify it? A I was present when the man signed.

Q That man is Winston— A Winston D. Moore.

Q And he signed on or about the 19th of January, 1965? A Yes, sir.

Q It was signed in your presence? A Yes, sir.

Q This is a Union application? A Yes, sir.

Q I show you what has been marked for identification General Counsel Exhibit 10H and ask you if you can identify that document.

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10H for identification.)

A Yes, sir, signed by Daniel Ellis, on 1-19-65.
Q Was that signed in your presence? A Yes, sir.
Q I show you what has been marked General Counsel Exhibit 10i for identification and ask you if you can identify that? A I can. Signed by Lawrence E. Hysell on January 14, 1965 in my presence at his home.

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10i for identification.)

[fol. 78] Q I show you what has been marked for identification Exhibit 10J and ask if you can identify that.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10J for identification.)

A Yes, James K. Johnson, signed on January 19, 1965, at his home.
Q In your presence? A Yes, sir.
Q I show you what has been marked General Counsel's Exhibit 10K for identification and ask you if you can identify that document.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10K for identification.)

A It's a Union application signed by John T. Mollohan in his home on January 13th, 1965.
Q Is it John T. A Yes.
Q That was in your presence? A Yes, sir.
Q I show you what has been marked General Counsel Exhibit 10L for identification and ask you if you can identify that?

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10L for identification.)

[fol. 79] A This, Francis Fortune signed a Union ap-

lication, signed by Francis Fortune on January 14th, 1965, in my presence.

Q I show you a document marked General Counsel Exhibit 10M for identification and ask if you can identify it.

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10M for identification.)

A A Union application signed by Donald Meadows on the 19th of January, 1965 at his home, in my presence.

MR. BAKER: At this time, Your Honor, I offer General Counsel's Exhibits 10G through 10M, marked for identification, into evidence.

MR. JENKINS: We object to the admission of these documents. The materiality has not been proved and they're not properly authenticated.

TRIAL EXAMINER: They're received.

* * * *

[fol. 80] JESSIE C. SPITZER

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

[fol. 81] DIRECT EXAMINATION

BY MR. BAKER:

Q Would you state your name and address, please, for the rocrd? A Jesse C. Spitzer. My address is R.F.D. 1, New Market, Virginia.

Q By whom are you employed, Mr. Spitzer? A I'm employed by the Amalgamated Meat Cutters and Butcher Workmen of North America.

Q What's your position with Amalgamated Meat Cutters and Butcher Workmen of North America? A I'm an organizer.

Q In your capacity as an organizer what work do you perform? A I go out and organize unorganize people, plants, whatever.

Q How do you go about this? A Well, the usual procedure is getting authorization cards signed.

Q Did you engage in a campaign in the Huntington area? A I did.

Q What campaign was that? A On the Gissel Packing Company.

Q Did you, as you state, get authorization cards signed in that campaign? A Yes, sir.

Q Now, Mr. Spitzer, I show you what has been marked General Counsel Exhibit 10O for identification and ask [fol. 82] you if you can identify that document.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10O for identification.)

A Yes, sir.

Q How do you identify it? A Because by the name.

Q That name is what? A Ivan Caldwell.

Q You were there when? A That was January the 15th, 1965.

Q Was that document signed in your presence? A Yes, sir.

Q It is an authorization for Local 347 to represent this employee's interest in collective bargaining as it states? A Correct.

Q I show you what has been marked as General Counsel Exhibit 10N, and ask you if you can identify that document.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10N for identification.)

A I do. I saw Ralph Hysell and I was present, in fact, the man had agreed to sign only he could not write. He asked if I would write his—

MR. JENKINS: Object. Hearsay.

TRIAL EXAMINER: Overruled.

[fol. 83] MR. BAKER: Go ahead.

THE WITNESS: He asked if I would sign his name and he would put an "X."

MR. JENKINS: Motion to strike. Hearsay.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker:) Did he in fact put an "X?" A Yes, he did.

Q I note there is an "X" on the document, is that the "X" put on by Mr. Hysell in your presence? A Yes.

Q And you signed his name? A Yes, sir.

Q Is this your handwriting? A This is my own writing, witnessed by me.

Q That was put on at the time you signed it? A Yes, sir.

Q I show you what has been marked General Counsel's Exhibit 10P for identification and ask if you can identify that document.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10P for identification.).

A Yes, I do.

Q How do you identify it? A By the name.

Q The name is what? A Siddy Caldwell.

[fol. 84] Q Was that document signed in your presence? A It was.

Q Where? A At her home.

Q And on the date indicated? A January 16th, 1965.

Q I show you now what has been marked for identification General Counsel Exhibit 10Q and ask you if you can identify that.

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10Q for identification.)

A I do.

Q How do you identify it? A By the name.

Q Which is? A Cordell Adkins.

Q Where was the card signed? A At his home.

Q Was it signed in your presence? A Yes, sir, it was.

Q Under—On what date? A January the 18th, 1965.

Q I'll show you what has been marked as General Counsel Exhibit 10R for identification and ask you if you [fol. 85] can identify that document? A Yes, sir, by the name Jerry B. Scott and the date was January 18th, 1965, it should be.

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10R for identification.)

Q That is '64, isn't it? A Yes.
Q Were you present when that was signed? A I was.
Q It was signed on January 18, 1965? A Yes, sir.
Q In your presence? A In my presence.
Q I show you what has been marked as General Counsel Exhibit 10S for identification and ask if you can identify that document? A I do by the name John Vance and in my presence. He signed at his home January 16th, 1965.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10S for identification.)

Q (By Mr. Baker:) I note that was a 4, that was changed, I assume. A Yes, that 5 is right.
Q Now, I show you what has been marked for identi-
[fol. 86] fication General Counsel Exhibit 10T and ask you if you can identify that document? A Paul Rowe. This was signed at his home on January 18th, '65.
Q This document I note says '64. It was '65? A It was '65.
Q Were you in Huntington January, 1964? A No, sir.
Q What time had you been in Huntington? A I came in Huntington on the 13th of January.
Q And stayed how long? A I stayed until, I was in the area until February the 9th.
Q And you left? A I left then.
Q Was that your first trip into Huntington? A It was.
Q You hadn't been there before January 13th, 1965? A No, not on any programs.
Q I show you what has been marked for identification General Counsel Exhibit 10U, and ask you if you can identify it. A This is Emogene Ellis. I recognize by the name and I signed her up at her home and that was January the 19th, 1965.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10U for identification.)

Q I show you what has been marked for identification [fol. 87] General Counsel Exhibit 10V and ask you if you can identify that document. A Carl McComas, yes, I do.

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10V for identification.)

Q Where was that signed? A That was signed at his home. It was January the 18th, 1965.

Q Was that the first time you had ever been to see McComas? A Yes, I guess so, as far as I know. I'm sure it was.

Q I'll show you what has been marked as General Counsel Exhibit 10W for identification and ask you if you can identify that document. A Yes, sir, this was John Ellis and this was not signed at his home. It was signed outside of Tip's Tavern, I believe it's called uptown, in my presence, in my automobile.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10W for identification.)

Q And on the date of? A January 18th, '65.

Q I'll show you what has been marked for identification General Counsel Exhibit 10X and ask you if you can identify that? A Yes, sir. Ronnie Lee Curry, that was signed at his home, January 18th, 1965.

[fol. 88] (Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10X for identification.)

Q Was it in your presence? A In my presence.

Q I show you what has been marked for identification General Counsel Exhibit 10Y and ask you if you can identify that document. A Yes, sir. Now, Nell Charles, it was signed at her home by her in my presence on January the 18th, 1965.

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10Y for identification.)

Q I show you what has been marked for identification General Counsel Exhibit 10Z and ask you if you can identify it. A Yes, sir. It's Lowell Bailey and he signed that at his home and that was in January—on January 14, 1965, signed in my presence.

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10Z for identification.)

MR. BAKER: At this time I would offer into evidence General Counsel Exhibits 10N through 10Z for identification.

MR. JENKINS: The Respondent makes the same objection as was previously made to the other exhibits marked General Counsel Exhibit 10.

[fol. 89] TRIAL EXAMINER: They will be received. You know you have an automatic exception.

* * * *

[fol. 90] CROSS EXAMINATION

BY MR. JENKINS:

Q Mr. Spitzer, who was with you when you interviewed Adkins? A Adkins?

Q Yes. A Cordell Adkins?

Q Yes. A I think Mr. Don Kidd.

Q Are you sure of that? A Yes.

Q Who was with you when you interviewed Mr. Hysell? A Hysell?

Q Yes. A John or Ralph? Ralph?

Q Yes. A There was no one.

[fol. 91] Q Who was with you when you interviewed Jean Caldwell? A I think—it looks like Jean on there. I believe it's Ivan. Anyway, there was no one with me as far as I—she was in her home.

Q Were you personally acquainted with her previous to this occasion? A No.

Q Were you personally acquainted with Mr. Hysell previous to this occasion? A No.

Q Were you personally acquainted—Who was with you when you interviewed Siddy Caldwell? A There was no one with me.

Q Were you personally acquainted with him? A No.

Q Who was with you when you interviewed Jerry Scott? A No one.

Q Were you personally acquainted with Jerry Scott? A No.

Q Who was with you when you interviewed John Vance? A There was no one.

Q To save time, who accompanied you on interviewing any of the other persons that you have testified about here? A Well, Don Kidd as far as I know, any of those that I've—

[fol. 92] Q Do you know on which occasion Mr. Kidd was really with you? A I know that occasion.

Q On which occasion? Adkins? A Yes.

Q Now, other than the Adkins situation, was anyone with you on any of the other interviews which you had? A Not on any of those that I submitted.

Q Were you personally acquainted with any of these people? A No.

Q Had you ever seen them before that day? A No.

Q Have you ever seen them since that day? A Yes.

Q Which ones have you seen since that day? A At the time I was in the area I kept in pretty close contact with the people.

Q Which ones specifically did you see and on what dates did you see them after your initial interview with them? A Well, I don't know if I can get the correct date but within a time after I signed they, why, I went back to see several of them.

Q You don't know which ones you went back to? A I think the two Caldwells, Don Kidd. That's all I can recollect right now.

[fol. 93] Q Describe for me John Ellis, his appearance?

* * * *

A It's hard to describe each and every face that I saw

and signed since he's not the one I revisited since the signing of the application.

Q Can you tell us what he looks like at all? A As far as I know he was a younger man.

Q What color was his hair? A I couldn't describe his hair.

[fol. 94] Q Can you estimate his age? A Not precisely, no.

Q Can you describe him in any other way physically?

MR. BAKER: Your Honor, I submit that this is entirely out of order.

THE WITNESS: I've been away from the scene—

* * * * *

[fol. 95] THE WITNESS: I can't describe him specifically. I remember the situation surrounding the signing of him. It was a brief period of time, within five minutes. And it's six months apart, many places I've been since that time. Many of the faces I do recognize that I saw then.

Q (By Mr. Jenkins:) Can you describe Ralph Hysell? A Yes. He's a short fellow and I can remember this since he could not write his name. He asked me to write it. He's a short fellow.

Q Can you describe him in any other way? A What other way?

Q Is there anything else that comes to your mind about him in describing him? A Not specifically.

Q How about Paul Rowe, can you describe him? A He was a young man, too. I can't describe him. Not any more just than he was one of the ones that I was with briefly, long enough to sign an application.

Q Now, in talking to Mr. Rowe what did you say to him in connection with the signing of this application? A I told him that we were organizing this plant or attempting to and in order to do that we had authorization cards that would be signed by the employees in order to—and if we reached a majority that we would ask for recognition.

Q What else did you tell him? A I don't recall everything that was said in respect to the Union. That is what I told him.

Q Did you advise him of his rights under the Labor Law not to join the Union? A If the question had come up I would have.

Q I didn't ask you that. I asked you did you specifically advise him of his rights. A I told him he had the right to belong or not to belong.

Q You told Rowe this? A Yes.

Q Did you make this statement to Jerry Scott? A I suppose I made it to all of them.

Q You told each one of these employees that they had a right not to belong to the Union if they didn't want to? A I said, "It's your right to belong to the Union or it's your right not to. The law says so."

Q You made this statement to Hysell, the two Caldwells, Adkins, Scott, Vance, Rowe, Ellis, McComas, John Ellis, Ronnie Curry, Nell Charles, Lowell Bailey, to each one of those people you made that statement? A I couldn't specifically say that I said it but they signed the cards in a brief time.

Q This is not what I asked you. My question to you is did you make this statement to each one of those named individuals? A Yes.

[fol. 97] Q All right. What else did you tell each one of them? A I don't recall anything else pertaining to the Union. Either they signed or they didn't sign. The people, when they signed, that was it.

Q Now, did you approach some employees who did not sign? A I don't recall that I approached any that didn't sign.

Q Every employee which you approached— A I said I don't recall.

* * * *

Q What purpose did you state? A That we were going to, if we got a majority of the cards signed, that we would ask for recognition.

* * * *

[fol. 98] Q What, if anything, was said to any of these employees about working conditions as an inducement to get them to sign these cards? A Well, I would say yes, there was some.

Q Well, to whom? A Improvements in wages and working conditions.

Q What did you promise them specifically and to whom? A Nothing specifically.

Q Whom did you make these statements to, which ones of these people? A Each and every one of them.

* * * *

[fol. 100]

HERBERT FRANKLIN MOUNT, JR.

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q Please state your name and address for the record. A Herbert Franklin Mount, Jr., I live at 121 Marion Street.

Q Where is that? A In Huntington.

Q Have you ever been employed by Gissel Packing Company? A Yes, sir.

Q When did you first working for Gissel? A It was about April, 1963.

Q Who hired you? A Charles Gissel.

Q What was your job there? A Well, I was to work in the shipping department as far as I knowed, I mean that was where I went to work at.

Q Did you work there the whole time you were there? A Well, yes, sir.

Q How long did you work for them, Gissel Packing? A A little better than two years.

Q When did you leave? A It was about December, '65.

[fol. 101] Q It couldn't have been December— A Sixty-four.

Q Did you come back after that? A Yes, sir.

Q Did you leave again? A Yes, sir.

Q When was that? A About, it was about a month or two afterwards.

Q Would it have been in April, the 22nd of April was that the date you left? A Yes, sir.

Q All right, now, while you were there were you ever approached by anyone to join a Union or sign a Union card? Did you sign a Union card? A Yes, sir.

Q Where did you get the card that you signed? A He brought it to my house.

Q Who did? A Red.

Q Red Cass? A Yes, sir.

Q The man who is an International representative who was in the room with you? A Yes, sir.

Q I show you what has been marked as General Coun-
[fol. 102] sel's Exhibit 10AA for identification and ask if that's your signature?

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10AA for identification.)

A Yes, sir.

Q Herbert F. Mount, Jr.? A Yes, sir.

Q You signed it on or about the date indicated January 19, 1965? A Yes, sir.

Q Did you get any cards signed yourself? A Yes, sir.

Q Who did you get signed up? A John Robinson.

Q I show you what has been marked for identification General Counsel Exhibit 10BB, and ask you if that's the card you got signed? A Yes, sir.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10BB for identification.)

Q With John Robinson's name on there, dated January 20th, 5 it says. Was that January 20th of this year, the day after you signed your card? A Yes, sir.

[fol. 103] Q Where did Robinson sign? Where were you? A At the Gissel Packing Company.

Q Did he sign in your presence? A Yes, sir.

Q He signed, put his name on? A Yes, sir.

Q Did you ever have any conversation with any supervisor at the plant regarding the Union when the Union was mentioned? A With Charles.

Q Gissel? A Yes, sir.

Q Who is Charles Gissel, what's his position if you know? A Well, he was my boss.

Q Directing your attention to the first time did you have more than one conversation with Mr. Gissel where the Union was mentioned, Mr. Mount? A Yes, sir.

Q Directing your attention as to the very first time that the Union was ever mentioned to you by Mr. Gissel when did that take place? A Well, right after I first went to work.

Q Back in 1963? A Yes, sir.

Q Where did this conversation take place? A Out at the front docks.

[fol. 104] MR. BAKER: Before you go on, Madam Examiner, this conversation will be beyond the 10(b) period, and it's not expected that you would find an unfair labor practice but it is being offered to show the background of this case and the animus on the part of the Employer towards Unions.

TRIAL EXAMINER: Very well.

Q (By Mr. Baker:) You say this was out on the dock? A Yes, sir.

Q Who else was present, if you recall? A Well, I don't think there was anybody.

Q All right. What did Mr. Gissel say to you about the Union and what, if anything did you say in reply?

MR. JENKINS: We object to that, Your Honor. This is not material to any issue before this hearing. I'm not sure I heard the date referred to but I believe it was sometime in 1963.

TRIAL EXAMINER: That's correct.

MR. JENKINS: And we are not prepared to try any case growing out of any testimony or any other thing that goes back outside of the period that's material in this case.

TRIAL EXAMINER: If you need additional time, I refer to ILTWU, Local Lodge 1424, in which the Supreme Court held evidence with respect to events which occurred prior to the six months' limitation period may be adduced to shed light upon events which happened within the limitations, Mr. Jenkins.

[fol. 105] MR. JENKINS: I assume, Your Honor, that in order to protect the record it is not necessary to make a motion to strike this.

TRIAL EXAMINER: That's correct. You have a standing objection. I would like to say to you if you want time in which, if you care to, prepare your answer to this you just ask for it, I'll rule upon your motion when it's made.

MR. JENKINS: To amplify my objection to it, Your Honor, so the record, I'm not arguing with your ruling, I just want to be sure the record is properly protected, this is evidence here that is not material to anything that is set out in either of the complaints and that is the basis for our objection to it.

TRIAL EXAMINER: Very well.

Q (By Mr. Baker:) Mr. Mount, you say this was back when you were hired, you think, some part of '63, is that correct? A Yes, sir.

Q And it was out on the loading dock? A Yes, sir.

Q What did Mr. Gissel say to you at that time? A He told us the shop was non-Union and if we was caught talking to a Union representative we would be fired.

Q When was the next conversation that you had with Mr. Gissel where he mentioned the Union? A Well, it was back about September, Buckeye Loan—

[fol. 106] Q Of last year? I say was that September of last year? A Yes, sir.

Q Do you remember what part of September that was? A I believe it was about the first.

Q First of September. All right, what happened on that occasion? Did you say something about Buckeye? A Yeah. Buckeye Loan Company, where I had my house loan were about to sue, came out to talk to me.

MR. JENKINS: I can't understand. Buckeye Loan Company what?

THE WITNESS: (Continued.) They came to talk to me because I was behind on my payments.

TRIAL EXAMINER: Something about loan on your house?

THE WITNESS: Yes.

Q (By Mr. Baker:) He was behind on his payments on the loan on his house. A And so he called me over to the side and talked to me.

Q That is the man from Buckeye Loan called you over

to talk to you? A Yes, sir. And whenever he left, Charles asked me if it was a Union representative, and I said no, and he did not believe it.

Q What do you mean, he did not believe it?

MR. JENKINS: Objection. Hearsay.

TRIAL EXAMINER: Sustained.

[fol. 107] Q (By Mr. Baker:) What did he say to make you believe he didn't believe it? A He just raised cain and said he thought it was a Union representative.

Q Even after you told him who it was he thought that it was? A Yes.

MR. JENKINS: Objection. This is leading.

TRIAL EXAMINER: Sustained. What did he say?

THE WITNESS: He just said he thought it was a Union representative. I tried to explain to him that it was a Buckeye Loan Company man and he didn't believe it.

TRIAL EXAMINER: After you said it was a Loan Company representative, what did Mr. Gissel say then?

THE WITNESS: Well, not much.

Q (By Mr. Baker:) He said he thought it was a Union representative. Did he say anything else then about the Union at that time? A Well, he's repeated before about if we was caught talking to one that we was fired.

Q How did he say that? A Well, he said, "You goddamned things will go." That's the way he put it.

Q Now, when was the next time that you heard Mr. Gissel mention the Union or say something about the Union? A Well, he was talking out front where we order

[fol. 10[illegible] meat and stuff.

Q [illegible]t's at the plant? A Yes. A guy that hauls the cattle [illegible]n there, Earlie, and he was talking about it.

Q Wait a minute. You say this guy that hauls cattle in, is he an employee of Gissel or do you know? A No, sir, he just hauls the cattle in to them.

Q He owns his truck or something? A I suppose.

Q You say Mr. Gissel was talking to him? A Yes, sir. They were talking about shutting his slaughter house down. He said maybe the Union was doing them a favor, that they could cut the slaughter house out and buy their meat already—have their meat shipped in.

MR. JENKINS: Objection. The time isn't shown. The materiality isn't shown.

TRIAL EXAMINER: When did this happen?

MR. BAKER: I was going to ask him that, Your Honor, but I would like if I may to go ahead and get the—

TRIAL EXAMINER: I suggest you ask the time before you ask the substance.

MR. BAKER: All right.

Q (By Mr. Baker:) When was this, do you remember, say, relative to when you signed a Union card, was it before or after? A Well, it was I'd say about a month [fol. 109] afterwards.

Q After you signed? A Yes, sir.

Q You signed on January 19th. A It would be about February, maybe the first of March.

Q All right, what was he saying? A Well, he said maybe the Union was doing him a favor because they could take and shut the slaughter house down and have their meat shipped in already cut, to do away with the men.

Q Who was he talking to? You say he was talking to this man? A Earlie. There were several present when he was talking.

Q How was he talking, soft or low, loud or low? A Well, about like usually.

Q How does he usually talk? A Mad.

Q Was it loud or soft? A Well, it wasn't loud and it wasn't soft.

Q But you heard it? A Yes, sir.

* * * *

[fol. 110] Q Will you state whether or not during that time you heard Mr. Gissel talking to another employee about the Union or where he wasn't talking to you but a conversation that you may have heard? A Well, I heard him talk to Rush Moore once about it.

Q When was that? A Well, that was, I believe it was along in March. It wasn't too long after we had signed the Union cards.

Q Where did this conversation take place? A Oh, they was getting ready to go over to the garage.

Q Was it in the plant? A Yes, sir, out front just as they started to go over to the garage.

Q Was anybody else present at that time? A I believe Ken Adkins was, I'm not sure.

Q Now, you say he was talking to Rush Moore? A Yes.

Q Who is Rush Moore? A He works at the plant, at the garage.

Q Is he the man that does a little bit of everything sort of jack of all trades around there? A Yes, sir.

Q And then you heard Mr. Gissel talking to Mr. Moore? A Yes, sir.

Q What did he say to Mr. Moore? A He told him to [fol. 111] find out all he could about the Union, who had signed the cards, and to report back to him.

Q Back to Mr. Gissel? A Yes, sir.

Q Now, were there any Union meetings involved in this campaign? A Yes, sir, there was one.

Q Just one? A Yes, sir.

Q Do you remember when that meeting was conducted? How long before you were fired was the meeting conducted?

MR. JENKINS: Objection. The statement about "fired," is an improper conclusion.

TRIAL EXAMINER: Before you left the Company.

MR. BAKER: Yes, all right.

THE WITNESS: It was four days, it was about Easter.

Q (By Mr. Baker:) About Easter? A Yes, sir.

Q I believe you stated you left on April the 22nd, or something, it was about four days prior to that? A Yes, sir.

Q What day of the week was it on? A Sunday.

Q What time of day? Are you sure it was Sunday or was it Saturday? Did you work that day? A Yeah, it [fol. 112] was Saturday for we had worked that day. It was Saturday at 2:00 o'clock.

Q All right. And that was in the month— A Sunday I believe was Easter.

Q The next Sunday was Easter. A (Nods.)

Q I mean the Sunday following that day. A Yes.

Q That would have been April 18th, or Easter. So that meeting was on April 17th, and then you were fired the following what—

MR. JENKINS: Objection.

Q (By Mr. Baker:) —you left the employ of the Company? A Thursday.

Q That would have been April 22nd. Did you attend this meeting? A Yes, sir.

Q Where was it held? A At the Hotel, Fourth Avenue, Governor—

Q Cabell? A Cabell.

Q All right. Now, before you went to the meeting do you have any reason to believe that the Company knew that you were at the meeting? A Yes, sir.

[fol. 113] Q How is that? A Well, it was a couple of days before, Charlie Hutchison came in and told Charles, asked him—

Q Charles who? A Gissel.

Q Where did this take place? A In the shipping room.

Q Were you present? A Yes, sir.

Q Charlie Hutchison, who's he? A Herb Gissel's son-in-law.

Q And you heard a conversation between Charles Hutchison and Charles Gissel? A Yes, sir.

Q All right. Would you tell the Trial Examiner what Mr. Hutchison said to Mr. Gissel—

MR. JENKINS: Objection,—

Q (By Mr. Baker:) —and what Mr. Gissel said in reply?

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker:) You go ahead and answer. A Charlie Hutchison asked Charles Gissel if he knew there was going to be a Union meeting on Saturday, and he said yes, he knew it before the rest of us boys did, and he said that was all right. He said he was going to have somebody there to call in whoever come.

[fol. 114] Q That's Charles Gissel talking, is that right? A Yes, sir.

Q You say you went to the meeting? A Yes, sir.

Q What did you see when you got to the meeting, if anything? A Terry Lewis in a phone booth.

Q Terry Lewis that's the son of— A Gissel girl. She's Edith.

Q Edith Gissel Lewis? A Yes, sir.

Q Did Terry work at the plant? A Yes, sir, of evenings and through the summer months.

Q Where did you see Terry at the hotel? A In the phone booth.

Q What was he doing? A Calling Alfreda.

Q Who is Alfreda? A Alfreda Gissel or Clost—

Q Is that his mother? A No. That's—She's secretary, I mean the boss, as far as I know.

Q Alfreda Closterman? A Yes, sir, Alfreda Closterman.

Q How do you know he was calling her? A We heard him pronounce her name on the phone.

[fol. 115] Q Then what happened? A Well, then, we shoved the telephone booth door open and he jumped out and ran.

Q That was on Saturday? A Yes, sir.

Q Did you go back to work on Monday? A Yes, sir.

Q Did you have any conversations with Mr. Gissel on Monday? A Yes, sir.

Q Was the Union meeting mentioned? A Yes, sir.

Q When did this conversation take place? A About 11:30 at Gissel's parking lot.

Q What were you doing out at the parking lot at 11:30? A We went to eat our lunch and we asked him if we was—

Q Where was Mr. Gissel? A Sitting in his car listening to the stock market prices.

Q What did you say, you asked him something? A We asked him if we could work that afternoon.

Q And what did he say? A And he told us to wait a few minutes until that was off.

Q The stock market was off? A Yes, sir.

Q Then what happened? A He asked us if we went to the Union meeting.

[fol. 116] And I said no. He said he knew we had for he had been told and I said yes.

Q Then what was said? A He said from then on me and Jerry Frye would come in at 5:30 to work till 11:30 until further notice.

Q What time had you been normally coming to work? A At six o'clock.

Q How long did you work? A I'd average till 5:00 o'clock but sometimes we'd work longer till we got through.

Q But you started at six in the morning? A Yes, sir. Except for on Wednesday, we worked from 5:30 till sometimes six or seven o'clock.

Q Wednesday was your busy day? A Wednesday.

Q Now, so he told you he wanted you to come in at 5:30 and work till 11:30 and go home until further notice? A Yes, sir.

Q What did you do that day? A Well, we went home.

Q Did you work the next day? A Yes, sir.

Q What time did you come in the next day? A 5:30 till 11:30.

Q And then you went home? A Yes, sir.

[fol. 117] Q Did you work on Wednesday? A Yes, sir.

Q What time did you come in on Wednesday? A We come in at 5:30.

Q You left at what time? A Just a little bit afterwards. No, it was 11:30 we left Wednesday.

Q Now, do you know of your own knowledge whether Mr. Gissel knew you were leaving on Wednesday at 11:30? A Yes, sir, we all walked to the car together.

Q That is you and Jerry Frye? A And Charles, we all left for dinner at the same time.

Q Was anything else said to you at that time about leaving at 11:30? A No, sir.

Q What did you do that day? A Well, my father-in-law was working up on Third Avenue in the rear putting in a sewer and so he called down there and asked me if I got off to stop up there and help him to finish up that job and so I was staying with him so I stopped there.

Q You mean you were staying with your father-in-law? A Yes, sir. So I stopped up there to see what he [fol. 118] was wanting. He was wanting me to help him dig out a little bit so he could put the tile in. So me and Jerry Frye stopped and helped him for, I don't know, a couple of hours, and then we was there about an hour when Eddy Lewis and Rush Moore come up and looked in the

garage door where we was standing at and they turned around and left. They didn't say nothing to us.

Q All right, now, did you go to work on Thursday? A Yes, sir.

Q What time did you go to work Thursday? A 5:30.

Q What happened when you got to work that day? A That's when our timecards were gone.

Q You mean they were missing from the timecard racks? A Yes, sir.

Q What did you do then? A We looked around and couldn't find them. We thought maybe we overlooked them so we looked again and they wasn't there, so we walked over to the office and asked him where our timecards had gone.

Q Asked whom? A Charles Gissel.

Q I want you to tell the Trial Examiner just exactly what happened, what Mr. Gissel said when you asked him for your timecards. A I asked where our timecards was at and he said, by God, we had walked off the job. [fol. 119] I said no, we didn't. I said, "You told us to work from 5:30 till 11:30.

He said, "I meant for you to come back in on Wednesday." He said, "You know Wednesday is our busy day."

I said, "You didn't say anything about us coming back."

And he said, "Well, I meant for you to."

And we tried to explain and he grabbed the phone, going to call the law, and then we got—we finally argued around a little bit, try to get our job back, and he told us when we got ready to leave, to take the god-damn Union and stick it up our ass.

Q You said that you had left once before, is that right? A Yes, sir.

Q When was that? A It was about a month or two before. I don't recall the date.

Q Was it before or after you signed a Union card? A It was after.

Q What happened then? A Well, he said we was supposed to have—he come down about 11:00 o'clock and told me we was supposed to have the hams in the pans.

TRIAL EXAMINER: Who is "he?"

THE WITNESS: Charles Gissel. (Continued.) —in the pans and cooking and I said he didn't tell me that. So we got in an argument and he told me I was fired, so I went upstairs and got my knife and things and left. And [fol. 120] he sent Eddy Lewis—

Q Before you were fired, did Mr. Gissel do anything to you at that time, did you have—were there any blows struck or anything? A No, sir.

Q All right. He didn't throw any knife at you or anything? A No, sir.

Q Now, he told you to leave, is that right? A Yes, sir.

Q Where did you go? A I went over to Fourteenth Street restaurant, got me a cheeseburger and Coke.

Q I see. Now, what happened then? A Well, I was there about half an hour and Eddy Lewis came over and told me Charles wanted me to come back to work.

Q Did he say why Charles wanted you to come back to work? A No, sir.

Q Did he say he was feeling any differently or something like that? A No, sir.

Q What did you tell him? A I told him I didn't know.

Q Did you go back to work at that time? A No, sir, it was the following Tuesday.

[fol. 121] Q Then what happened? A Well, just the same old stuff.

Q What do you mean? How did you happen to go back to work on the following Tuesday? A Well, I looked around for another job.

Q Did you call him up and ask him if you could come back to work or did he call you back? A Well, he—a couple of the boys said he had sent for me to come back and at last I called and asked if he wanted me to come back.

Q What did he say? A He said yes, it was up to me.

* * * *

MR. JENKINS: Motion for Jenks Act statement.

MR. BAKER: I don't know what Jenks Act statements

are, Your Honor. If he wants to know if we have any pretrial statements, I have those, if that's what he means.

TRIAL EXAMINER: Very well.

MR. BAKER: Is that what you mean, Mr. Jenkins?

MR. JENKINS: You know what I mean, Mr. Baker. We go through this little colloquy in every hearing. He know what I mean; I know what he's going to give me. It's part of the game he goes through.

MR. BAKER: It's still fun.

* * * *

[fol. 122] MR. BAKER: Your Honor, at this time, I'd like to offer into evidence General Counsel's Exhibit marked for identification as 10AA and 10BB.

MR. JENKINS: We have the same objections as were made to the other Exhibits 10 of the General Counsel on the same grounds.

TRIAL EXAMINER: They will be received.

* * * *

CROSS EXAMINATION

BY MR. JENKINS:

Q Mr. Mount, you testified earlier about a conversation between Charles Gissel and a cattle hauler, did you not? A Yes, sir.

[fol. 123] Q Do you know the name of this man who hauls cattle? A I just know him by his first name.

Q At the time of that conversation, Charles Gissel made the statement to the cattle hauler that he could buy his cattle already slaughtered and get his beef shipped in already killed and that would enable him to do away with the plant, didn't he? A The slaughter house department.

Q Right. And that's all that you recall him saying on that occasion, wasn't it? A Yes, sir.

Q And that is the truth, isn't it? A Yes, sir.

Q Now, when was the last time that you came back to work for the Packing Company before your employment terminated in April? A You mean how long I had worked there?

Q Yes, I understand that you began your employment sometime in 1963 and then that there was a break in it

sometime and I'm not sure when that was. When was it? A I don't understand you.

Q Well, you first went to work for the Packing Company in April of '68, you testified, is that correct? A Yes, sir.

[fol. 124] Q And as I understand December, was it, '64, that you left for awhile? A You mean when I was let go.

Q Were you let go in December of '64? A Yes, sir.

Q And what was the occasion for that? A Well, for not having the hams put in the pans at the time.

Q This was in December of '64? A I'm not positive about the date, no.

Q Do you remember when it was? A It was a couple of months before I was let go the last time.

Q Now, had you taken a vacation sometime just before that? A Yes, sir.

Q Did you return to work after your vacation when you were supposed to? A No, sir.

Q Why not? A I was working on my house.

Q What day were you supposed to come back to work? A It was on Monday.

Q Do you remember the day of the month? A No, sir.

Q Was it sometime in February of '65? A I believe it was.

[fol. 125] Q And you were supposed to report back when your vacation was over on a Monday, right? A Yes, sir.

Q And you did not do it? A No, sir.

Q And the reason was you were working on your house? A Yes, sir.

Q And did you call the Company and tell them you were not coming back in? A Yes, sir.

Q Whom did you talk to? A Alfreda Closterman.

Q And what day did you call in and tell her that you were not coming in? A On Monday morning.

Q Were you given permission to take off? A Well, I would say given permission.

Q You were given permission? A No, sir, I just called in and said I wouldn't be in.

Q When did you report for work? A I believe it was on Wednesday.

Q That would be two days late? A Yes, sir.

Q And the reason was that you were just working on [fol. 126] your own house, is that right? A Yes, sir.

Q What were you doing on your house? A I was putting a roof on it.

Q Did you not give a statement to an agent of the National Labor Relations Board on the 23d day of February, 1965, did you not sign an affidavit that says as follows: "I went on vacation during the week of February 7th, 1965. I did not return to work until about February the 17th, 1965 because I had a chance to make some money plumbing on February the 15th and 16th. It is not unusual for a man to take a few days off from Gissel without calling in if a man could make more than $1.25 an hour that Gissel paid." Did you sign an affidavit under oath to that effect to an examiner by the name of Jerald—What's his name?

MR. BAKER: Scheinberg.

Q (By Mr. Jenkins:) —Scheinberg of the Regional Office of the National Labor Relations Board in Cincinnati? A Yes, sir.

Q Was it the truth? A Yes, sir.

Q Isn't it true that the statement that you made here now that you called into the office is a lie? A I called in.

Q Isn't it a fact that when you testified previously here [fol. 127] that you were home working on your roof that that was false, that you were out doing plumbing work for money? A That was the afternoon.

Q You say now you did both of them? A That afternoon.

Q When you came back to work two days late did anybody inquire where you had been? A Well, Charles Gissel asked me where I had been.

Q What did you tell him? A I told him home.

Q And what did he say? A He said he'd fire me right then if it wasn't for the god-damned Union.

Q Now, you testified about an incident with respect to putting these hams in pans, didn't you? A Yes, sir.

Q After that incident occurred did you get a letter from the Company? A Yes, sir.

Q Do you have a copy or does your attorney over here have a copy of that letter? A I had the copy but I don't have it now.

Q Do you know who has the copy of it? A No, sir.

MR. BAKER: I've got it, Mr. Jenkins.

[fol. 128] MR. JENKINS: May I have it?

MR. BAKER: It was attached to his statement.

MR. JENKINS: I'd like this Respondent's Exhibit Number 1, please.

(Thereupon, the above-mentioned document was marked Respondent's Exhibit No. 1 for identification.)

MR. BAKER: No objections to its receipt.

MR. JENKINS: By stipulation of counsel, this letter, Respondent's Exhibit Number 1, we offer it in evidence.

TRIAL EXAMINER: Received.

(Thereupon, the document heretofore marked Respondent's Exhibit No. 1 for identification was received in evidence.)

Q (By Mr. Jenkins:) Mr. Mount, will you identify that Respondent's Exhibit Number 1 as the letter you received—

MR. BAKER: I think it's unnecessary since it has been received, Your Honor.

MR. JENKINS: It may be in evidence, Your Honor, but I want to tie it into the incident repudiating his prior testimony.

TRIAL EXAMINER: Use it to refresh his recollection for the reason it was received?

MR. JENKINS: Yes, ma'am.

THE WITNESS: This is it.

Q (By Mr. Jenkins:) This is the letter? A (Nods.)

MR. BAKER: The Trial Examiner will note that the [fol. 129] letter is signed by Alfreda Closterman.

Q (By Mr. Jenkins:) Now, this letter, Respondent's Exhibit Number 1, Mr. Mount, makes this statement—

MR. BAKER: I'm going to object to counsel reading—

MR. JENKINS: I'm making this a question, Your Honor.

Q (By Mr. Jenkins:) "You were due to return and report for work after your vacation on Monday, February 15, and you did not appear until Wednesday, February 17. We attempted to contact you unsuccessfully, and you have no excuse for your failure to appear for work as scheduled." Signed Alfreda L. Closterman.

This letter was written on February 19th, Mr. Mount. In the light of this letter, are you still testifying that on Monday, February the 15th, you called Mrs. Closterman and told her where you were and that you would not be in? A Yes, sir.

Q But she wrote you this letter after that?

MR. BAKER: Objection. That's argumentative.

TRIAL EXAMINER: Sustained.

MR. BAKER: The fact that she put it in a letter doesn't bother this witness.

Q (By Mr. Jenkins:) Now, this letter here, Respondent's Exhibit Number 1, makes reference to the fact that you were regularly late for work on a number of occasions, is this true?

MR. BAKER: Now, Your Honor, I'm going to object [fol. 130] to that because clearly if the letter is going in for the purpose as proof of the matter asserted, it's clearly hearsay.

TRIAL EXAMINER: He can question him about it.

MR. BAKER: He—I think he can question him so long as he's not indicating the letter is proof of what the letter says.

TRIAL EXAMINER: I'm not taking it as proof. I assume he's asking him questions based on it.

MR. JENKINS: Yes, Your Honor, that's correct. This letter here says that: "—you have been regularly late for work on a number of occasions." This letter was dated February the 19th.

Q (By Mr. Jenkins:) Is that true had you been late for work regularly on a number of occasions? A Yes, sir.

Q Mr. Mount, you testified about a conversation between Rush Moore and Charles Gissel. Do you recall that conversation in your testimony about it? A Yes, sir.

Q Who else was present, if anybody, when this conversation took place? A I believe Ken Adkins was, I'm not sure.

Q Was anyone else there? A No, sir, I don't think so.

Q Now, at the Union meeting at this hotel on April [fol. 131] the 17th, you testified about an incident down in the lobby of the hotel around the telephone booth, didn't you? A Yes, sir.

Q Who was there at the time this incident occurred beside yourself and Terry Lewis? A Jerry Frye, Ed Lees.

Q Who? A I don't know. There were three or four standing around there.

Q Do you know the names of any of the others? A No, sir. I don't recall the names.

Q On the day that you left at 11:30 and went up to work for your father-in-law, did you have any conversation with Charles Gissel that morning? A No, sir, not as I can recall.

Q The day of the week was Wednesday, wasn't it? A Yes, sir.

Q Is this a slow day at the plant? A No, sir. It's the busiest day.

Q Had you ever not worked on a Wednesday before? A All day?

Q All day. A Well, we been let go earlier in the evening.

Q On Wednesdays? A Yes, sir.

[fol. 132] Q How early? A I think we left there as early as 3:00 o'clock.

Q What day did this happen on? A I don't know the exact date.

MR. BAKER: He answered it happened on Wednesday. Is that what you're asking him?

Q (By Mr. Jenkins:) Now, had you worked on the previous Wednesdays of that month? A Yes, sir.

Q All day? A As far as I know, yes.

Q Why was it that you had to work all day on Wednesdays? A Because that's when all the truck orders and everything had to go out.

Q What kind of work did you do? A Well, I boned hams and worked in the shipping room and helped fill orders.

Q Did you work with any crew of fellows regularly? A Well, when I boned hams I generally boned by myself

but when I worked in the shipping room I worked with other guys, yes.

Q What other guys would you work with in the shipping room? A Elmer Cremains.

Q And who else? A And Jerry Frye.

[fol. 133] Q Who else? A Kenneth Adkins.

Q Anybody else? A Well, just whoever else was in there. I mean sometimes it wasn't the same ones every week.

Q On Wednesdays would you work both places or would you work just in the shipping room or would you just be boning? A Well, I have boned hams on Wednesday and worked in the shipping room. I boned hams part of the day and then come up in the shipping room depending on how busy they was.

Q You worked both places then? A Yes, sir.

Q Now, you say that on Monday of the following week you worked at the plant and that Karl Gissel told you and Frye on that Monday morning that your hours would then be from 5:30 until 11:30 until further notice, is that right? A Yes, sir.

Q And who else did he make that statement to? A Well, Tommy Burchell was out there and he told him he didn't need him the next day.

Q That was for Tuesday? A Yes, sir.

Q All right, but he did ask you to work on Tuesday? A Yes, sir.

Q And who else did he tell that they would not work [fol. 134] after 11:30? A Jerry Frye.

Q And who else? A That was all in my presence.

Q Do you know whether any of these regular people that you were working with worked after 11:30 on Tuesday or Wednesday? A Yes, sir.

Q Which one of them worked after 11:30 on Tuesday in your regular crew that you have mentioned? A Elmer.

Q Wo else? A I can't remember who else was working in the shipping room at that time.

Q Now, isn't it a fact that you always got your instructions as to when you were to work on a day by day

basis? In other words, you'd come in in the morning and then if you were going to be laid off early that day because of lack of work, well, you'd be told that day, wouldn't you? A Yes, sir.

Q That had been the invariable custom of the business down there, hadn't it? A Well, we worked, we'd come in and worked, I mean just whenever we got through we were through.

Q Right. And if you got through early then you were laid off, isn't that right? A Yes, sir.

[fol. 135] Q Now, the week before your last week had you been coming in at 5:30 or at 6:00? A At 6:00.

Q Starting the following week who all came in at 5;30? A You mean the week we was let go?

Q Yes. A Me and Jerry Frye.

Q Who else? A I believe that was all.

Q No one else had to come in at 5:30? A Yes, sir. I'm pretty sure that was all that was coming in at 5:30.

Q Why were you asked to come in at 5:30? Was there extra work or something to be done? A No, sir, it was just work on the truck orders.

Q In order to get the trucks filled? A Well, yes, sir.

Q Did you need that extra half an hour in order to get the trucks ready so that they could leave on time? A Yes, sir, if the orders were big enough.

Q And apparently the orders were big enough to require that, is that right?

MR. BAKER: I'm going to object.

TRIAL EXAMINER: Overruled.

[fol. 136] Q (By Mr. Jenkins:) When you were requested, it would be on that basis I assume, is that correct? A Yes, sir.

Q Now, on this Monday that you were there by around 11:30, this is the last week you worked, was the work that you were to do apparently finished? A Well, there wasn't any hams to amount to anything on the shelf. We had just about boxed them all up, I mean orders.

Q That is part of it. You had finished that job, is that right ? A No, sir. I don't think I boned any hams that morning.

Q I see. Well, what I'm asking you is this, Mr. Mount, were you apparently through the work that you had to do there on that Monday by around 11:30? A I would say no.

Q Well, what about on Tuesday, did— Let me put it this way: Who all left at 11:30 on Monday? A Me and Jerry and I think Tommy Burchell did, I'm not sure about him, I think he left though.

Q Did any of the rest of them leave at that time? A No, sir, I didn't notice anybody. I mean we just went ahead and went home.

Q Well, then you don't know whether they left or not, is that what you're saying? A Yes, sir.

[fol. 137] Q Now, on Tuesday who left at 11:30 besides yourself and Frye? A Well, that's all as I know of.

Q You don't know whether anybody else left then or not? A No, sir, we just went ahead and left.

Q Now, in addition to the other problems that came up between you and the Company that we've already covered here, there was an incident that occurred also when you refused to shake hides at the request of the Company, didn't you? A Yes, sir.

Q Now, when did this occur? A About 6:30 that night.

Q And about what month was this or day? A I wouldn't have any idea.

Q Well, this was in the last part of March of 1965, wasn't it? A Sounds about right.

Q And at that time you were requested to assist the other employees of the Company there in shaking hides, weren't you? A No, sir. I was just asked would I go back if I would help them.

Q Yes. A It was no order. They just asked. Eddy Lewis asked me would I help them.

Q Uh-huh. This is a job that everybody does, isn't it? [fol. 138] A No, sir. It's call for extra help.

Q Well, the other fellows in the plant do this work, don't they? A Not all of them.

Q Well, most of them do, don't they? A No, not most of them, just a few. Whenever they have a few of them back there who quit or something, they would come up and get a few out of the plant, just a few.

Q On April the first of this year before a court reporter didn't you give me a statement in which this question was asked and you gave this answer: "Have the other fellows here in the plant done it before sometimes?" Answer: "Yeah, they have." That's correct, isn't it? A Yes, sir.

Q Did you not tell me when I questioned you that you refused to shake hides when requested to do so because you weren't hired for it? A Yes, sir.

Q And I asked you if you had not done it on an earlier occasion and you said that you had, didn't you? A Yes, sir, one time.

Q And this was all in the last part of March, isn't that right? A I think so.

[fol. 139] Q And when you were asked to do it, you refused and punched out and went home, didn't you? A I had already punched out to go home when I was asked to do it.

Q And then you refused to do it and went on home, didn't you? A I said I had to go on home, yes, sir.

MR. BAKER: I move that line of questioning be stricken as I know of absolutely no materiality to that.

TRIAL EXAMINER: I still don't know what the Company's defense is going to be. This is one of the problems when the answer doesn't give you any idea of what the Company's explanation is going to be, whether the facts are material or immaterial.

MR. BAKER: I would assume, Your Honor, that based on Mr. Charles Gissel's testimony that the employee wasn't fired at all; he quit. If he quit I don't see any materiality to any of this, unless they have a flexible defense that can move from one point to the other as the case may be.

Q (By Mr. Jenkins:) Are you employed now, Mr. Mount?

MR. BAKER: Object. That's immaterial whether or not he is employed now. This is not a back pay hearing.

TRIAL EXAMINER: What is the purpose of that?

MR. JENKINS: I think we have a right to ask him that situation, Your Honor.

MR. BAKER: I think in light of this Company's conduct they don't have.

TRIAL EXAMINER: For what purpose?

MR. JENKINS: We want to know what he's doing now. It may give us a lead on something that might be material here. By the same token we—

TRIAL EXAMINER: Do you have something affirmative in mind or is it just a fishing expedition?

MR. JENKINS: I don't have anything specifically in mind except that we want it as part of our general information just like I think he was asked where he lived. I don't know that that's of material—

TRIAL EXAMINER: Very well. He may answer.

MR. BAKER: I think that under these circumstances, this employee has been discharged from his job and I think fairly obviously for Union activity. I don't know what the vindiction of this Company is but I certainly cannot see any materiality to his state of employment.

TRIAL EXAMINER: Certainly the question of back pay is not to be litigated in this proceeding.

MR. BAKER: Just fishing as to whether or not this witness is working somewhere is immaterial.

TRIAL EXAMINER: Are you presently employed?

THE WITNESS: Yes, ma'am.

MR. BAKER: He answered that. Counsel wants to [fol. 141] know where he's employed and that's the part I'm objecting to. It's not material at all.

TRIAL EXAMINER: Sustained. He may be willing to tell him.

MR. BAKER: I just don't want it on my conscience, Your Honor.

Q (By Mr. Jenkins:) Mr. Mount, do you remember the day you signed some authorization card for this Union? A Yes, sir, I remember signing, not the specific day.

Q Where were you when it happened? A At home.

Q Who was present when you signed it? A My wife.

Q And who else? A Well, Red Cass.

Q What did Mr. Cass say to you in connection with that visit? A He told me he was taking applications for the Union and I—and asked me if I would want to sign. I said yes.

Q What else was said? A Well, just that he had talked to some of the other boys about it, that some of them had signed.

Q Did he say that some of them had not signed? A Yes, sir.

Q Did he say who had refused to sign? A No, sir.

[fol. 142] Q Did he give any reason why anybody had not signed? A No, sir.

Q What did he say to you about signing as far as why you should or should not sign? A Well, he didn't have to say anything to me for I knew we needed better working conditions.

Q He didn't say anything else to you? A No, sir.

Q You mean he just walked in, handed you a card, and you signed it; and he left, and that was all that was to it? A No, sir.

MR. BAKER: I object. Counsel is not characterizing the testimony correctly at all.

TRIAL EXAMINER: Sustained. I didn't understand the witness to say no words were spoken. I assume he said hello.

Q (By Mr. Jenkins:) I have asked you about—I have asked you some questions about what was said. Now, I want to know what else was said that you have not already testified about here? Anything? A He just explained about what the Union was from and said that they were trying to organize the Union.

Q Did he make any statement to you about whether or not you would have to join the Union in order to work at Gissel? A No, sir.

[fol. 143] Q Did he make any other promises to you? A No, sir.

Q Didn't promise you a thing? A Didn't promise me nothing.

MR. JENKINS: That's all I have.

MR. BAKER: May I see that document you were reading from, Mr. Jenkins?

MR. JENKINS: No, sir.

MR. BAKER: Your Honor, I think in light of counsel's statement that he had a document or interview recorded by a court reporter that General Counsel should be

equally entitled to see that under the circumstances as counsel for Respondent is entitled to see anything and everything that General Counsel uses in the matter of interrogation. I know nothing about this but apparently this attorney has interviewed another witness. I think that I should—

TRIAL EXAMINER: The witness?

MR. BAKER: It was this witness. And I knew nothing about it and I think that I would like to see the document from which counsel was reading.

TRIAL EXAMINER: You may make the request.

MR. BAKER: I requested and counsel has refused. I'm not asking the Trial Examiner to order him to present that document. The—

TRIAL EXAMINER: Can you cite authority?

[fol. 144] MR. BAKER: I can cite the Jenks Act. What is sauce for the goose is sauce for the gander, as a matter of speaking.

TRIAL EXAMINER: Well, it's argument. Can you cite me any—

MR. BAKER: I can't cite you any at this moment other than he used a document for the purpose of interrogation of this witness.

TRIAL EXAMINER: On this basis, you have a sounder point I should think.

MR. BAKER: He read from that document and cross-examined the witness and I'm asking that I might be allowed to see the document.

TRIAL EXAMINER: What is your answer to that, that you read from a document?

MR. JENKINS: My answer is that I refuse to do it, that it's part of my personal file. It was not introduced into evidence and my file is not available to the General Counsel.

TRIAL EXAMINER: But you did read from it, a portion to this witness.

MR. JENKINS: Yes, I did, and the witness admitted it.

TRIAL EXAMINER: That's right but you were using the document in examining this witness.

MR. JENKINS: I referred to the document and I asked the witness a statement if it were true, a factual

statement, and the witness testified that it was true, and I did not use the document to impeach him and then I fol-
[fol. 145] lowed it up with a question to the witness, "Well, the statement you made is the truth," and he admitted it, and I let it go at that.

TRIAL EXAMINER: Did you say at the offset, didn't you make a statement to me before a reporter at sometime in March, I believe the date was? Did you ask that question?

MR. BAKER: He did.

MR. JENKINS: I think my recollection is not good enough to represent to you. I think we better have the reporter go back and check it.

(Record read.)

TRIAL EXAMINER: Back on the record.

MR. JENKINS: Before you rule on the request, as I understand it the request is from the General Counsel that I as attorney for Respondent turn over the statement of April 1st to which I referred in the cross-examination. Now, the position of the Respondent is that such statement is a part of my work product in the preparation of this case. The fact that I asked a question of this witness which was explicit on its face and the witness admitted that he did make such a statement at that time and that it was the truth does not entitled the General Counsel to go into that statement on what some people might call a fishing expedition or anything else for other or collaterial matters involved in it. I will have to respectfully say that I will not turn over that statement because I think, with all due respect to any ruling that the Trial Examiner may
[fol. 146] make, it is a privileged part of my work product. There has been no authority whatsoever cited by the General Counsel wherein an attorney for Respondent under such circumstances as these has had to turn over such part of his file and if there is authority that the Trial Examiner knows of, I'll be glad to consider it and reconsider our position on it. But so there won't be any misunderstanding about it, as of this time until we see authority to the contrary I refuse to turn over the statement.

TRIAL EXAMINER: Mr. Baker, do you have authority?

MR. BAKER: Just the general rules of evidence where a document is brought in pertaining to the witness and used from counsel table or at the witness chair and there is interrogation from that document that the other side has always been entitled to see it. It's just a matter of evidentiary rules. However, it would appear that regardless of how Your Honor would choose to rule, Mr. Jenkins does not intend to comply with it should you say do it. I assume the whole thing is moot.

TRIAL EXAMINER: I would think so, too.

MR. BAKER: And I will rely on that I made my request for it and Mr. Jenkins has refused the Examiner's ruling notwithstanding.

TRIAL EXAMINER: I haven't—

MR. BAKER: I would like the Trial Examiner to rule.

TRIAL EXAMINER: My ruling is if the document is [fol. 147] being used as a basis of examination, counsel has a right to examine it on either side. I would request that it would be produced. But, of course, as Mr. Jenkins holds, as you know, you have no authority to require production.

MR. BAKER: Just so the record shows that as of now I have no authority.

REDIRECT EXAMINATION

BY MR. BAKER:

Q Mr. Mount, did you appear before the court reporter when Mr. Jenkins asked to take a statement from you? A No, sir.

Q You didn't? Did he talk to you before today, Mr. Mount, Mr. Jenkins? A I don't remember of him ever talking to me.

Q You don't remember him calling you into the office and telling you who he was and having a court reporter there and asking you questions and putting it down around two or three weeks before you were fired? A There were two guys came but I couldn't swear that he was one of them.

Q Where did this take place? A In the office.

Q Why were you in the office? A Charles Gissel came down into the pickling room where I was boning hams and got me.

Q Where did Mr. Gissel send you when he got you? [fol. 148] A He just told me to come up to the office there was a guy wanting to talk to me.

Q Did he tell you who this guy was? A No, sir.

Q Did he tell you what the guy wanted to talk to you about? A No, sir.

Q When you got there what did the guy say? A He was asking me about the hide shaking and he asked me about Kenny Adkins.

Q What did he ask you about Kenny Adkins? A Asked me what did I—did I hear Charles Gissel fire him.

Q Was Kenny Adkins fired? A Yes, sir, he was fired.

Q Do you know why he was fired? A For not shaking hides.

Q You're sure it wasn't Mr. Jenkins? He's a great big, tall fellow, sitting there? A He could have been.

Q Did he have someone else with him you say? A Yes.

Q What was this other fellow doing? A He was writing it down.

Q What did he have to write with? A Just a pad. [fol. 149] Q Taking shorthand? A Well, he was—he just had a pad and a pen.

Q Did they tell you they were taking down everything you said? A I don't remember them telling me but I knew that they were doing it.

Q Did they show you anything? This is a blue book he had. Did he ever show you that after he took it down? A No, sir.

Q Did he mention the Union at anytime during this, while he was talking with you? A I don't think so. I'm not positive but I don't think so.

Q What else did he ask? A He just wanted to know what the boys' reply was when they was asked to shake hides.

Q Whose reply, your reply? A No, the other boys.

Q What was the other boys' reply? A Well, they asked Kenny, Eddy Lewis came up and asked him to shake

hides, and he said he wasn't going to shake them, and so he told him to get his stuff and go, that he was fired.

Q Now, you said something about shaking hides, they had extra help, what did you mean by that? A Well, they always run an ad in the paper, hire extra help shaking hides.

[fol. 150] Q You say you had shaken them one time before? A Yes, sir.

Q When was that? A I'm not very good on dates but it was, oh, I was there about a year or something like that.

Q And you shook them the one time? A Yes, sir.

Q Is that the reason you didn't want to shake them again? A Yes, sir.

Q What's wrong with shaking hides? A Well, it's just a filthy damn job. It breaks your hands out and when you get back there and shake them they dog you to death. They just work you to death and you don't never get to stop or nothing.

Q What's wrong with the hides? What kind of shape are they in? A Well, maggots, just dirty and everything, salt all over them.

Q Did anyone else shake hides that you knew of besides the extra help when they asked you this last time? Did anybody go back and shake hides that worked in the plant that you know of? A I think it was a few but I don't remember just who it was but there was very few that went back.

Q You say you had already clocked out when Eddy [fol. 151] Lewis talked to you? A Yes, sir. I had worked from six till six, and it was about 6:30 when I clocked out.

Q What did he say to you? A Well, I had punched out and walked out the door. He said he was out there asking to go back to shake hides, they had about an hour left. He said they had about an hour. He asked—he just asked who would help. He said, "Will you?" and he kept going like that. When he got to me, there was four or five of us said no, so when he got to me I said I had to go on home. So he didn't say nothing else.

Q Had about an hour left is that what he said? A Yes, sir. They calculated they would finish up about 7:30 that night.

Q What do they pay you an hour? A $1.25.
Q You say those hides are covered with maggots? A Yes, sir.
Q And you worked 12 hours? A Yes, sir.

* * * *

[fol. 156] Cabell County Court House,
Huntington, West Virginia,

Thursday, August 5, 1965.

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[fol. 157-A] MR. BAKER: In yesterday's cross-examination of Mr. Spencer by Mr. Jenkins reference was made to the prior election, I don't know if he gave the case number, I think it was 9-RC-3966. At this time, I would like to have marked for identification and offer into evidence the Trial Examiner's decision from Case Number 9-CA-2068, which was an unfair labor practice case involving this Respondent and this Charging Party, out of which election in the "R" case arose.

Would you mark this for identification, please.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit No. 11 for identification.)

(Document is shown to Mr. Jenkins.)

TRIAL EXAMINER: Any objection?

MR. JENKINS: Yes, Your Honor, we object to admission into evidence of General Counsel's Exhibit Number 11. The cross-examination that we made yesterday was after you had ruled, subject to that ruling we take the position we did yesterday that this type of evidence is inadmissible in this hearing and is not proper. It would get us involved in some preliminary findings of a Trial Examiner. We would have to go back and try that same case. I don't know what probative value a Trial Examiner's decision in a case in July of 1960 would have. [fol. 158] No reason has been advanced by the General Counsel to sustain the materiality of it to any issue that is properly before the Board at this time. It's a collateral matter that has no bearing on the situation here. Cer-

tainly we did not waive, in view of the decision yesterday on direct examination when we objected to certain questions that Mr. Baker asked this Union man, we did not certainly by going along with cross-examination, in light of your ruling at that time, we certainly did not waive any of our rights to the materiality as evidence.

TRIAL EXAMINER: You waived no rights.

MR. JENKINS: Pardon?

TRIAL EXAMINER: You waived no rights.

MR. JENKINS: Right, and that's our position on it.

TRIAL EXAMINER: It will be received.

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[fol. 159] MR. JENKINS: Now, Your Honor, in view of your ruling in admitting General Counsel's Exhibit Number 11, I request that the hearing of this matter be adjourned now or at the conclusion of the General Counsel's case that it be adjourned for sufficient time in order to give me time to review that ruling and interview the witnesses involved in that and bring them in.

TRIAL EXAMINER: We're not going to litigate this. This is simply a matter of a finding that has been made in a proceeding. What weight is to be given to it is a matter for my judgment. The Board has held and the courts have held that certainly prior decisions of the Board, the Board is entitled to take official notice of them which does not mean they are to be relitigated. I will determine what weight to be given to that and I certainly am not going to relitigate it. You can introduce any evidence you have with respect to objections filed to that adverse action taken by the Board or some court but we're not going to relitigate the matters therein. This is a matter of the Board and its Trial Examiner taking official notice of prior findings by a Trial Examiner and/or the Board in a case involving the same parties. I assume it's the same Union, is that true?

MR. BAKER: Same Union, same Employer.

TRIAL EXAMINER: Very well.

[fol. 160] MR. BAKER: It's offered, Your Honor, simply in light of counsel's implication in his cross-examination yesterday about this Union following this kind of procedure. It is simply to show why an election in all prob-

ability could not be held under the laboratory conditions required by the Board.

MR. JENKINS: So the record will be clear, it is my understanding that you have denied my motion, is that correct?

TRIAL EXAMINER: That is correct.

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[fol. 161] JERRY LEE FRYE

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q State your name and address, please, for the record. A Jerry Frye. I live at 1509 and a half Seventh Avenue here in Huntington.

TRIAL EXAMINER: Speak as loud as you can, Mr. Frye.

THE WITNESS: O.K.

Q (By Mr. Baker) Were you an employee of Gissel Packing Company? A Yes, sir.

Q When were you first hired? A Around the last of June of '63.

Q Who hired you? A Charles.

Q What was your job there? A I worked in the shipping room and I boned a few hams, mostly in the shipping room.

[fol. 162] Q Now, are you presently employed at Gissel Packing? A No, sir.

Q When did you leave? A I was discharged April 22nd.

Q Of this year? A Yes.

Q Now, let's take the date of April 22nd, there has been testimony given there was a Union meeting on or about April the 17th, I believe; would you state whether you attended that meeting? A Yes, sir.

Q Where was the meeting held? A Governor Cabell Hotel.

Q Now, going back prior to the meeting, say the week of the meeting, did you have any cause to believe that the Employer knew that that meeting was to be held? A Yes, sir.

MR. JENKINS: Objection. Calls for a state of mind.

TRIAL EXAMINER: Sustained.

Q (By Mr. Baker) Did you know whether or not the Employer was aware that meeting was to be held?

MR. JENKINS: Objection. Calls for a state of mind.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) You may answer. A Yes.

[fol. 163] Q How were you aware that the Employer was aware that this—

MR. JENKINS: Objection.

Q —this meeting was to be held?

MR. JENKINS: Objection on the same ground.

Q (By Mr. Baker) How did you know that the Company knew about the meeting?

MR. JENKINS: Objection, same ground.

TRIAL EXAMINER: You have a standing objection.

MR. JENKINS: Yes.

Q (By Mr. Baker) Go ahead, answer. A On Thursday morning before the Union meeting on Saturday, I heard Charles talking to—Charles Gissel and Charles Hutchinson were talking.

Q Charles Hutchinson I believe is a relative or something? A Yes, he's some relative of Herb Gissel.

Q Where did this conversation take place? A In the shipping room.

Q Where were Mr. Gissel and Mr. Hutchinson at the time? A They were standing at the desk where the orders are wrapped.

Q Where were you? A I was about three feet from them.

Q What did you hear Mr. Gissel say to Mr. Hutchinson or Mr. Hutchinson say to Mr. Gissel? A Mr. Hutchinson told Mr. Gissel that there was going to be a Union meeting Saturday.

[fol. 164] MR. JENKINS: Objection. Hearsay.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) Go ahead. A He said there was going to be one Saturday at 2:00 o'clock and asked Charles

if he knew anything about it. Charles Gissel said he already knowed about it. He said he knowed about it two or three days ahead of time and Charles said that there would be somebody there watching to see who all went in.

Q Someone where? A At the hotel.

Q Did you say you went to the meeting? A Yes, sir.

Q Was there someone there watching? A Yes, sir.

Q Who? A Terry Lewis, that's Edie Lewis' son. She's a sister to Charles Gissel.

Q I see. What happened then? Where was Terry Lewis? A He was in a telephone.

Q Booth? In a booth? A Booth. Talking.

Q Did you see him there? A Yes, sir.

[fol. 165] Q Did he see you, if you know? A Yes, he looked right at me.

Q You were in front of the booth? A Yes, sir.

Q How close would you say you were to the booth? A Oh, two or three feet.

Q And Terry looked right at you? A He was looking right at me.

Q Did you go to work on Monday? A Yes, sir.

Q What happened on Monday? A Nothing happened till about 11:30.

Q What happened then? A Me and Herb Mount walked out to Charles' car.

Q Charles Gissel's car? A Yes.

Q Was he in the car? A Yes, sir.

Q What was Charles doing in the car, if you know? A I think he was listening to the stock reports because that's what he did about every day.

Q I see. Was there any conversation with Mr. Gissel at that time? A Yes, sir.

[fol. 166] Q What was the substance of that conversation? A He was listening to the stock report and told us just to wait a few minutes, so we stood there and waited, and he asked Herb if he went to the Union meeting Saturday. Herb said no, and Charles said, "I know you did. You were saw there. Someone told me you were there."

And then Red said, yes, he was.

And then Charles said, "Well, there's going to be some different arrangements made around here now."

Q Did he say what those arrangements would be? A Yes, he said—we asked him if he wanted us to work that afternoon and he said no. He said, "I want you all to come in 5:30 and work till 11:30 until further notice."

Q What time had you been coming in? A Coming in about six and working till four or five.

Q That was on Monday. Did you come in on Tuesday? A Yes, sir.

Q What time on Tuesday? A 5:30.

Q How long did you work? A 11:30.

Q What about Wednesday? A Same thing.

Q Came in at 5:30 and worked till 11:30? A Yes, sir.

[fol. 167] Q Did you leave the plant at 11:30? A Yes, sir.

Q Do you know if Mr. Gissel was aware that you were leaving the plant at 11:30 that day? A Yes, sir.

MR. JENKINS: Objection. Calls for a conclusion.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) How did you know that Mr. Gissel was aware that you were leaving the plant that day? A He walked up to the door the same time we did.

Q What conversation, if any, did you have with Mr. Gissel as you left that plant that day? A He never said nothing.

Q Now, what happened say on Thursday, did you go back to work at 5:30 as usual? A Yes, sir.

Q What happened then when you got to work, if anything? A We were looking for our timecard.

Q What do you mean you were looking for your timecard? A We thought maybe somebody hid them someplace so we kept looking for them.

Q Do you have a timeclock, do you? A Yes.

Q And a rack for cards? A Yes.

[fol. 168] Q And your name on them? A Yes, sir.

Q There's a special portion of the rack for your card? A No, not really, just a timeclock. Lots of places they've got numbered timecards but this one they don't. They—just where you usually put your card in.

Q A rack? A Just a rack.

Q Were your cards there? A No, sir.

Q What time did you arrive at the plant that morning? A About 5:30.

Q How long did you look for these timecards? A I'd say about five minutes.

Q Then what did you do, if anything? A Went towards the office.

Q Was there anybody in the office? A Yes, sir.

Q Who was there? A Mr. Charles Gissel.

Q Did you have any conversation with Mr. Gissel? A Yes, sir.

Q Would you tell the Trial Examiner what was said in the office that morning by Mr. Gissel and by you or Mr. Mount? A We asked him where our timecard was.

[fol. 169] Q What did he say? A He said, "We pulled them."

Q Go ahead. A We said, "What for?"

He said, "You all walked off the job yesterday."

I said, "No, we didn't walk off the job yesterday."

He said, "Yes, you did, too." He said, "You all—" in other words, your overwork.

I said, "Yes, I worked about 10 or 15 minutes or maybe a little longer." I says, "But you didn't tell us to come back."

He said, "Well, you all should have knowed."

I said, "No, we shouldn't have knowed." I said, "You told us Monday that we would work from 5:30 till 11:30 till further notice." And I said, "You didn't tell us no different."

And he said, "Well, you still should have knowed."

And he said, "I want you all to get out of here." He said, "I'm going to call the law."

Q What was he doing, if anything, at that time when he said he was going to call the law? A He was standing there and he started toward the desk.

Q All right. Then what happened? A And Red said he was going down to get his boots and knife and I imagine it was about 20 minutes till 6:00 then, and Charles hollered over to the sausage room, we was standing there ready to go to work.

[fol. 170] Q Who was there, sausage room employees? A Yes. Told them we was late.

I said, "Yeah, we would be late," I said, "we've been standing here looking for our cards for five minutes." I said, "We were arguing with you for five minutes."

Q Did he say anything to the men in the sausage room if you recall? A Yeah, he said, he told them to look at us, how late we were. That's when I told him, I said, "Yeah, we would be late, standing here for five minutes looking for our timecard," and five minutes arguing with him, you know, to try to get our job back.

Q All right, then, what happened? A Then when Red got his butcher knife—

Q When you say Red— A Herbert Mount.

Q Did Red come back up? A Red come back up and we started out the door. Charles said, "You all can take that Union and stick it up your ass."

Q That was the end of it? A That was the end of it.

Q You hadn't had any conversation with him since? A No, sir.

Q Had you heard Mr. Charles Gissel make statements about the Union before this last week that you were there? A Yes.

[fol. 171] Q You have. All right. Now, directing your attention to the first time that you heard Mr. Gissel mention anything about the Union, would you tell us when that was? A Well, I don't know exact but I think it was around about the middle of September.

Q Last year, '64? A Sixty-four.

Q Where did this conversation take place? A In his office.

Q Was anybody else present? A I don't know really. Alfreda Closterman, she could have been, I mean I don't know.

Q What were you doing in Mr. Gissel's office. A Went to ask him something about an order.

Q What did he say to you? A He told me to shut the door.

Q Did you go into his office or go into a larger office? A It was a big office there. Alfreda and his mother and Charles—

Q I see. A —all stay in there.

Q So he asked you to shut the door? A Uh-huh.

Q What did he say to you? A He asked me if anybody talked to me about a Union. I said no, I said, "I didn't talk to anybody."

[fol. 172] He said, "Well, if you do or of I think you're talking to a stranger, that is a Union man," he said, "I'll fire you right now."

Q Just from your own knowledge there wasn't any Union around in September, was there, talking to you? A They never talked to me if they was around.

Q From your own knowledge in Huntington was there a Union campaign going on that got any publicity that you were aware of? A Yeah, I believe there was.

Q Do you remember where it was? A I think it was at Logan.

Q Logan Packing Company? A (Nods.)

Q Is that a company? How does it compare with Gissel Packing?

MR. BAKER: Pardon me?

TRIAL EXAMINER: He's going to have to answer. He nods his head.

Q (By Mr. Baker) What is Logan?

MR. JENKINS: Objection. Irrelevant.

TRIAL EXAMINER: He may answer.

[THE WITNESS:] It's a meat packing plant like Gissel.

[fol. 173] Q (By Mr. Baker) About the same size, would you say, or is it larger or smaller? If you know. A I don't know.

MR. JENKINS: Objection. Irrelevant.

TRIAL EXAMINER: Sustained.

Q (By Mr. Baker) Did you have other conversations or hear conversations about the Union that Mr. Charles Gissel had after this conversation in September, if you recall? A Yeah.

Q When was that? A I think that was in February. I don't know actually when it was.

Q February. Do you remember what part of February? A I think about February the 10th.

Q Where did this conversation take place? A Over at the garage.

Q All right. Who was present at the time? A Mr. Charles Gissel and Rush Moore, he's a maintenance man.

Q Who was Mr. Gissel talking to, you or Mr. Moore? I assume you were there if you heard it. A Mr. Moore.

Q What did Mr. Gissel say to Mr. Moore at that time? A He asked him if he knowed anything about the Union or if any Union men had been around to sign him up for a Union or if he knowed anything or heard anything.

[fol. 174] Q All right. A Mr. Moore said no, he hadn't.

Q All right. A Then he asked me, he said, "Do you know anything about Don Kidd."

Q Who is Don Kidd? A He was a man who did work in the boning room.

Q What did Mr. Gissel say about Donald Kidd? A He asked Rush if he know if he was the leader of the Union or if you know anything about Don Kidd, and Rush said no, he didn't know anything about it.

And Charles said if he finds out for sure that Don Kidd was the leader, he said he would fire him right there.

Q If he found out Don Kidd was the leader, did you say? A Yes, sir.

Q Now, did you have any conversation with Mr. Gissel. other than conversation you just overheard? Did he ever say anything to you after this incident on February the 10th? A Yes, sir.

Q When was that? A Same day. This incident happened in the morning. This other incident now I'm going to say happened in the afternoon.

TRIAL EXAMINER: Which is the morning?

THE WITNESS: The one Rush Moore and Charles—

TRIAL EXAMINER: In which Mr. Kidd was mentioned?

[fol. 175] THE WITNESS: Yes.

Q (By Mr. Baker) You had this conversation with Mr. Gissel that afternoon, the same afternoon? A Yeah, about 2:30.

Q Where did this conversation take place? A In the shipping room.

Q Was anybody else present at that time? A No, sir.

Q What did Mr. Gissel say to you and what, if anything, did you say in reply in regard to the Union? A He asked me if I knowed anything about the Union. I said, no, I didn't. He says, "What did they offer you?"

I says, "They didn't offer me nothing."

He turned around, starting to walk out the door of the office, and he turned around and asked me, he said, "I can offer you more than what they can."

Q Was that the extent of the conversation, if you recall? A Yes, that was all I know of.

Q Now, Mr. Frye, I show you what has been marked General Counsel Exhibit 10-CC for identification, and ask you if you can identify that document? Was that your signature? A Yes, sir.

Q Did you sign it on or about the date indicated, January 19, 1965. A Yes, sir.

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit No. 10-CC for identification.)

[fol. 176] MR. BAKER: At this time, I offer General Counsel's Exhibit 10-CC for identification into evidence.

MR. JENKINS: We object on the same grounds as the objections to the other General Counsel's Exhibits 10.

TRIAL EXAMINER: It will be received.

* * * *

[fol. 177] CROSS-EXAMINATION

BY MR. JENKINS:

Q How old are you, Mr. Frye? A I'll be 22 October the 3d.

Q Where do you work? A What was that again?

Q Where do you work?

MR. BAKER: I'll object to it. It's the same objection as I had yesterday. I see no materiality where he's working now. He testified he worked at Gissel and he was discharged so I don't see the materiality of his place of employment.

TRIAL EXAMINER: What is it material to?

MR. JENKINS: I think it's part of the background on any witness, that we have a right to know. It may furnish a lead for further investigation, his activities. We don't have the benefit of discovery in these cases. We have the right to ask a man where he works now, what his age is, where he lives. These are just routine. I've never had an objection on something like this before.
[fol. 178] TRIAL EXAMINER: I'll sustain the objection.

MR. JENKINS: May we vouch the record then, his answer?

MR. BAKER: No.

TRIAL EXAMINER: Sir?

MR. JENKINS: Will you permit me to make an avowal for the record what his answer—

TRIAL EXAMINER: Yes, you can offer proof, if allowed to answer he worked a certain place.

MR. BAKER: But not in the form, Your Honor, not in question and answer.

TRIAL EXAMINER: That's right.

MR. JENKINS: You will not permit the witness to answer?

TRIAL EXAMINER: You may make an offer of proof if allowed to answer the witness will state he works so and so.

MR. BAKER: Yes, but not if counsel knows where he works.

TRIAL EXAMINER: That's right. He may make an offer of proof.

* * * *

[fol. 179] Q [By Mr. Jenkins] Now, when was the next contact you had with respect to any Union activities after that? A I don't remember right off.

Q You don't remember? Let me remind you that you have reported detailed conversations here about various things. Are you now saying you don't remember when your next contact with the Union was after January the 19th?

MR. BAKER: I think that's argument. The witness has answered.

TRIAL EXAMINER: He said he could not remember.

Q (By Mr. Jenkins) Is your answer still that you cannot remember? A Well, I mean what do you want to know?. I can tell you a lot of things but I don't know what you are wanting—

* * * *

[fol. 180] Q Now, you testified that awhile back, that in February you had a conversation with Charles Gissel and that he asked you if you knew anything about the Union, you so testified, didn't you? A Yes, sir.

Q And your answer to him was no? A Yes, sir.

Q And that was not true, was it? A Yes, sir.

MR. BAKER: I think a good deal of law, Your Honor—

TRIAL EXAMINER: This is a matter for briefs.

MR. BAKER: Well, stating that the witness lied in response to illegal interrogation—

TRIAL EXAMINER: Is a matter to be pointed out in brief.

MR. BAKER: All right.

Q (By Mr. Jenkins) Now, in February, did you have a conversation with Charles Gissel in the shipping room, did you testify about this? A Yes, sir.

Q Did you tell Charles Gissel, and did you so testify here earlier, that you did not know the name of the Union [fol. 181] that was trying to get into the plant? A Yes, sir.

Q And that was not correct, was it? A I did not know the name. They told me but I had forgotten but I did not know at the time.

Q You remember all these specific conversations but yet you forgot the name of the Union you had signed up with, is this not correct? A Yes.

Q And you signed up with the Union in January and then in February you could not even remember the name of it? A No, sir.

Q And you have testified here with respect to some conversations that took place in September of 1964. Whom did you first report these conversations to? A What do you mean?

Q Whom did you first tell about these conversations, the fact that you had heard them? A I don't think I told anybody.

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[fol. 185] Q (By Mr. Jenkins) What else was said about Gissel at the meeting? A I can't remember.

* * * *

Q Do you know who Woody Gunnoe is? A Yes, sir.

Q Who is he? A He's a Union official.

Q Did you have a meeting with him on February the 11th? A I could have. I can't recall right at the time.

Q You don't remember?

MR. BAKER: He said I could have but I don't remember.

Q (By Mr. Jenkins) What is your answer? I'm sorry, I misunderstood you if you did say that. A I said I could have but I said I can't recall right at the time.

[fol. 186] Q Do you remember in February having any conversation with Woody Gunnoe? A Just like I said I could have but I don't remember.

Q If you don't remember if you met with him or not then you wouldn't remember anything he said, would you?

I'll put the question more clearly: Do you recall any statement that Woody Gunnoe made to you at any meeting in February that you may have had? A I can't recall.

TRIAL EXAMINER: Speak louder.

THE WITNESS: I can't recall it.

Q (By Mr. Jenkins) Do you remember signing any statement in the presence of Woody Gunnoe in February? A I could have I mean I just don't remember it at the time.

Q Do you remember signing any statement for Woody Gunnoe in March? Or April? A I can't recall. I mean I could have.

Q You're just saying you don't remember is that right? A I don't—I don't remember.

Q Now, you testified about a conversation that you had or you overheard out at the garage down at Gissel

between Charles Gissel and someone else, is that correct? A Yes, sir.

Q And that Was Rush Moore, wasn't it? A Yes, sir.

[fol. 187] Q And what was the date of that conversation? A February the 10th.

Q How do you fix that date?

Who told you it was on February the 10th? A I just remember.

Q How do you remember that particular date of February the 10th? Who told you that it was the 10th?

MR. BAKER: I'm going to object to that.

TRIAL EXAMINER: This is cross-examination. He may answer.

MR. BAKER: There are two questions: How do you remember? Who told you?

TRIAL EXAMINER: All right. Who told you it was February the 10th? Let him answer.

MR. BAKER: The witness answered. He said he just remembered it.

Q (By Mr. Jenkins) Who told you it was February the 10th A I told you I just remembered.

Q Did anyone else tell you it was February the 10th? A No, sir. I just remembered it.

Q How do you explain that you just remembered a particular date of February the 10th?

MR. BAKER: Objection. Argument.

TRIAL EXAMINER: Sustained. This is a matter for argument in briefs.

[fol. 188] MR. JENKINS: Will you allow us to vouch the record and permit him to answer the question?

TRIAL EXAMINER: You may make an offer of proof.

MR. JENKINS: You refuse to let him answer?

TRIAL EXAMINER: Yes. This is a matter for argument.

MR. JENKINS: Let the record show that we have requested the right to have the witness answer this question which was refused.

* * * *

[fol. 195] MR. BAKER: Your Honor, while this discussion of the notes that the witness may have made

came up, I've been going through the Regional Office's files to see if perhaps there are some notes in there that I might have overlooked and which clearly counsel would be entitled under the Jenks Act, and while looking through there I have found a statement.

TRIAL EXAMINER: Are there notes attached to it?

MR. BAKER: No, there are no notes attached but it is a statement given by Mr. Frye to Jerald Scheinberg at the Labor Board which I have not to this time given to Mr. Jenkins primarily because I didn't know it was there. I am prepared to give him this statement; however, with Your Honor's indulgence I would like to go through it myself just to see what's in it. It was in the back of the file.

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[fol. 196] MR. JENKINS: Your Honor, before Mr. Frye leaves, I would like to make a motion that the entire testimony of Mr. Frye be stricken from the record of this case on the ground that at the conclusion of his direct examination counsel for the Respondent requested all statements, Jenks Act statements made, in the possession of General Counsel, that the Trial Examiner indicated that that motion was granted and that thereupon Mr. Baker furnished me two purported statements here which he represented were all the statements which they had on [fol. 197] file and it was only after Your Honor had ruled with respect to these notes that Mr. Baker then comes up with what purports to be an additional affidavit here from this witness. I think that this holding back of papers under the circumstances is improper, it's certainly illegal grossly. It's a direct violation of the Jenks Act and a misrepresentation to Your Honor and to me as to his compliance with it and I think that it therefore means that this man's testimony because it involves this statement should be stricken.

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TRIAL EXAMINER: Motion denied.

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[fol. 199] TOMMY LEE BURCHELL

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q State your name and address, please, for the record? A Tommy Lee Burchell, 522 Seventh Avenue, Huntington.

Q Are you an employee of Gissel Packing Company? A Yes, sir.

Q How long have you worked for them? A About seven months.

Q Seven months? A Or a little longer.

Q Who hired you? A Charles Gissel.

[fol. 200] Q What department do you work in? A I work in the shipping room and I was driving.

Q Driving a truck? A Yes, sir.

TRIAL EXAMINER: May I ask for my information, are the persons who drive the trucks the same persons Mr. Gissel described yesterday as peddlers?

MR. KARL H. GISSEL: No, ma'm.

TRIAL EXAMINER: They are not.

Q (By Mr. Baker) Were you aware of the Union campaign at the Gissel Plant going on? Did you know there was a campaign? A When I first went down there I didn't know a thing about it.

Q I see. Did you subsequently find out about it? A Yes, sir.

Q How did you find out about it? A Well, this boy, Tommy Mollihan, he first came up and told me about it.

Q While you were there did you have any conversation or hear any conversation by any supervisor relative to the Union, regarding the Union? A Once. Mr. Gissel talked about it.

Q When was that? A It was about a week after I was there.

Q Do you recall when about you started working there, what month it was in? A It was in February, about the early part of it.

[fol. 201] Q The early part of February and this was about a week later? A Yes.

Q A week after you started working? A Yes.

Q Where did this conversation take place? A Second floor, right beside—right where they put BRT hams in.

Q Was anybody else around at that time? A No, sir.

Q Tell us how it came about, what happened? A Well, me and Red was—

Q Red who? A I call him Red. We was down there and we was on a break and I was talking to him for a few minutes.

Q Sort of like a coffee break? A Coffee break, yes. And then I went back on my job.

Q Yes. A And then a little later Charles came and got me and took me up to the second floor.

Q Took you to another part of the plant? A Took me to another part of the plant.

Q For what purpose do you know? A I just thought it was to do something else.

[fol. 202] Q I see. But did you do something else when he took you to this other part of the plant? A No.

Q What happened? A He asked me where I knowed Red Mounts from.

Q I see. You had only been there about a week or so at the time, is that right? A About a week, yes.

Q So he wanted to know where you knew Red from? A Yes.

Q What happened? Did he say anything? A Well, I told him.

Q What did you tell him? A I told him, I said I knew him through his wife.

Q Then what? A Well, he said that, he asked me if he said anything to me about a Union, and I said no, I hadn't heard a thing about it.

Q He asked you who said anything to you about a Union? A Red.

Q You told him you hadn't? A I hadn't heard nothing, no.

Q Did he say anything else then that you recall? A Yes, sir, he said he was bad and I should stay away from him.

[fol. 203] Q From whom? A Red.

Q Stay away from whom? A Red Mount.

Q That he was what? A He would be bad for me, you know, cause me trouble.

Q Did you have any other conversation with Mr. Gissel that you can recall or hear any conversation? A Well, in about April, I think it was, that me and another employee was walking through the sausage room, Lawrence Hysell, and he owed me some money.

Q Who owed you some money? A Lawrence Hysell.

Q I see. A So I stopped there for a couple of minutes to write down how much he owed me and about that time Charles come through the sausage room.

Q What happened? A Well, this boy went on.

Q That's Hysell? A Yes. He went on and I started to go through to go out in the office or outside and Charles stopped me.

Q What did he say to you then, if anything, about the Union? A Well, he asked me—

[fol. 204] MR. JENKINS: Objection. Leading.

TRIAL EXAMINER: What did he say to you?

THE WITNESS: He asked me if the boy was trying to get me to go to a Union meeting or sign me up, and I told him no.

Q (By Mr. Baker) Was that all of the conversation? A Yes, I walked away.

Q Did you ever sign up with the Union? A Yes, sir.

Q I show you what has been marked as General Counsel Exhibit 10-GG for identification and ask you if you signed this card.

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10-GG for identification.)

A Yes, sir.

Q Is that your signature? A Yes, sir.

Q Did you sign it on or about the date indicated May the 13th? A I signed it, the date, my name and my address, all of that.

MR. BAKER: Your Honor, this, as indicated, this document is dated May 13th, 1965. It was not in the demand period but at this time I'm offering General Counsel's Exhibit 10-GG for identification.

[fol. 205] MR. JENKINS: Do I have a copy of that? I don't believe I have a duplicate of that.

MR. BAKER: Mr. Jenkins, let me show you the original.

(Document handed to Mr. Jenkins by Mr. Baker.)

MR. JENKINS: We object to this, Your Honor, on the same grounds as to the other General Counsel's Exhibits 10. It certainly is not material since it was signed on May 13th.

TRIAL EXAMINER: It has nothing to do with the Union's majority at the time of the demand. It will be received.

MR. BAKER: That's correct. I just wanted it in the record for any future reference. However, I'll withdraw the document if it satisfies Your Honor and leave the statement of the witness in the record that he did sign the card.

TRIAL EXAMINER: It's up to you. I have received it. In view of the objection to it, if you want to withdraw it, you may.

MR. BAKER: I'll leave it.

(Thereupon, the document heretofore marked General Counsel's Exhibit 10-GG for identification was received in evidence.)

MR. BAKER: I have no further questions of this witness.

MR. JENKINS: Your Honor, in view of the incident that occurred before I request that the Trial Examiner personally check the records of the General Counsel here as far as any Jenks Act statements in order to determine that we have them all.

[fol. 206] MR. BAKER: Madam Examiner—

MR. JENKINS: I further ask Your Honor that they be produced for cross-examination purposes.

MR. BAKER: I object strenuously to the implication of counsel. Now, he's called me a shyster in this hearing room today among other things. I thought I adequately explained why that statement was not given to them.

TRIAL EXAMINER: Leaf through your file there in my presence.

MR. BAKER: I have done it many times.

TRIAL EXAMINER: And see if you have—

MR. BAKER: But I demand that counsel at least maintain some semblance of decorum of an attorney.

TRIAL EXAMINER: I think what has happened he's asked you to be very careful and check your file and—

MR. BAKER: I don't object to that. I'm objecting to the implication—

TRIAL EXAMINER: I understand. Go ahead.

MR. BAKER: —very strenuously.

I trust the Trial Examiner will note not only are there no statements from this witness but there are no statements in the file at all so that I should not be put to this degrading task.

TRIAL EXAMINER: I have not naturally seen each document but I'm watching you go through and as far as [fol. 207] I can see there is nothing which appears to me at this distance to have been an affidavit.

MR. BAKER: But I should not be put to this degrading task each time a witness—

Are you satisfied?

TRIAL EXAMINER: Yes, if you've checked to be sure—

MR. BAKER: I shall go through these papers here.

TRIAL EXAMINER: —that you are prepared to furnish all that are in your possession. You are requested to do so.

(Document is handed to Mr. Jenkins by Mr. Baker.)

MR. BAKER: Let the record show that the attorney for the Government is handing all that he has to Mr. Jenkins.

TRIAL EXAMINER: We'll take five minutes.

MR. BAKER: I trust Mr. Jenkins does not consider a Federal Judge in the same light he does Federal employees.

TRIAL EXAMINER: If you take less, let me know.

MR. JENKINS: Thank you, mam.

(Recess.)

TRIAL EXAMINER: On the record.

CROSS-EXAMINATION

BY MR. JENKINS:

Q Mr. Burchell, after you had this conversation with Charles Gissel that you referred to earlier, who was the first person, if anybody, that you told this to? A No one.

Q You didn't tell anybody about it? A Let's see. [fol. 208] Yes, I told Red.

Q Red Mount? A Yes.

Q When did you tell Red Mount about it? A I'm not sure. It might have been that day or it might have been a little later on. I'm not sure.

Q Was it within a few days of that? A I'm not sure what day I told him.

Q Now, other than that occasion who else did you give any information about the conversation to? A I'm not sure about that. I think I told one other person but I'm not—

Q Do you know who it was? A Not right offhand.

Q Do you know the name of the person? A I think it was Lawrence Hysell but I couldn't swear to it.

Q Do you know when and where you told him about it? A Just while working.

Q Who else other than those two people? A I believe I told my wife.

Q Anybody else? A No, sir.

Q Haven't discussed it with anyone else? A No, sir. I mean—

MR. BAKER: I want to at least get the time established as to when.

[fol. 209] Q (By Mr. Jenkins) At anytime? A No, sir.

Q In your conversations with Mr. Gissel, did he make —in discussing Mr. Mount, the fact that Mr. Mount was always late for work, was anything said at the time of these conversations that you testified about earlier, was anything said on the subject of Mr. Mount being regularly late for work? A He never said nothing about being late. He just said he was bad for me; he would cause me trouble.

Q Did he make any reference to the fact that he was always late for work? A No, he did not.

Q Nothing was said about that? A No.

Q Where were you at the time that you signed that authorization card that's been marked Exhibit 10-GG in this case? A I was up at Red Mount's house.

Q Who else was there besides you and Mount, anybody? A I believe his wife was there and the electrician. I've been up to his house a couple of times. One time his wife was there and another time the electrician was wiring his house.

* * * *

[fol. 210] REDIRECT EXAMINATION

BY MR. BAKER:

Q Mr. Burchell, did you give a statement to someone from the Labor Board? A Yes, sir.

Q Do you remember who it was? A No, sir. I can describe him but I don't remember his name.

Q What did you tell him?

MR. JENKINS: Objection.

TRIAL EXAMINER: Overruled.

MR. JENKINS: This is not proper redirect examination.

TRIAL EXAMINER: He may answer.

Q (By Mr. Baker) What did you tell the National Labor Relations Board? A He wrote down and I just told him everything about me having the conversation with Mr. Gissel on those two days, and then me going up to Red's house and signing up, and what was said.

Q Now, Mr. Jenkins asked you who all you talked to about this thing and you told him I believe Mr. Hysell and Red Mount and your wife. You didn't tell him about Mr. Scheinberg.

MR. JENKINS: Objection. That speaks for itself. It's in the record.

MR. BAKER: I just wanted to know why he didn't tell him.

[fol. 211] TRIAL EXAMINER: He may answer.

[THE WITNESS] Well, I just like—I'm not sure—well, I talked to him about it and I talked to him and then because Charles asked me if he signed me up for the Union and that's what I told Hysell, and I was talking to Red, I just talked to him because I replied to him.

Q (By Mr. Baker) That's not my question.

MR. JENKINS: Motion to strike the answer. This is not proper redirect.

MR. BAKER: I just was wondering, Mr. Jenkins asked who he talked to.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) You didn't tell him you talked to the Board. A Oh—

MR. JENKINS: Objection. Now, he's making statements into the record. These are not questions. He's arguing with the witness.

MR. BAKER: I just wanted to know why.

MR. JENKINS: He's arguing with his own witness.

TRIAL EXAMINER: Overruled.

MR. BAKER: I'm not arguing.

Q (By Mr. Baker) Why didn't you tell Mr. Jenkins you talked to the Board agent?

MR. JENKINS: This is asking him as to his mental [fol. 212] state of mind as to why he did something. It's not proper.

TRIAL EXAMINER: This goes to credibility. He may answer.

[THE WITNESS] The reason I didn't say nothing about the Board was because I had given him this statement and it's in the record. That's why I didn't say anything right now.

Q (By Mr. Baker) You just thought—
TRIAL EXAMINER: His answer may stand.
MR. BAKER: All right.
MR. JENKINS: Motion to strike his answer on the ground—
TRIAL EXAMINER: You have a standing objection.
MR. JENKINS: Thank you, Your Honor.

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[fol. 214] ELMER BERNARD MAYNARD

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q State your name and address, please, for the record? A Elmer Bernard Maynard.
1531 Washington Avenue.
Q Have you moved since you signed that paper?
TRIAL EXAMINER: How do you spell your last name?
THE WITNESS: M-a-y-n-a-r-d.
Q (By Mr. Baker) Are you presently employed? A Yes.
Q Where do you work? A Gissel Packing Company.
[fol. 215] Q How long have you been there, Mr. Maynard? A To my knowledge, close to a year.
Q Who hired you? A Charles Gissel.
Q What work do you do? A Bone hams.
Q Did you sign a card for the Union? A Yes.
Q I show you what has been marked for identification as General Counsel Exhibit 10-HH, and ask you if that is your signature?

(Thereupon, the above-mentioned document was marked General Counsel Exhibit 10-HH for identification.)

A Yes.

Q Did you sign it on or about the date indicated, January 21, 1965? A Yes.

MR. BAKER: I now offer General Counsel Exhibit 10-HH into evidence.

MR. JENKINS: We object to the admission of this document on the same grounds as assigned in connection with the other General Counsel Exhibit 10.

TRIAL EXAMINER: I would like to have you restate them. Are you making all of the same objections even though the witness who actually signed the card has identified it as the card he signed?

[fol. 216] MR. JENKINS: Yes, sir.

TRIAL EXAMINER: All right. It will be admitted.

(Thereupon, the document heretofore marked General Counsel Exhibit 10-HH for identification was received in evidence.)

Q (By Mr. Baker) Mr. Maynard, did you have any conversation or overhear any conversation with a supervisor or boss of Gissel Packing Company wherein the Union was mentioned? A Only once downstairs in the boning room where we were boning hams, you know, and he said he didn't give a damn about the Union, when he let Red go that day.

Q Who said that? A Charles Gissel.

Q You say that's the only conversation you recall? A About the Union.

Q Do you recall any other conversation that you had with Mr. Gissel, Mr. Charles Gissel, wherein he was talking to you or to someone else in regards to the Union? A I can't think of none right now.

Q All right. What day did you say that was? A I don't know for sure but I think around February the 18th. I don't know for sure.

Q What happened at that time, did you say that [fol. 217] Mount was fired? A Yeah. He told me to bone hams and put them in pans by 12:00, but I never heard him tell Mount, and he come down there and he jumped him and said he told him to bone hams and have them in pans by 12:00 but he never told him, he told me; and I forgot to tell Mount.

Q Then what did he do? A He told him to get out. Q Did you say he said something about the Union? A Yeah. He told him he didn't give a damn about the Union, he could stick it up his ass.

Q All right. At that time, let me ask you this, did he say anything to you about you and the Union? A All he said was, asked me if they ever brainwashed you.

Q Asked you if who ever brainwashed you? A Well, Mounts.

Q How did he say that? A He's just—he's asked me two or three times if I've ever been brainwashed. He just said, "Have they brainwashed you?" He never said nothing else.

Q He didn't say anything on the day he fired Mount to you, did he say that that day if he had brainwashed you, do you recall? A I couldn't say for sure because on and off he said it quite a bit. I don't know just how many.

[fol. 218] Q Did he ever say anything to you in regards to a strike, or something in that nature?

MR. JENKINS: Just one minute. I move to strike this testimony about brainwashing. There's no allegation in the complaint about this.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) What was your answer?

I said did he say anything to you in regard to a strike or anything like that? A He asked me if I was going to walk out if they did. I asked him what he was talking about and he never said nothing else.

MR. JENKINS: Motion to strike.

TRIAL EXAMINER: When you say "he," whom do you mean?

THE WITNESS: Huh?

TRIAL EXAMINER: When you say "he," whom do you mean?

THE WITNESS: Charles asked me if I was going to walk out—

TRIAL EXAMINER: Charles Gissel?

THE WITNESS: Yes.

Q (By Mr. Baker) Now, he asked you if you were going to walk out, did he explain what he meant by walking out? A No, he turned and walked off.

MR. JENKINS: Motion to strike. This is not in the complaint.

TRIAL EXAMINER: You have a standing objection.

[fol. 219] Q (By Mr. Baker) Do you recall anything else that he said at that time when he was talking about walking out? A No, sir.

Q Did you give a statement to the Labor Board? A Yes.

Q Is this your signature (showing document to witness)? A Yes.

Q Is this your initial here? A Yes.

Q I ask you to just read this,—

MR. JENKINS: Object.

Q (continued.) —the last paragraph to yourself.

MR. JENKINS: This is highly improper. He's cross-examining his own witness from an affidavit there, and he's handing the witness this statement here to read over in order to give him something to testify from. This is highly improper.

TRIAL EXAMINER: Is this for refreshing?

MR. BAKER: I think the witness has exhausted his memory. He says he recalls nothing further. I'm simply showing him—

TRIAL EXAMINER: You may refresh his recollection. It will go to the weight given and the quality of the testimony.

Q (By Mr. Baker) Just that one paragraph there, does that refresh your recollection now as to what was [fol. 220] said at that time? A Yes, sir, right there.

Q That was true, would you say, what you read? A Yes.

Q Just tell the Trial Examiner what was that conversation now when Mr. Gissel asked you if you were going to walk off with the rest of the men.

MR. JENKINS: We object to this. Handing this witness written out statements to give him something to look at and testify from is not proper.

TRIAL EXAMINER: You have your objection.

Q (By Mr. Baker) Does it refresh your memory as to that conversation on February 18th? A I don't know why but he got mad. He was mad before he come down there, you know, he works down there in shipping all the time. He's back and forth.

Q Charles? A Yes.

Q All right. Just tell what happened. A He come downstairs mad and he jumped us, jumped Red Mount there first, and he said that he told him to bone the hams until he had enough hams, to put them in pans by noon, but he never told Mount, he told me; and I forgot to tell him, you know, and that's when he said about the Union. He said he didn't give a damn, we could have the Union, and—

Q I'm talking about this statement, though, that you [fol. 221] just looked over here about when he asked you if you were going to walk out.

MR. JENKINS: This is gross error to permit a witness to read a statement.

TRIAL EXAMINER: I think you showed him and he's still repeat—

MR. BAKER: I think I misled him myself by saying February 18th.

TRIAL EXAMINER: Do you recall any other conversation?

THE WITNESS: No.

Q (By Mr. Baker) The conversation that you described—

MR. JENKINS: I object, Your Honor. Here he is cross-examining his own witness.

TRIAL EXAMINER: There is such a thing as refreshing the witness' recollection.

MR. JENKINS: When the witness has replied to your question, Your Honor, he said he remembers nothing else. In all sense of fairness—

TRIAL EXAMINER: It goes to the weight of the testimony.

MR. BAKER: I can understand. The witness has testified that Mr. Gissel asked him if he was planning to walk out.

Q (By Mr. Baker) Now, just tell us about that conversation.

MR. JENKINS: Now, Your Honor, he has answered your question on this. He's been prompted here on it and he's answered that this was the extent of his knowledge even after being prompted in answer to the Examiner's [fol. 222] question.

TRIAL EXAMINER: Do you have any further recollection of what was said in that conversation?

THE WITNESS: I don't know about walking out. All I reckon he meant if they went on strike.

TRIAL EXAMINER: Do you remember anything else that was said?

THE WITNESS: No, mam.

TRIAL EXAMINER: Sustained.

MR. BAKER: He doesn't say nothing else was said, Your Honor. He simply says he doesn't remember anything else.

TRIAL EXAMINER: But you have shown him a document and he has still not—

Q (By Mr. Baker) Did you read this last statement?

MR. JENKINS: I object to this.

TRIAL EXAMINER: Mr. Baker, apparently the reading of the affidavit would not refresh his recollection.

MR. BAKER: Just let me ask him this question.

Q (By Mr. Baker) Could you read it?

MR. BAKER: I just want to know.

TRIAL EXAMINER: Can you read?

THE WITNESS: Some. That writing I can't hardly read it.

TRIAL EXAMINER: Did you read what was written on there?

THE WITNESS: I couldn't read all of it, what I could have.

[fol. 223] TRIAL EXAMINER: Did you?

THE WITNESS: Yes.

TRIAL EXAMINER: Can you tell me what part you could not read?

THE WITNESS: That last part down there I couldn't hardly read it.

MR. BAKER: That's the part I wanted him to read.

I hesitate to read it to him myself.

TRIAL EXAMINER: I don't want you to read it to him. Let him look at it and if he wants to come up and ask me, if I can help him read what's on there, I'll be glad to do so and then Mr. Jenkins can check whether my reading of it is correct.

Q (By Mr. Baker) (Document is handed to witness.) Can you read this, just this last part here? That's all. If you can't read it all, say so. A I can't make out these words, I can't read that way, writing that way.

MR. BAKER: I can't read that to be perfectly honest with you.

TRIAL EXAMINER: May I see it? (Document is handed to the Trial Examiner.)

Mr. Jenkins, do you want to look at it to see—

MR. JENKINS: No, mam. This is just gross error in taking a witness on cross-examination, of his own witness, and trying to lead him by this statement here when [fol. 224] the witness has testified that he has exhausted his recollection of the events that he's been inquired about, and I understood my objection had been sustained. Apparently, I was mistaken.

TRIAL EXAMINER: Personally, I don't know what Mr. Baker's questions are about.

MR. BAKER: I shall withdraw the question.

I have no further questions of this witness.

MR. JENKINS: Motion for Jenks Act statements.

MR. BAKER: Let the record show General Counsel has furnished Mr. Jenkins all statements in the possession of the General Counsel.

TRIAL EXAMINER: We'll take a five minute recess and let me know.

(Recess)

TRIAL EXAMINER: On the record.

MR. BAKER: I have one more question on direct if I may.

TRIAL EXAMINER: Very well.

Q (By Mr. Baker) Mr. Maynard, what are your hours of work now? A I go to work at six and off anywhere from four till five.

Q In the afternoon from six in the morning? A Yes.

Q Have you gone to work any hours other than six? A Yes, 5:30.

Q 5:30. A. (Nods).

[fol. 225] Q Do you recall when you started working at 5:30? A Well, here a while back, I worked from 11:00 till 5:00.

Q Eleven at noon? A 11:30, that's when lunch is. I started at 12:00, it would be from 12:00 on till 5:00.

Q When were you working this 11:30, 12:00 till 5:00? A I don't know the exact date but I remember Mount and Frye would leave and I'd go to work. They'd leave at 12:00, 11:30 and at 12:00 I'd go to work and work till 5:00.

Q Now, just before you started working at 12:00 what hours had you been working? A Before I started that?

Q No, before—as I understand it, you say you normally worked from 6:00 in the morning until 4:00 or 5:00 in the afternoon. A Yes.

Q You said there was a time when you started to work at 12:00 noon and worked till 5:00. A Worked till 5:00.

Q And Mounts and Frye till 11:30? A They worked from 5:30, I believe it was, until 11:30.

Q Then you came on at 12:00? A Yes.

Q Now, did someone tell you to do that? A Charles Gissel.

[fol. 226] Q What did he tell you?

MR. JENKINS: Objection. This is immaterial.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) What did he tell you? A He just told me to come in at 11:30—at 12:00, 11:30 till their noon, and come in at 12:00. He didn't give me no reason. He just told me to come in.

Q Did he tell you how long to do that? A No.

Q How long did you work those hours? A Till Mount and them was fired.

Q Then what happened? A I started to work—

MR. JENKINS: Object. Conclusion.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) Then what happened? A I started to work at 5:30, after awhile I mean he put it up till 6:00.

Q Now, when you started at 5:30, how did you know that you were to go to work at 5:30? A Charles Gissel told me to come in.

Q What did he say to you at that time? A He just told me to come in at 5:30 that morning.

Q That was the morning when? A After they had been fired.

[fol. 227] Q Did you attend any Union meeting, by the way? A Yes.

Q Relative to that Union meeting, using that as a guide, do you remember when Mr. Gissel told you to come in at 11:30, was it before or after the meeting? A It was before the meeting.

Q Before the meeting? A I believe so.

Q You're not sure? A I'm not sure. I couldn't say for sure.

Q Did he tell you what Frye and Mount were doing? A What?

Q He didn't say what hours they would work? Do you recall what hours they were working? A Yeah, the guys around the factory told me they were working 5:30 till 11:30.

Q And then you would come in at 12:00 A Yes.

* * * *

CROSS-EXAMINATION

BY MR. JENKINS:

Q Mr. Maynard, you testified here about a conversation that you had about February the 18th, some things that Charles Gissel said, do you recall your testimony about that, February the 18th? A I remember talk-

[fol. 228] ing—

Q A conversation referred to as downstairs. A That was when he fired Red, wasn't it?

Q Is this the time you're referring to? A Yes.

Q To whom did you report this conversation that you heard on that day for the first time after you heard it? Whom did you tell about it? A The Union man, I don't know his name.

Q You don't know what his name is? A No, but I can point him out.

Q All right. A He's in the room.

Q One of the fellows in here? A They call him Red I think.

Q They call him Red? A What's his name?

Q Well anyway—

MR. BAKER: We can identify him.

MR. JENKINS: Red Cass?

TRIAL EXAMINER: I assume it's Red Cass.

Q (By Mr. Jenkins) Cass is his name? Big, heavyset fellow? A Yeah, short.

Q Short, heavyset fellow? A Yes.

[fol. 229] Q When did you tell him about this? A I don't know the date.

Q Well, how soon after it occurred did you tell him about it? A I don't know. They called me over to make my statement. I don't remember the date.

Q Well, was it within a day or two after the event occurred? A I couldn't say.

Q They called you over to make a statement about it? A Yeah.

Q Where was this? A Over at Colonial Inn, I believe.

Q And you did make a statement there? A Yes.

Q You signed something, they wrote it out? A Yes.

Q And did they give you a copy of it A Yes.

Q And did—do you have a copy of it with you? A No.

Q Do you know where it is? A No.

Q Has anyone talked to you this morning about statements or given statements in the room in there? A What I give?

[fol. 230] Q Yes. A No.

Q Nobody said anything to you about statements this morning? A No.

Q Or any other statements? A No. They never talked to me this morning.

Q Or anybody else? A No.

Q Now—

MR. BAKER: What was the question? "Anybody else," what do you mean?

TRIAL EXAMINER: Talked to anybody else.

MR. BAKER: Did someone talk to anybody else, is that the question?

TRIAL EXAMINER: About statements.

MR. JENKINS: Yes, correct.

MR. BAKER: Nobody talked to you?

THE WITNESS: No. The guys talked to me.

MR. BAKER: Is that your question, Mr. Jenkins? I'm not sure I understood.

TRIAL EXAMINER: I thought the question was had he heard anyone else talk to any of the other witnesses.

THE WITNESS: You mean to anybody else?

TRIAL EXAMINER: Yes.

THE WITNESS: I was talking to Red and he was talking to me.

[fol. 231] TRIAL EXAMINER: No, about talking to other witnesses. Did you hear anyone else say anything to other witnesses about statements?

THE WITNESS: Yes.

Q (By Mr. Jenkins) What was said? A Red there.

Q What did he say?

MR. BAKER: It's all right.

[THE WITNESS:] I didn't pay any attention. He was carrying on with the other guys.

Q (By Mr. Jenkins) You're talking about Red Mount? A No, the other one.

Q Burchell? A No, I think probably Frye. Tommy and the one, I call him Red.

Q What did he say? A I don't know. He was joking with the other guy, telling jokes.

Q Why did you turn to Mr. Baker there a minute ago and the Union representative and ask if you ought to tell about it? Why did you have to ask them? A The only

thing that was, was he asked how he met Mount, through his wife, and that's all I know. That's all I heard.

Q We're talking about statements, Mr. Maynard. A That's all I heard. They didn't have any statements. He [fol. 232] was asking how he met Red, and he said through his wife.

Q What statement did Burchell say, anything else other than that? A I don't know. They were telling jokes.

Q You have told me that you reported this conversation to I think it's Red Cass, the Union representative, the conversation that happened downstairs. Now, who else did you report this conversation to after that, at anytime after that? A Nobody I can recall.

Q Well, weren't you interviewed from somebody from the National Labor Relations Board?

MR. BAKER: What was the question?

TRIAL EXAMINER: Weren't you interviewed by somebody from the National Labor Relations Board.

Address your answer to Mr. Jenkins.

MR. BAKER: Do you understand the question?

THE WITNESS: Did anybody else you mean about the—what I said?

MR. JENKINS: I ask the reporter to please read the question.

(Question read.)

TRIAL EXAMINER: By interviewed, do you understand the word "interview?" Did somebody talk to you?

THE WITNESS: Somebody talked to me.

TRIAL EXAMINER: Go ahead, answer.

[fol. 233] [THE WITNESS:] He asked me about it.

Q (By Mr. Jenkins) Who? A Asked me what they said, what's his name.

MR. BAKER: Jack Baker.

THE WITNESS: Jack Baker.

MR. BAKER: General Counsel.

THE WITNESS: I don't know the Union, you—

MR. BAKER: No, I'm with the Government.

[THE WITNESS:] (Continued) That's all. That's the only person I ever, after I talked to Red what's-his-name in there.

Q (By Mr. Jenkins) In other words, the only person that you talked to was Red Cass and Mr. Baker, is that what you're saying? A Yes. Now, wait a minute. It wasn't Red Cass, I didn't talk to him. He was the one that took me down there but there was another guy, I don't know who it was, over in another hotel room. He took me over there. He was the one that wrote the stuff down.

Q Who was this, do you know? A I don't know.

Q Do you know when it was that you went down there and wrote this stuff down? A The same day Cass took me down.

Q That would have been how long after the incident occurred? A I don't know.

[fol. 234] Q Was it within a day or two or a month later? A I couldn't tell you for sure. I wouldn't want to say something and tell a lie about it.

Q You don't have any idea at all how long it was? A No.

Q When the incident occurred you stated specific conversations here that took place and I asked you then who you talked to about this and you said, well, you told Red Cass about it? A I never—

Q Now,—or you said Red, I think, he's a Union fellow.

Now, what I'm asking you, are you saying you don't have any idea as to how long afterwards it was you talked to him? A How long after it happened?

Q Yes. A That's what I said, I don't know.

Q No idea? A No idea. I ain't good on dates.

Q Anyway, sometime later on you went down to some hotel room and somebody else took a statement from you, is that right? A Yes.

Q And you don't know who that was? A No.

[fol. 235] Q And was Red there? A No, just me and that guy.

Q Now, did this guy identify himself, tell you who he was? A Yeah, he showed me papers but I forget who he was.

Q You don't remember who he was? A I forget the names. I can't remember names.

Q Who had made the arrangements for you to go down and see him? A Cass, evidently.

Q But didn't stay? A Cass took me down there and he took me over to that guy's hotel room. They were in separate rooms.

Q And you can't remember who this guy was working for or his name? A No. He just took a statement is all I know.

Q Well, what did he ask you about? A He asked me what happened.

Q Did you tell him? A Yes.

Q Did he write it down on a paper? A Yes.

Q Did you sign it? A Yes.

Q Did you swear to it? A I swore to it. —

[fol. 236] Q Is that the only time you've sworn to any statement in this whole business except today? A Yes. Now, when they asked me to join, I signed up.

Q But you didn't swear to that? A No, I—

Q Did this fellow write down there what you told him at that time? A What happened?

Q Yes. A Yes.

Q And before you signed it and swore to it, did you read it or did he read it over to you? A He read it and I read it, too.

Q So he read it to you and then you read it yourself, right? A Yes.

MR. JENKINS: I would like this affidavit that was tendered by the General Counsel be marked Respondent's Exhibit Number 2 for identification.

MR. BAKER: I would like to question the purpose of having that document marked for identification.

TRIAL EXAMINER: Wait and I assume we'll find out.

(Thereupon, the above-mentioned document was marked Respondent's Exhibit No. 2 for identification.)

Q (By Mr. Jenkins) Elmer, this affidavit of yours, marked Respondent's Exhibit Number 2, R-2 stands for [fol. 237] Respondent's exhibit, was this your signature on there? A Yes.

Q And it's dated the 24th of February, 1965, it says, "subscribed and sworn to before me this 24th day of January, 1965," and it's got Jerald Scheinberg, Field Examiner, NLRB. Is this the paper that you signed? A Yes.

Q And this is the paper that you swore to, right? A Yes.

MR. JENKINS: We move to admit it into evidence.

* * * *

[fol. 241] TRIAL EXAMINER: Very well. For that purpose it will be admitted.

* * * *

[fol. 252] JERRY LEE FRYE

resumed the stand and testified further as follows:

CROSS-EXAMINATION (Continued.)

BY MR. JENKINS:

Q Mr. Frye, were you able to find your notes? A No, sir.

Q Where are they? A I don't know.

Q When is the last time you saw them? A About a month, a month and a half ago.

Q You didn't look them up in connection with getting ready for your testimony here? A No, sir.

Q You thought it was important to write it down at the time it happened, didn't you? A Yes, sir.

Q You didn't think it was important to look it up when you were going to come in?

MR. BAKER: Objection. That's argument.

[fol. 253] TRIAL EXAMINER: He just said he didn't look at them, Mr. Jenkins.

Q (By Mr. Jenkins) Where were these notes the last time you saw them? A I had them in a shoe box with all my check stubs.

Q Is that shoe box still at home? A Yes, sir.

Q All those check stubs still there? A Yes, sir.

Q Everything there but the notes? A Yes, sir.

Q And they just disappeared?

MR. BAKER: Objection.

TRIAL EXAMINER: You did not see them?

THE WITNESS: I did not see them.

TRIAL EXAMINER: And you looked?

THE WITNESS: Yes, sir, I looked. I got two, three drawers, I looked in all of them, I couldn't find them.

Q (By Mr. Jenkins) Where about is the shoe box that you put them in? A It's in the dresser drawer over by the window.

Q And they were there a month ago, right? A A month or month and a half ago. It was in there looking at my check stubs, I had them in a little book.

[fol. 254] Q And when you went back and looked today is the little book there? A No, sir.

Q And the book was what your notes were in? A Uh-huh.

Q And your check stubs are still there, though? A Yes, uh-huh.

Q Everything is there except the book with the notes? A I don't know if all the check stubs were there.

Q They appeared to be? A They were out of the box, some of them. I guess my aunt looked through them. They might have been in there, I don't know. She stays there, she gets in the drawer sometimes.

Q Does she just look for notes and not check stubs? A I don't know what she took.

MR. BAKER: I object. Ask that be stricken—

[THE WITNESS:] (Continued.) She gets in my letters and things.

MR. BAKER: Would you grant that?

TRIAL EXAMINER: It may stand.

Q (By Mr. Jenkins) I want to go back to the time that you were down at the hotel when you said you saw Terry Lewis in a phone booth. Where were you standing or where were you when you saw him in the phone booth? A I was coming by as I was going in. He was sitting in the phone booth.

[fol. 255] Q When you were coming by was anyone with you? A There could have been. I don't remember. There were two or three of us standing outside but I don't know if anyone walked in with me or not.

Q What are the names of the two or three that were standing outside? A Elmer Maynard.

Q You passed him standing outside when you went in? A Yes, sir.

Q Who else? A Kenneth Adkins.

Q He was outside with Maynard? A Uh-huh.

Q Who else? A And Mustache.

Q Who was that? A I don't know what his name is. He's Kenny's brother.

Q Cordell? A Yes.

Q Adkins. Anybody else? A There could have been but that's about all I can remember right at the moment.

Q When you went in the hotel, did Elmer Maynard, Kenneth Adkins or Cordell Adkins—Mustache—did any of these gentlemen go in with you? A They could have come in behind me, I mean I don't know.

[fol. 256] Q They didn't accompany you in? A They were back behind me, they could have come in behind me.

Q When you passed Lewis, saw him in the phone booth, what did you do? A I just looked at him.

Q Then what did you do? A He looked at me.

Q Then what happened after that? A He was talking.

Q Then what happened after that? A I went on and went through.

Q And you went on where? A Upstairs.

Q Was that all that hapened? A That's all I remember.

Q Now, you testified with respect to a conversation in the parking lot on Monday sometime with Charles Gissel when he was listening to a radio in the car, stock market reports, do you remember that? A Yes, sir.

Q Where were you standing at the time when you overheard this conversation that you testified about? A I don't know which side of the car I was standing on.

[fol. 257] Q Were you near the car, though? A We were near the car.

Q When you say "we,"— A Red Mount.

Q Is that Herbert Mount? A Red, Herbert Mount.

Q Who else? A That's all I remember.

Q No one else there? A There could have been somebody else there but I wasn't paying much attention.

Q Now, on the Thursday that you came in and your timecard was not there, then you had a conversation with Charles Gissel that you testified about in the office in which you testified he told you that you all had walked off the job, remember that statement? A Yes.

Q All right, now, when you had this conversation with Charles Gissel, who else was there? A Me and Herbert Mount.

Q Who else? A Some of the boys over in the sausage room.

Q Do you remember the names of any of them? A No, I don't remember who it was at the time, I wasn't paying much attention to them.

[fol. 258] Q You couldn't identify them now? A I might if I seen them.

Q You don't know their names? A One was—

Q Did they have nicknames? A George.

Q George. And he works in the sausage room? A Yes.

Q And? A Bailey, I believe.

Q Another man named Bailey? A Yes.

Q And Bailey that works in the sausage room? A Yes, sir.

Q All right. Anybody else? You've named Herbert Mount, a man named George, another man named Bailey. A I believe Charlie Hutchinson was—

Q Charlie Hutchinson. Anybody else? A Let's see.

Q Where does Charlies work? A He works in the sausage room.

Q Can you think of anybody else? A There could have been another one but I don't remember now.

[fol. 259] Q That's all you remember? A Yes.

Q You testified about a conversation in February between Charles Gissel and Rush Moore. At the time this conversation took place who else was there? A Me and Charles and Rush Moore as far as I know.

Q Anybody else? A No, not as far as I know.

Q Just the three of you? A Uh-huh.

Q I believe you testified that that same day in the

afternoon Charles Gissel asked you if you knew anything about the Union. When you say this conversation took place who else was there? A There wasn't nobody, just me and him, me and Charles.

MR. JENKINS: That's all I have.

REDIRECT EXAMINATION

BY MR. BAKER:

Q You met Mr. Jenkins before today? This is Mr. Jenkins (indicating).

MR. JENKINS: That's not proper redirect.

MR. BAKER: I think in light of all the business about the notes and so forth that I am at least entitled to ask him that question.

TRIAL EXAMINER: You may answer.

[THE WITNESS:] Yes, sir, I think I did.

[fol. 260] Q (By Mr. Baker) Where did you meet him? A In the office down at Gissel.

Q And what was he doing, do you know? Why were you down in the office? Were you in the office? A I was in the shipping room and Charles come up and asked me, he said, "There's a man in the office wants to see you."

Q Did you go up to the office? A Yes, sir.

Q Who was there? A Just me and him and another man.

Q Did those people introduce themselves to you? A He said something about he was from Cincinnati and he was—had something to do with the Labor Board.

Q Then what did he do after that? A He said this guy—he shut the door so nobody could hear and had everybody else out, just me and him and the guy that was taking notes, and he said that, the first thing he asked me about was how come I didn't want to shake hides, and he told me that he was from Cincinnati and he was working or something about the Labor Board. And he said, "Don't be afraid to tell me anything. Just tell me everything you know."

Q Did he ask you questions? A He asked me questions.

Q Do you know if the other man was taking it down? A Yes, sir.

[fol. 261] Q Did they swear you in? Before they took the questions, did they ask you to raise your right hand and swear? A No, sir.

Q Did you ever see any of these questions written out some way that you could read them? A You mean when he was writing them down?

Q Yes. A No. He sat off to the side. He asked me the question (indicating), and the other guy wrote what I said.

Q Did he ever type them up or something and bring them back, something for you to read? A No.

Q Like the Labor Board man did with the statement here? A No, sir.

Q Did you ever sign them? A No, sir, I didn't sign them.

MR. BAKER: That's all I have.

MR. JENKINS: Motion to strike. Not proper redirect.

TRIAL EXAMINER: Overruled.

Do you have any further questions?

RECROSS-EXAMINATION

BY MR. JENKINS:

Q You do know my name, don't you? A I don't know your first name. I know you're Mr. Jennings.

Q My name is what?

MR. BAKER: Jennings.

[THE WITNESS:] Jennings.

[fol. 262] Q [By Mr. Jenkins] You have referred to a conference down in the office at Gissel Packing Company, is that right? A Yes, sir.

Q Now, who was it that told you they were from Cincinnati? A You two guys, or you, or I don't know if he said it, or one of you said it, was from the Labor Board from Cincinnati.

Q And said we were from the Labor Board? A I'm pretty sure you did.

Q Now, you be careful about this. Are you testifying under oath here that I told you I was from the Labor Board? A Yes, sir.

Q And I told you that I was from Cincinnati? A Yes, sir.

Q And I remind you about your oath. Is that correct under oath? A Yes, sir.

* * * * *

[fol. 264] MR. JENKINS: The second thing, by reason of some testimony that was given immediately prior to our adjournment at noon it appears to me that it is going to be necessary for me to be a witness in this case because a witness testified that I represented to him that I was an agent of the Board and I was from Cincinnati. I categorically deny this as untrue and I think that it is going to be necessary for me to be a witness in the case because I think that information on the whole line of questioning was irrelevant to any charge in this proceeding as grounds before Your Honor, but I don't know why he did it, and before I can leave it stand undenied I have to suggest, I feel that it poses an ethical problem when an attorney has to become a witness in a case, I have two possible suggestion on it. One, is that we go ahead and continue the case, the taking of the evidence and then at the conclusion of it that I will make my evidence on that and then anything thereafter I will refer the matter to other counsel. The other possibility is that I'm perfectly willing [fol. 265] to withdraw as counsel in the case. Now, since this problem has come up, if that is what we decide should be done and it is going to be necessary for me to get other counsel to represent my clients here, I believe we will probably have to have the record transcript written up to this point anyway so that any counsel coming into the case right now could go ahead with it properly so that my clients will be properly represented in the matter. Those are the only two procedures that occur to me on it, and I think probably some recommendation from you on the matter would be in order.

TRIAL EXAMINER: Do you have a statement to make, Mr. Baker?

MR. BAKER: Let me make this statement. Whether the matter is relevant or not I simply shall not say. I knew nothing about these statements, nothing at all, until yesterday when counsel began to interrogate from them.

After that time during the recess when I found out that apparently there had been some interrogation, I asked some of my witnesses if any of the others had been and this witness told me that he had, and the questions, what was said and what the witness said was the testimony that he gave. Now, rather than to cause any problems of counsel, rather for him to withdraw and bring other counsel in, I have no objection if that testimony is stricken from the record so that we may proceed without it.

TRIAL EXAMINER: You mean physically stricken?

[fol. 266] MR. BAKER: Physically removed from the record. Now, that motion is entirely up to the Trial Examiner.

TRIAL EXAMINER: Are you making that in the form of a motion?

MR. BAKER: Yes, I make that in the form of—

MR. GUNNOE: I would object to it being stricken. I feel like it should be left in the record as we may find it necessary to file additional charges in this case.

MR. BAKER: Before you rule, my second suggestion would be that if counsel wants to take the stand it's certainly not unusual in this type of case. He may interrogate himself by question and answer.

TRIAL EXAMINER: Well, my own suggestion would be, Mr. Jenkins, as Mr. Baker has said it's not unusual for an attorney to appear in such cases. I agree with you that it is undesirable but my own suggestion would be that after all the evidence is in with respect to everything else that you take the stand as to this one limited matter.

MR. JENKINS: Very well.

TRIAL EXAMINER: It would be limited to that. It will be understood it will come in only after everything else has been taken care of and everyone has rested, rebuttal, and everything.

MR. BAKER: On my motion to strike, I have made that motion, would you rule on my motion?

[fol. 267] TRIAL EXAMINER: In view of the opposition of the Charging Party, I will deny the motion to strike. But I would say that I would suggest this procedure that after you have rested and after Mr. Baker has indicated he has included any rebuttal he may have, that

you may take the stand and at that point testify only as to this incident you are referring to and that cross-examination be limited to this incident, and then we will close the record.

* * * *

ELISHA WATTS

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BAKER:

Q Would you state your name and address, please? A Elisha Watts, 2974 James River Road.

Q Are you presently employed at Gissel Packing Company? A No, sir.

Q Have you ever been employed there? A Yes, sir.

Q When did you begin working at Gissel? A Well,—

Q Approximately how many years had you been there? A I approximately been eight years, off and on.

[fol. 268] Q Off and on? A Off and on.

Q When did you leave the last time? A It was in April—May the 1st, 1965.

Q While you were an employee of Gissel Packing Company were you approached by a Union representative to sign a Union card? A Yes, sir.

Q Did you sign such a card? A Yes, sir.

Q I'll show you what has been marked as General Counsel Exhibit 10-FF for identification and ask if that's your signature?

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10-FF for identification.)

A It sure is.

Q Did you sign the card on or about the date indicated, which is January 16, 1965? A Right.

Q Do you recall whom you got the card from? A He's in there.

Q Is it the one that's called Red? A Red.
Q Red? A Yes.
[fol. 269] MR. BAKER: I offer General Counsel's Exhibit 10-FF for identification into evidence.
MR. JENKINS: We have the same objections as we did to the others, marked Number 10.
TRIAL EXAMINER: Received.

(Thereupon, the above-mentioned document heretofore marked General Counsel's Exhibit 10-FF for identification was received in evidence.)

Q (By Mr. Baker) Mr. Watts, while you were employed at Gissel did you ever hear any supervisor or boss say anything about a Union?
MR. JENKINS: Objection.
TRIAL EXAMINER: Overruled.
Go ahead.
[THE WITNESS:] Yes, sir.
Q (By Mr. Baker) What supervisor or boss did you hear? A I heard Charles, I heard Pootchie.
TRIAL EXAMINER: Who is this?
THE WITNESS: His name is Herbert.
TRIAL EXAMINER: What is the last name?
MR. BAKER: Gissel and he called him Pootchie. That's like Pork Chop and Mustache.
TRIAL EXAMINER: That's what I was trying to understand.
Q (By Mr. Baker) Directing your attention to the conversation you heard—you say you had heard with [fol. 270] Charles Gissel, do you remember when that took place? A I heard him, it was on Saturday morning, Charles.
Q It was on Saturday morning. Do you remember when? A I don't know the date. As well as I can remember it was on a Saturday morning approximately 7:00 o'clock.
Q Where did this conversation take place? A It was out in the hallway when I was coming in.
Q Do you remember what—Was it before or after you had signed the Union card? A It was after it.

Q How long after would you say? A I'd say approximately a month.

Q What did you hear Mr. Gissel say? To whom was he talking? A He was talking to them boys that works there. There was a whole bunch of them.

Q What did he say? A He said, "The hell with the Union," the exact words he said, "I'm going to leave it and turn it over to them."

Q Leave what? A This plant and give it to them if they want it.

Q Were there other people around? A Yes, sir.

Q Who all was around if you recall? A Don Kidd.

[fol. 271] Q Anybody else? A Well, they ain't here. They heard it but they're not here.

Q What are the names? A Mollihan and all of them.

Q What place in the plant did you say this was? A In the hallway to the office there.

Q You say you heard Herb say something, Herb Gissel? A Well, one day I was cutting bacon and he come in, he said, "If you don't—"

MR. JENKINS: Just a second. I think any conversations ought to be identified by date and place so we can—

Q (By Mr. Baker) Where was this conversation? A I was working as a meat cutter. I was trimming bacon. Herb come in there and he said—

MR. JENKINS: Just a minute.

Q (By Mr. Baker) When was this, do you remember? A No, sir, I don't remember exactly.

Q Was it after this conversation you heard with Charles or before? A After that.

Q How long after that would you say? A Oh, I'd say approximately a week, a week and a half.

Q All right. Who else was present at that time you heard Herb say this? A Kenneth Adkins.

[fol. 272] Q What did Herbert say at that time? A He said, "I don't want to hear any more about this Union stuff. If you can't do your work, get out."

Q Is that all he said? A That's right.

Q You don't recall him saying anything else? A Well, there was argument and he said so much stuff, going on like a typewriter.

Q Do you recall him saying anything else at that time about the Union? A He said it several times.

Q What about this time when you and Adkins were there, do you recall anything further? A Yeah, they pinned all kind of stuff on me to run me off.

Q Let me ask you this—

MR. JENKINS: Objection. Motion to strike. No charge—

MR. BAKER: I have no objection, Your Honor.

TRIAL EXAMINER: Very well.

Q (By Mr. Baker) Did Mr. Herbert Gissel indicate to you that he knew you were the head of this Union? A No, sir, I didn't hear him say that.

Q You didn't hear him say it? A No, sir.

* * * *

[fol. 273] CROSS-EXAMINATION

BY MR. JENKINS:

Q Mr. Watts, you testified here about a conversation or statements, really, that Charles Gissel made on Saturday morning, I think you said about 7:00 o'clock, about a month after you signed a Union card. Do you remember your testimony about that? A Yes, sir.

Q Who was the first person that you reported this to? Who did you tell about it? A Well, everybody heard it walking through there.

Q No, I'm asking you who you told it to. Who have you told about overhearing it? A I didn't tell nobody. They all heard it just talking amongst one another.

Q Well, after that day didn't you tell anyone else about having heard it then? A No, sir, it wasn't none of my business.

[fol. 274] Q You never did? A No, sir.

Q You never told anybody about it? A No.

Q You never discussed it with anybody? A No. We were just talking back and forth but you know through the general talk.

Q Uh-huh. Well, did you, for example, call up the Union organizers or tell them about it? A No, sir.

Q Did you tell anybody who was investigating this case for the Labor Board about it? Do you remember telling them anything about it? A Well, I talked to a certain person, I don't recall his name. I think this boy sitting right there but I don't think—

Q You told him about it? A Yes, sir.

Q That's Mr.— A —about one part of it.

Q That's Mr. Gunnoe? A Right.

Q Do you remember when you told him about it? A Well, it was along in February sometime.

Q Did you give him any statement or anything like [fol. 275] that in writing? A No, sir, as I recall, all I give the statement is to what I heard and what I said.

Q I'm speaking about who you gave it to, not what you put down, but did you give a statement to Mr. Gunnoe about— A I gave a statement to one of them Labor Boards sent up there from the Government, yes, sir.

Q From the Government? A Yes, sir.

Q And anybody else other than the Government man? A No, sir.

Q Now, you left the employment of the Company May the 1st, I believe, is that correct? A Somewhere along the last day of April, the first day of May.

Q Had you been in and out of the Company as an employee a number of times before that? A Well, sure, I've been there seven, eight times.

Q You've been employed— A Fired, hired, fired, hired, fired.

Q Several times? A How many times I couldn't count them.

Q Do you recall attending a Union meeting about the middle of April down at one of the hotels here in Huntington? A Well, I don't want to say anything to incriminate myself.

[fol. 276] MR. BAKER: If you attended a Union meeting, go ahead and testify to it.

[THE WITNESS:] Yes, I did.

Q (By Mr. Jenkins) Well, who presided at this meeting? A I don't know the name. There was a slew of them.

Q Do you know who was there in charge? A Nope, I don't.

MR. BAKER: I think he's exceeding the scope of direct examination, hasn't he? I don't know what relevance this has.

TRIAL EXAMINER: That is true.

Q (By Mr. Jenkins) Do you remember any discussion there of how things were going down at the Gissel Plant? A That's more than several months, that's been so far, I don't remember any of that, I didn't write it down.

Q You testified about conversations that you overheard even longer— A I kept it in my own head because I heard it and I wrote it on black on white.

Q You did? A Yeah, blue ink, and signed it.

Q When? A It was somewhere in February.

Q And that was the only reason you remember because you wrote it down? A Well, I was wanting to hang on to it because that's what's happened.

[fol. 277] Q Well, what about conversations that happened at this Union meeting in April, do you remember those? A They told us about Sehon Stevenson and they told us about this and they told us about how you been treating us which every bit of it was true.

Q What did they tell you? A Well, just—I can't think of all the things they got up and said.

Q You said it was all true. What was it? A Anything they said would be true to me.

Q It may be to you what was said? A Well, just a few words, conversation, kept going through that and hashed it out, and went on home.

Q What was it, what was said and who said what? A Well, they just said how the Company was going to have to organize when they come—and I'm not going to say too much about it because it didn't interest me.

Q Doesn't interest you? A No. All that interests me is what they done against me and against the Union. I'm a Union man myself.

Q Well, what was said at the meeting? A Well, they just—conversation back and forwards.

Q Well, what was the meaning of that, what were the words? A Just to point out a few things to us.

[fol. 278] Q What did they point out? A That we were getting along good, just keep it up.

Q What did they mean by that? A Well, I don't know. You're a lawyer.

MR. BAKER: I don't think there's any relevance to this, Your Honor.

Q (By Mr. Jenkins) Well, what I want to know is, what was said, the specific words or the substance, the meaning of the conversation that was told to you at the meeting in April.

* * * *

[fol. 280] A All I remember, we all, I think there was approximately, oh, everyone down there but three, I can name them off, was up there. He told us, he said that, Logan, he talked about Logan Packing Company which is right here, about Sehon Stevenson, and he talked a little about Gissel up there, and I don't know the rest of it. I can't think that far back.

Q (By Mr. Jenkins) What did he say about Gissel? A He said, "They're unfair."

Q What else did he say? A We should make more money.

Q Yes. A That's about all I can understand of it.

Q You don't remember anything else? A That's as far as I'm going with it.

Q It's not clear to me. Are you saying that you know something more but you're not going to say it? A I don't know nothing else more.

Q This is everything you remember? A That's right. I'll just say everything and let it go.

Q How long was the meeting? How long did it last, [fol. 281] approximately? A I'd probably say an hour and a half. I went to sleep.

* * * *

KENNETH ADKINS

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[fol. 282] BY MR. BAKER:

Q Would you state your name and address, please, for the record? A Kenneth Adkins, 1268 - 28th Street.

Q Are you presently employed at Gissel Packing Company? A Yes.

Q When did you begin working there? A About two years ago.

Q What department do you work in? A No?

Q Yes. A Boning room.

Q Who is your supervisor or boss? A Pootchie will be back there.

Q Pootchie? A Yes.

Q Do you know his first name? Is that Pootchie, his first name, or is that a nickname? A I don't know. That's what we call him. I don't know whether that's his real name or not.

Q Would you state whether or not you signed a card, an application for the Union? A Yes, sir.

Q Where did you get the application? A Some Union man come around and asked if I wanted to sign.

[fol. 283] Q Where did he come to? A My home.

Q I show you what has been marked General Counsel's Exhibit 10-EE for identification and ask you if that's your signature?

(Thereupon, the above-mentioned document was marked General Counsel's Exhibit 10-EE for identification.)

A Yes, it is.

Q Did you sign the card on or about the date indicated, February 19, 1965? A Yes.

MR. BAKER: I offer General Counsel Exhibit 10-EE into evidence.

MR. JENKINS: Same objections as to all of General Counsel's Exhibit 10.

TRIAL EXAMINER: It will be received.

(Thereupon, the document heretofore marked General Counsel's Exhibit 10-EE for identification was received in evidence.)

Q (By Mr. Baker) Mr. Adkins, while working at Gissel, will you state whether or not you overheard any supervisor or boss make any statement about the Union? A Yes, sir.

Q Did you hear more than one supervisor make such a statement? A Yes, sir.

[fol. 284] Q What were their names? A Charles Gissel and Herbert Gissel.

Q All right. Directing your attention to the statements or conversations with Charles Gissel, will you state when that happened and where? A The first one? When the first one—

Q The first one, yes. A —the first one said something about the Union?

Q Yes. A The first time I heard him say was around January the 27th, it was in the shipping room, working, just me.

Q Who else was there? A Simon.

Q Who's Simon. A He's a boss.

Q You heard Mr. Charles Gissel talking to Simon, is that right? A Well, he wasn't talking to me. He was just talking.

Q What did he say? A He said it would be cheaper just to have the meat shipped in, cut up and all, and get rid of most of the men in the back, he said, between the kill room and the bone room.

Q Did he mention the Union at this time? Did you hear him say anything about the Union? A He didn't say anything about the Union.

[fol. 285] Q Did you hear him have any other conversation with Charles that you recall where the Union was mentioned? A One time out in front at the loading dock, just me and Simon and Charles was out there.

Q When was this? Was this after this time you heard him say it would be cheaper to have the meat shipped in? A This was before then.

Q Before then. What did he say then?

MR. JENKINS: Objection. I think he's required to fix a time.

Q (By Mr. Baker) How long before would you say? A It was around, this happened around February 23d, something like that.

Q You say this other one was January the 27th, so it was after? A Afterwards.

Q This all was in 1965? A (Nods.)

Q What did he say at this time? A He said, he got mad and said he'd just take his money and leave. If the Union got in, he'd just take his money and let the Union run the place the way they wanted to.

Q Now, did you hear him say anything else? A That's all.

Q What about Herbert, you say you had a conversa-
[fol. 286] tion with Herbert, when did that happen? A I didn't have a conversation. I just heard something.

Q When did you hear this? A It was about the first week in February, I think.

Q 1965? A Yes.

Q Where were you at that time? A This was in the boning room.

Q Anybody else present at that time? A Yeah, all the employees.

Q What did Herbert Gissel say? A He was talking to Elisha Watts and he was bawling him out or something. He said—

MR. JENKINS: Just one second, please. What paragraph of the complaint does this refer to?

MR. BAKER: I think 5(b).

MR. JENKINS: Excuse me. Go ahead.

[THE WITNESSS:] (Continued.) Herbert was bawling out Elisha. Elisha wasn't trimming the bacon or something right, or something. He said he was going to trim it his way, and the Union wasn't going to get in. He'd have to fight the Union first, said it wasn't going to get in.

Q (By Mr. Baker) Say that again. Say each time what it was that Herb said. A He said the Union wasn't going to get in, that it would have to fight him first.

[fol. 287] Q It would have to fight him first? A The Union.

Q All right. Is that all you can recall he said? A Yes.

* * * *

CROSS-EXAMINATION

BY MR. JENKINS:

Q Mr. Adkins, you say you heard a conversation between Charles Gissel and Mr. Simon in the shipping room on January the 27th? A Yes, sir.

TRIAL EXAMINER: Just a minute. I am not clear who Mr. Simon is.

MR. JENKINS: That's my next question.

TRIAL EXAMINER: All right.

[fol. 288] Q (By Mr. Jenkins) Who is Mr. Simon? A Just a boss there as far as I know.

TRIAL EXAMINER: Is Simon his first name or his last?

THE WITNESS: I don't know. Just a nickname, I imagine.

MR. JENKINS: Motion to strike his testimony with respect to conversation between Charles Gissel and Simon.

TRIAL EXAMINER: Overruled.

MR. JENKINS: The ground of the motion I think so the record will show, this is not relevant, two supervisors talking to each other.

TRIAL EXAMINER: Ruling stands.

MR. JENKINS: Pardon?

TRIAL EXAMINER: My ruling stands.

MR. JENKINS: Of course.

Q (By Mr. Jenkins) You mentioned a conversation, Mr. Adkins, in February on the loading dock when Charles Gissel was there, didn't you? Do you remember that? A Yes, sir.

Q Who else was there when that conversation took place? A On the loading dock?

Q Yes. A Just me and Simon and Charles.

Q Was Charles talking to Simon again? A Not particular.

Q The three of you were there, correct? A Yes.

[fol. 289] Q What did you say on that occasion? A I didn't say nothing.

Q Naturally you weren't involved in it? A No.

MR. JENKINS: Same motion now with respect to this colloquy, dock conversation, same grounds.

TRIAL EXAMINER: Denied.

Q (By Mr. Jenkins) Mr. Adkins, after this conversation in January in the shipping room that you testified about here, who did you first report this to or tell about the conversation? A I didn't report it to nobody.

Q Well, eventually, sometime from then up until now, you must have told somebody about it, didn't you? A Yeah, I guess so.

Q Who? A One of the Union men.

Q Do you remember what his name was? A No, no.

Q Do you remember about when you talked to him? A No.

Q Do you know what he looks like? A No, I don't remember.

Q Do you remember what was said at the time of that conversation between you and the Union man? A Yes.

[fol. 290] Q What? What did you say? A He asked me if I heard anything mentioned about the Union, and I just told him.

Q And you don't remember when this was? A No.

Q No idea? A No.

Q Have you talked to anyone else about it other than this one time? A No.

Q No one at anytime? A No.

Q When you talked to the Union man about it, were just the two of you alone? A No.

Q Who else was there? A My wife.

Q And who else? A That was all.

Q And you're sure this man was a Union organizer? A Yes, he showed me his identification.

Q As a Union organizer? A Yes.

Q Did it say Food Store Employees Union, AFL-CIO, do you remember? A I don't remember.

[fol. 291] Q Are you sure from looking at it that he was with the Food Store Employees, Butcher Workmen Union? A Yes.

Q Do you know Jerald Scheinberg? A I think he's one of the Union men. I'm not sure.

Q Did he tell you he was a Union man? A I don't know whether I ever talked to him or not.

Q You don't know him, do you? A No, not particularly.

Q Do you ever remember giving a statement then or signing anything at the request of a man named Jerald Scheinberg? A I don't remember. I might have.

Q Well, here's an affidavit here, Mr. Adkins, it's got the name of Kenneth Adkins signed on it. This is the affidavit which the lawyer from the Government has just given me. Is that your signature? A Yes, it is.

Q And it's dated February 23d, 1965, 23d day of February, 1965, Jerald Scheinberg. Do you remember signing that? A Yeah, I remember. That's my signature.

Q Do you remember signing it? A Yes, I do.

Q Whereabouts were you when you signed it? A I don't remember.

[fol. 292] Q What did you tell Mr. Scheinberg? A I told him what was wrote down there.

Q Do you know what is written down there? A Yes.

Q You read it? A Yes.

Q When did you read it last? A I don't know if I read that certain copy. I have one.

Q You have one yourself? A Yes.

Q When did you last read it? A A couple of weeks ago.

Q You haven't read it since? A No.

Q No one showed you one of these statements since that time? A No.

Q No one has asked you about it? A No.

Q Haven't talked to a soul about it?

Is that your statement that you have not talked to anybody about it? A Yes, I talked to somebody about it.

Q Who? A One of the Union men.

[fol. 293] Q Who? A I don't remember which one.

Q This is just something that happened within the last week or so and you don't remember?

Your answer is no? A No

Q Have you talked to Mr. Baker over there about it? A Yes.

TRIAL EXAMINER: When you say "it," what are you talking about?

MR. JENKINS: Talking about the statement.

TRIAL EXAMINER: Not about things generally; just the statment?

TRIAL EXAMINER: Yes, ma'am.

Q (By Mr. Jenkins) When did you talk to Mr. Baker about it? A I didn't talk to him about the statement what I wrote in it exactly. I talked to him the other day about it, how it would be.

Q When was this? A Monday, the other day.

Q All you talked to him about was just the date of the trial? A Yeah.

Q Nothing else? A Well, a few other things but nothing about it.

[fol. 294] Q Nothing about a statement? A Not what I have to say or anything.

Q Nothing about what you were going to testify about? A No.

Q You never discussed that with Mr. Baker? A No.

Q He never asked you what you were going to say in this hearing, did he? A He didn't tell me what to say. He just said he might ask me.

Q Did he ask you what you were going to say? A No, he never.

MR. JENKINS: That's all.

* * * *

[fol. 400] Common Pleas Court Room,
Cabell County Court House,
Huntington, West Virginia.

Wednesday, August 4, 1965.

* * * *

[fol. 402] RUSH D. MOORE

a witness called by and on behalf of Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JENKINS:

Q Where do you work? A Gissel Packing.

Q How long have you worked there? Approximately? A Off and on about three years.

Q What is the general nature of your work? What

kind of job do you do? A I do a little bit of everything out there.

Q Mr. Moore, have you been employed down there during 1965, this year? A Yes, sir.

Q Back in March, 1965, there has been testimony in this case to the effect that a conversation took place between you and Charles Gissel. Do you know who Charles Gissel is, do you not? A Yes, sir.

Q At which conversation, this was out in front I think of the office or someplace described as out in front, Charles Gissel, according to a witness who previously testified in [fol. 403] this case, is supposed to have asked you to find out all you could about the Union and to report back to Mr. Gissel what you found out. Now, I ask you did any such conversation as this take place between you and Charles Gissel? A No, sir, it did not.

Q Now, there had been further testimony in this case that on or about February the 20th, back at the garage, there was a conversation between you and Charles Gissel that Gissel asked you if you knew anything about the Union, that he also asked you if you knew anything about Don Kidd. He wanted to know if Don Kidd was the leader of the Union and Charles Gissel, according to this witness, that if Kidd was the leader of the Union he would be fired. Now, did any such conversation as this take place in your presence? A No, sir.

Q Now, you said you did a number of things down there. Do you do maintenance work among other things? A Yes, sir, I do.

Q Beginning in January of 1965 will you state whether or not there began a series of unusual incidents occurring down there at the plant with respect to trucks, people's property, and other matters? A Yes, sir, I would.

MR. BAKER: I object to the leading nature of the question.

TRIAL EXAMINER: Ask him if there were any incidents.

[fol. 404] MR. JENKINS: Yes, that was my next question.

Q (By Mr. Jenkins) Would you tell us what incidents, exactly what incidents began to occur in January? A Yeah, I could say a few things but I wouldn't want to say them in front of ladies.

TRIAL EXAMINER: Go ahead.

MR. BAKER: I object on the basis of the materiality. What difference does it make if there were incidents?

TRIAL EXAMINER: I want to know who did them and in what connection.

[THE WITNESS:] (Continued.) Well, there was a coat down there that somebody stole off, and Bill is a boss back in the boning room, and soiled up in it, if you know what I mean if you get the picture.

* * * *

MR. JENKINS: The materiality of this line of questioning, what we intend to develop, Your Honor, is part of a calculated plan. This Union started stirring up troubles down there beginning in January to provoke the management and we intend to bring out a series of incidents that all occurred immediately following the time the Union made its demand for recognition and was refused in this case.

* * * *

[fol. 406] MR. JENKINS: Correct. Correct. We refused to bargain. Our position on that, so there is not mistake, is because our people did not believe they represented a majority and the unit was not appropriate. Now, that is the reason that there was a refusal to bargain and we think the record should show this course of conduct and this is a calculated plan to try to make the Bernel Foam doctrine apply here so this Union won't have to stand an election and this is a typical thing, demand for recogni-
[fol. 407] tion, a refusal if the management doesn't think they have a majority, and then stirring up the campaign of trouble so they can bring in the other 8(a) charges and apply the Bernel Foam so they can get recognized without an election. This is our position in the case.

* * * *

[fol. 408] Q (By Mr. Jenkins) This event that you described, Mr. Moore, with the coat did this occur back at the beginning of the year? A It occurred right around

the time that the Union, you know, they were talking about the Union and stuff like that.

Q Had an incident like this ever occurred before to your knowledge? A No, not that I know of.

[fol. 409] Q Now, you mentioned there were other unusual incidents. What other incidents do you remember with respect to equipment of the Company, trucks—

MR. BAKER: I suggest counsel is leading now.

TRIAL EXAMINER: Ask him what events he remembers and then you can refresh his recollection.

Q (By Mr. Jenkins) Do you have any recollection about other events? A Well, I don't know the dates or the month that it happened but I know that down there we had some truck motors to blow up, about five or six of them I imagine, and we sent some motor oil off to have it, you know, analyzed and—but that was as far as I ever heard about that.

Q And do you know what was in the oil? A Well, I don't know myself. I mean just using my own judgment it felt like sand.

MR. BAKER: I object—

MR. JENKINS: He can use his own judgment.

MR. BAKER: —unless he is established as an expert. Is he a chemist?

MR. JENKINS: He can certainly use his own judgment about it. He's a maintenance man.

TRIAL EXAMINER: He can state his judgment. It depends on what weight I shall give it.

[fol. 410] Q (By Mr. Jenkins) Go ahead, Mr. Moore.

TRIAL EXAMINER: If they had an analysis I assume that if it showed sand, I'll get to that eventually. I'll see the analysis.

Q (By Mr. Jenkins) Go ahead, Mr. Moore. A Anyway, that's what we found in all the motor oil. It felt like sand to me; and another incident came up about it, you know, where it first started about the Union down there, somebody had cut it out of the paper, you know, and hung it on the door.

TRIAL EXAMINER: Did what?

THE WITNESS: You know where they started about the Union, you know they put it in the paper, something, you know somebody did. Well, anyway, whatever it was

in the paper, they cut it out and hung it on the boning room door.

[THE WITNESS:] (Continued) And just small items like that, you know, is all I know.

Q (By Mr. Jenkins) Now, the time that you had the difficulties with the motor blowing up in the trucks when was that in relation to when this Union business started in January? A Well, sir, I couldn't call the dates because I never paid no attention to that.

Q Had you ever had any trouble down there with sand in the motors before? A No, sir.

* * * *

[fol. 412] CROSS-EXAMINATION

BY MR. BAKER:

Q How did you know the Union was trying to get in, Mr. Moore? A Well, there was talk going on around the factory about it.

[fol. 413] Q Who was doing the talking? A I don't know. I'd be off in a distance, I'd be hearing them talk about it.

Q You don't know who it was? A No, sir.

Q You never did hear any of the Gissels say anything about the Union, I take it? A No, sir.

Q You never heard them say a word? A No, sir.

Q You never heard them mention the Union? A Not until just about the last week they mentioned about it and, of course, I knowed, you know, that all the guys, you know the biggest majority of them was for it. I didn't know their names or anything like that.

Q You did know they were all for it? A No, sir, I said you know the biggest majority of the guys that was for it. That's the way I felt, you know, that they were for it.

Q Did anybody ever ask you to sign a card? A No, sir.

Q Did anybody ever talk to you directly about the Union? A No, sir.

Q Yet you knew that the biggest majority were for it? A Yeah, I mean, you know, you get around, you talk to

[fol. 414] the guys and you hear them or something like that. You know, you know they're for it by the way they talk.

Q I thought you said no one talked to you directly but just in the distance. A I mean it's the way they talk.

Q There wasn't any doubt in your mind that most of the people there wanted a Union, isn't that right? A No, I wouldn't say that.

Q I thought you did say it. I thought you said that the biggest majority wanted it. Now, did they or didn't they?

MR. JENKINS: He said the biggest majority of the ones he heard talking.

TRIAL EXAMINER: I understood him to say that the biggest majority of the employees, this was his impression, wanted a Union.

THE WITNESS: Yes, ma'am, that's the way I said it but, you know, by the people that—see, I gas up trucks in the morning time, you know, I hear, you know, as they walk by or something like that.

Q (By Mr. Baker) Besides gassing up the trucks, I believe you do a little bit of everything, don't you? A Yes, sir.

Q You're sort of jack of all trades? A Yes.

[fol. 415] Q You work around th whole plant? A Yes, sir.

Q Not only in the garage? A Yes, sir.

Q So you have an opportunity to hear not only just the drivers but people working in the slaughter house and shipping room, you're in all of these places, aren't you? A Yes, sir.

Q You heard all of these people talking, I mean people in all the departments, you weren't just limited to the garage, isn't that right? A I'm not limited to the garage, that's right.

Q So when you say that the biggest majority wanted the Union, you're talking about all the people down there because you were working with all of them, isn't that correct? A Well, let's put it like this here now—

Q Just answer my question.

MR. JENKINS: You let him answer it and answer in his own words. Don't you interrupt.

TRIAL EXAMINER: Let him answer it.

MR. BAKER: I'm just asking for an answer to my question.

[THE WITNESS:] Whenever I walk around the plant if anybody is talking they all shut up and walk off away from me.

Q (By Mr. Baker) They do? A Yes, sir.

[fol. 416] Q Why would they do that? A Well, you use our own judgment on that. I don't know.

Q Are you a boss? A No, sir.

Q But they wouldn't talk so you could hear them? A No, sir.

Q So when you said that what you heard you really didn't hear them, is that right? A Sir?

Q Are you now saying that you did not hear this stuff that you said you heard in the beginning of your testimony? A Oh, no.

Q You did hear it? A Yes, sir.

Q You heard enough to know the biggest majority wanted a Union, is that right, now? A Yes, sir. My brother joined the Union.

Q I see. But if anybody was talking and you walked up, they would quit talking and walk away? A Yes, sir.

Q Were you for or against the Union?

MR. JENKINS: Objection. Not proper.

[THE WITNESS:] Well, I—

MR. JENKINS: Just a minute.

TRIAL EXAMINER: He may answer. Overruled. He may answer.

Q (By Mr. Baker) Were you for or against the Un-

[fol. 417] ion yourself? A Well, I'm against it my own self, sir.

Q Against them? A Yes, sir.

Q Why are you against them? A Because I just don't believe in it, that's why.

MR. JENKINS: Motion to strike. Irrelevant.

TRIAL EXAMINER: No.

Q (By Mr. Baker) Did you ever discuss the fact you do believe or you don't believe in Unions would you say with Mr. Herbert Gissel? A I don't understand it.

MR. JENKINS: When is it proper in an unfair practice hearing to ask an employee his opinion and his personal beliefs?

TRIAL EXAMINER: Because it may have in the case of General Counsel, the fact that a witness favors a Union is an element to be taken into consideration in determining his credibility.

MR. JENKINS: Do I understand from that then it's your ruling that it's proper to make an inquiry here of each of these witnesses as to their attitudes toward a Union, pro or con, or their philosophy about the Union movement?

TRIAL EXAMINER: Well, the questions weren't asked. Certainly the witnesses, as it turned out, if a witness testified, testified that he had signed a card so it was [fol. 418] perfectly obvious from the beginning that he favored the Union at some stage.

MR. JENKINS: I certainly object to that conclusion that everybody who signs a card proves that they're in favor of the Union movement. They may have another reason for it.

• • • •

[fol. 421] MR. JENKINS: The Respondent moves that the Hearing Officer disqualify herself and that the hearing be terminated until another Hearing Officer is appointed or in the alternative that the hearing recess while the Respondent takes an interim appeal. The basis for the Respondent's motion is the comments on the law and the evidence which the Hearing Officer has made at this hearing today.

• • • •

[fol. 424] MR. JENKINS: I was going to ask something else. Your Honor, not that we're back on the record so that I will understand the specific part of your ruling my motion, of course, was two-pronged. The first motion, of course, was for disqualification and the appointment or assignment of another Trial Examiner. In the alternative I asked for time for an interim appeal.

TRIAL EXAMINER: The first motion is denied.

MR. JENKINS: I want to be sure.

TRIAL EXAMINER: The second motion is granted.

MR. JENKINS: Correct, fine.

It just occurred to me while we had an off-the-record discussion that there was an additional ground that formed the basis of my client's decision to make this motion which perhaps the record, in fairness to Your Honor, and counsel for the Union and the Government, should state and that is the comments made with respect to admitting evidence of the witness as to his opinion or his [fol. 425] feeling for or against the Union. We felt that your comments on that and your ruling on that was highly prejudicial to us.

TRIAL EXAMINER: You say I should not take into consideration—

MR. JENKINS: Yes, ma'am.

TRIAL EXAMINER: —the fact that an employee favors the Union in evaluating his testimony?

MR. JENKINS: Yes, ma'am.

TRIAL EXAMINER: It is not a factor to be considered either way?

MR. JENKINS: It is my opinion that it is not proper to ask a witness in a proceeding such as this, either a witness for the Government or the Union or for the Respondent, whether he is for or against the Union, and I feel your ruling and comments on that were prejudicial and I just simply state so I would be competely candid and complete with Your Honor.

TRIAL EXAMINER: Certainly. I want to ask you then this: If it is your position that in evaluating testimony of the witnesses called by the General Counsel and/or the Union that I would not—that it would not be proper for me to consider in evaluating their testimony that they might be pro-Union and have an interest in seeing that the Union won?

MR. JENKINS: I think it is not proper for them to be specifically asked what their philosophy is for or against [fol. 426] the Union which was the question involved with this witness without regard to any time of his opinion and his state of mind. I just feel that that was highly improper.

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[fol. 434] City Council Chambers, City Office Building and Judge Daugherty's Chambers, County Court House Huntington, West Virginia,

Tuesday, August 17, 1965.

* * * *

[fol. 436] TRIAL EXAMINER ROSANNA A. BLAKE: On the record.

Before I forget it, there is a statement I would like to make.

The first day of hearing. Mr. Jenkins made a motion with respect to certain allegations of the Complaint on the grounds that the events had occurred more than six months prior to the date of the filing of the Charge.

I assume they had occurred more than six months prior to the filing of the Charge, and I indicated that no unfair labor practice findings would be based on any events which occurred more than six months prior to the filing of the Charge; but, that under the Bryan Rule, such things could be considered for background.

Subsequently, in checking, it appears to me that the six months goes back to August and, before issuing my opinion, I will check and double-check.

If this is so, and I did point this out, I believe, off the record at the start of the second day of hearing, and at that time I understood Mr. Jenkins to say that he or to point out that there was a variance between the Charge and the Complaint.

This is an argument which he certainly is entitled to make. But, in case there has been any misunderstanding [fol. 437] with respect to the ruling on the first day, with respect to the 10(b) period, I want it clearly understood that the ruling was made on the supposition that the events in the complaint in fact occurred more than six months prior to the filing of the charge. If they did not occur prior, more than six months prior to the filing of the charge, they will be considered as any other allegation in the Complaint, which is timely.

This, I think, should be made clear lest there be some misunderstanding about the ruling on the first day; that

is, the events in the Complaint which occurred within the six month period will be considered in the light of the testimony in the usual manner.

At the close of the previous day's hearing, Mr. Jenkins was allowed a recess to enable him to file a motion with the Trial Examiner or an affidavit of disqualification.

A document was filed, it was mailed on August 9, 1965 with a covering letter which I would like to ask [be] marked for identification as Trial Examiner's Exhibit 1 (A).

(The document above referred to was marked Trial Examiner's Exhibit No. 1(a) for identification.)

TRIAL EXAMINER: The attached document will be marked as Trial Examiner's Exhibit 1(b).

(The document above referred to was marked Trial Examiner's Exhibit No. 1(b) for identification.)

[fol. 438] TRIAL EXAMINER: The document filed by Mr. Jenkins has been considered and by telegram sent at 1:40 o'clock p.m. on August 8, 1965, the Trial Examiner denied the motion. It was sent by telegram to John E. Jenkins, Esquire, to P. O. Box 1457, Huntington, West Virginia, with information copies to Mr. Jack V. Baker, Esquire and Mr. Woodrow R. Gunnoe.

A copy of the telegram will be marked for identification as Trial Examiner's Exhibit 2.

(The document above referred to was marked Trial Examiner's Exhibit No. 2 for identification.)

TRIAL EXAMINER: I had understood that Mr. Jenkins was considering filing an interim appeal with the Board in case his motion was denied.

When I left Washington yesterday, no interim appeal had been filed as far as the Board's records show.

Was an interim appeal filed, Mr. Jenkins?

MR. JENKINS: There was not.

TRIAL EXAMINER: Thank you.

The Trial Examiner's Exhibits 1(a), 1(b), and 2 are received in evidence and made a part of the record.

(Whereupon, the documents previously marked as Trial Examiner's Exhibits Nos. 1(a), 1(b) and 2 for identification, were received in evidence.)

[fol. 439] TRIAL EXAMINER: Are there any further preliminaries before we continue with the witness?

MR. JENKINS: Just a moment, please.

(Examining documents.)

Your Honor, is the telegram which you sent me on August 11 designated as Trial Examiner's Exhibit 2.

TRIAL EXAMINER: Yes, it is.

MR. JENKINS: The only comment I have with respect to the information contained in Trial Examiner's Exhibit 2 is that this telegram makes reference to Counsel's failure to file the motion on the date set therefor.

This is incorrect.

The motion in this matter was made in the record as will be shown by a transcript of the proceedings held on August 6, 1965, and Counsel for the Respondent never agreed to file any motion. The Counsel for the Respondent submitted an affidavit in support of the motion but the document which was forwarded on or about August 9 was not a motion as observed in Trial Examiner's Exhibit No. 2; it was not intended to be a motion, but it was an affidavit in support of a motion which had previously been made at the hearing which the transcript of the evidence will clearly reflect. The transcript will reflect that that motion was made.

TRIAL EXAMINER: Your affidavit was, according to the record, was to have been filed on Monday, August 9, 1965.

[fol. 440] MR. JENKINS: That is correct, but that was contingent upon the fact that I was to get the transcript from the reporter in the mail and I went to the Post Office that morning and checked the mail and I also waited at my residence until noon because it was supposed to have been delivered at my residence by special delivery, air mail, but this was not done. The reporter had not followed through with the instructions.

TRIAL EXAMINER: At Page 432 of the transcript, I say at the bottom of the page:

"—if you find you do not get it"—meaning the transcript—"then if you will submit a telegram I will extend the time—"

And Mr. Jenkins, your answer:

"Fair enough."

MR. JENKINS: We did not send any telegram on that day but we sent the motion itself on Monday which was the first business day after receiving this record late on Saturday afternoon and I do not think it is reasonable to expect us to prepare documents or handle business in the late afternoon on Saturday.

TRIAL EXAMINER: The record will show that I had suggested sending it by telegram at the time if you were unable to get the affidavit in the mail and that you had indicated "Fair enough" on the record.

[fol. 441] As the telegram indicates, I have in fact ruled on the motion as if it had been timely received.

Are you ready to call Mr. Moore?

MR. JENKINS: Yes.

Whereupon,

RUSH D. MOORE

having been previously called as a witness by and on behalf of the Respondent and, having been previously duly sworn, resumed the witness stand and testified further as follows:

* * * *

[fol. 443]

FURTHER CROSS-EXAMINATION

BY MR. BAKER:

* * * *

TRIAL EXAMINER: Counsel, you were rubbing your fingers together and the record will not show the motion.

THE WITNESS: Yes, I felt of the oil.

Q (By Mr. Baker) You rubbed your fingers in the oil?

A Yes.

* * * *

[fol. 446] Q Do you know whether any Union adherent, that is, anyone in favor of the Union had anything to do with the sand in the motors, if there was, in fact, sand in there? A No, sir, I don't know.

Q Where did the company get the motoroil for these trucks? A From Pure Oil, I think it was.

Q Now, or at that time? A At that time, we got it from Pure Oil.

Q Where are you getting it from now? A From Keystone, I think.

Q When did you you change from Pure to Keystone? A I don't know the exact date.

Q It was right after these engines blew up, was it not? A Yes, sir.

Q As a matter of fact, the oil you were getting from Pure was not new oil was it? A Yes, it was new oil, yes, sir.

Q It was reused oil, was it not, bulk oil in a barrel which had been used one time? A I don't know about that.

I know it come in drums, that is all I know about it.

Q Did it have Pure Oil on the drums, written on the [fol. 447] drums or were they just plain drums? A They were just blue and white drums is all I know.

Q You do not remember now that it was used oil? A The only thing I can say is that they bought the oil from Pure Oil, that is all I can say. I don't know if it is used oil or not, I mean, as far as that is concerned.

Q After these engines blew up, you changed your supplier of oil, is that not true? A We changed over to Keystone.

Q What was wrong with Pure Oil? A You would have to ask Mr. Gissel or somebody like that, I don't know.

Q Did you go back and feel of any of the oil that was in the drums to see if it had "sand" in it? A Not that I know of.

Q Do you know if the mechanic did? A No, sir, I don't.

Q Do you know if anyone tested that oil that was left in the Pure Oil drums? A The only thing I can say is, like I said before, that we took the oil that we found in the

trucks, took it to Keystone to have it sent off and we took a sample of the other oil that was in the other drums from Pure Oil and sent it too.

That is all I can say.

[fol. 448] Q You do not know what the result is? A No, sir, I don't.

Q But you do know that, after this was done, you started buying your oil from Keystone and quit buying it from Pure? A Yes, sir.

Q I believe I asked you, the last question I asked you the other day to which there was no answer, I asked you if you had ever discussed with either of the Mr. Gissels the fact that you were for or against the Union? A No, sir.

MR. JENKINS: Objection, motion to strike.

TRIAL EXAMINER: Overruled, motion denied.

The answer may stand.

Q (By Mr. Baker) You say you had not? A No, sir.

Q You have had no discussion with them, the Gissels at all, relative to the Union? A No.

Q You haven't had any discussion to date with them regarding the Union, is that correct?

MR. JENKINS: Motion to strike, it is irrelevant and not material to any issues charged in the Complaint in this case.

TRIAL EXAMINER: Overruled.

THE WITNESS: What was the question?

[fol. 449] Q (By Mr. Baker) You have not had any discussion with them at all as of today with regard to the Union? A All I know, I am sitting here in Court today, that is all I know.

Q But you have not discussed what you knew about the Union or anything in connection with the Union before today or before—

MR. JENKINS: I object.

TRIAL EXAMINER: Let him finish his question.

Q (By Mr. Baker) I was simply saying that you have had no discussions or discussion with the Gissels at all as far as the Union is concerned before today, or before you took the witness chair two weeks ago? A No, sir.

MR. JENKINS: Objection, motion to strike; it is highly improper.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) As far as you knew, the Gissels had no idea how you felt about the Union, is that right?

MR. JENKINS: Objection, motion to strike, irrelevant to any charge in the Complaint.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) Is that true as far as you are concerned, the Gissels had no idea, prior to your taking the witness stand two weeks ago, how you felt about the Union; is that right?

[fol. 450] MR. JENKINS: Objection and motion to strike, the fact that he had no idea calls for an opinion, it is an opinion question which is not relevant to any issues properly before this hearing.

TRIAL EXAMINER: The reporter will read the question.

(The reporter read the pending question.)

TRIAL EXAMINER: State your question in terms of fact, Mr. Baker.

Q (By Mr. Baker) As far as you know, the Gissels had no idea how you felt about the Union prior to your having taken the witness stand two weeks ago?

MR. JENKINS: Objection.

TRIAL EXAMINER: Sustained.

MR. JENKINS: It is highly improper—

TRIAL EXAMINER: You can ask him if he knows of any events.

Q (By Mr. Baker) Do you know—

MR. BAKER: Well, Your Honor, I think the witness can testify if he knows whether or not either of the Gissels knew how he felt about the Union.

MR. JENKINS: I object to the statement of Counsel—

TRIAL EXAMINER: You may ask if he had made any statements—

MR. JENKINS: I object to the line of questioning and—

[fol. 451] TRIAL EXAMINER: Has the witness made any statements to the Gissels—

MR. JENKINS: What this witness knew that somebody else knew is grossly improper as a basis from which to evidence an opinion.

TRIAL EXAMINER: You have a standing objection to the line of questioning, Mr. Jenkins.

MR. JENKINS: If Your Honor please, in view of the proceedings here, we are going to have to make a technical record in this case and if Your Honor does not mind, I am going to object to the questions since there is a variation in the grounds.

TRIAL EXAMINER: Very well.

State your question in terms of knowledge, Mr. Baker.

Were you aware of any facts—

MR. JENKINS: We object to the Trial Examiner instructing the Government Counsel as to how to ask his question and phrasing it for him.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) Have the Gissels ever said anything to you indicating that they knew that you were either for or against the Union?

MR. JENKINS: Objection, that calls for a conclusion and an interpretation of the remarks. The word, "Gissels" covers about fifteen or so people and it is not proper material going to any allegation in the Complaint in this case.

[fol. 452] TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) You may answer. A What was the question again?

Q All I am really wanting to know, Mr. Moore is whether or not you told the Gissels, any of the Gissels, Mr. Charles or Mr. Herbert Gissel, that you were against the Union or that you were for the Union?

MR. JENKINS: Objection, it is not proper whether he made the statement that he was for the Union or against the Union, it just is not proper; it is immaterial to any issue in this case.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) You may answer. A Well, I never said anything to the Gissels or the Gissels never said anything to me, if that is what you are wanting to know.

Q Now, getting back to my question.

MR. JENKINS: Motion to strike.

TRIAL EXAMINER: Overruled.

Q (By Mr. Baker) As far as you know, as far as your knowledge is concerned, the Gissels did not know, prior to your taking the witness stand two weeks ago, how you felt about the Union?

[fol. 453] MR. JENKINS: Objection, this is not proper.

TRIAL EXAMINER: I think you have an answer that he never said anything to anyone about how he felt about the Union and no one said anything to him.

* * * *

DANIEL ELLIS

having been called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JENKINS:

Q Please state your name for the record? A Daniel Ellis.

Q How long have you worked for Gissel Packing Company? A Going on nine months this last time.

Q What is your position with Gissel? A Mechanic.

Q Do you have charge of the maintenance of the trucks? A I do.

[fol. 454] Q Mr. Ellis, I will ask you to direct your attention to a period in January of this last year, this year, 1965, after the Union had demanded that this company recognize them down there, did any unusual incidents occur with respect to the trucks? A Yes, they did.

Q Will you explain for the Board what occurred? A Well, to start with, we found, I would say, sand in the motors.

Q Can you tell me the circumstances under which you discovered it; how it came to your attention that there was sand in the motor? A I was changing oil on one of the

trucks and, when I drained the oil out, this was just after we blew a couple of motors.

Q Yes? A After we drained the oil out, I called Charles' attention to it and I said, "Look here, there is a handful of sand in that motor; it is something gritty, I don't know what it is, but it looks like sand."

Q All right, continue. A That is how we discovered this sand in the motors.

Q Now, is there any sand around the area there? A Not now there isn't.

Q Was there sand at that time? A Yes, sir, there [fol. 455] was a truckload of sand over by the gas pump.

Q I see.

Do any of the employees of the company move their trucks around in the area where the sand pile was located at that time? A Well, yes, they do.

Q How many truck motors actually blew out? A We had four to blow out in about six weeks.

Q What was the cause of this? A I would say sand.

MR. BAKER: We object.

TRIAL EXAMINER: Overruled.

Q (By Mr. Jenkins) You are a mechanic, is that correct? A That is right, sir.

Q You understand motors, do you not? A Yes, that is right.

Q How long had you been a mechanic? A Twenty-five years.

Q Hav you worked for other garages? A I have been in business for myself and I have worked for other people, yes, sir.

Q You understand how combustion engines operate, such as truck motors, do you not? A Yes, that is right. [fol. 456] Q Based on your experience and knowledge, do you feel—I will start again.

Based on your experience and knowledge, you say that you feel that the sand that was in these motors caused them to blow up, is that right? A That is right, sir.

Q Now, had you ever had any of this trouble before January, any trouble of this type before?

MR. BAKER: We object, this witness has only been an employee of the company for nine months.

Q (By Mr. Jenkins) To your knowledge, had the company ever had any trouble of this type before—

MR. BAKER: Objection, we object to the—

THE WITNESS: I was there before, you know.

TRIAL EXAMINER: Overruled.

Now, Mr. Ellis, when there is an objection, please do not answer until it has been ruled upon and I would like to ask again that you speak up since there is an air conditioner over my head and I can hardly hear you.

Will you do that?

THE WITNESS: Yes, I will.

TRIAL EXAMINER: Now your answer was what?

THE WITNESS: Would you repeat the question?

Q (By Mr. Jenkins) The question was, to your knowledge, had there ever been any difficulty with sand in [fol. 457] the motors or the motors blowing up before this? A No.

Q As I understand your testimony, this incident occurred very shortly after the Union demanded that they be recognized, is that correct?

MR. BAKER: I am going to object to the implication of that question.

It is leading in the first instance, Counsel is testifying. If the witness knows when it happened, let him testify to when it happened.

TRIAL EXAMINER: Do you know when this happened; I know you will not know the exact date.

THE WITNESS: No, I don't know.

MR. JENKINS: I said in January, Your Honor.

THE WITNESS: It was January or February, along in there.

Q (By Mr. Jenkins) Now, about this same time, did you have any problems with any vehicles that were operated by Herbert Mounts, who is known as "Red" Mounts? A Well, yes, I did.

Q Would you explain the circumstances of that? A Well, he blew one up, I think, upon the turnpike somewhere.

I asked him why, when his truck started knocking, he did not pull it over. He said, "I ran it until it caught on fire."

[fol. 458] MR. BAKER: I am going to object to that; it is hearsay.

This witness, I assume, is not a supervisor, so it would not have been in the normal course of business, what Mounts said.

I assume he is offering it for the truth of the matter. It is clearly hearsay.

TRIAL EXAMINER: Is this man a supervisor?

MR. JENKINS: He is in charge of the garage. He is the only one. I do not know whether you would classify him technically as a supervisor, or not, but he is in charge of the garage.

But, what difference does it make, what does his supervisory status have to do with whether it is hearsay?

TRIAL EXAMINER: A statement made by one employee to another employee has a different status than a statement made by an employee to a supervisor.

What do you do in the garage?

THE WITNESS: I am head mechanic, I run the garage myself, no one else does. I take care of all the equipment, I am in charge of all the equipment.

TRIAL EXAMINER: What else do you do?

THE WITNESS: Nothing.

TRIAL EXAMINER: What do you have to do with the other employees?

[fol. 459] THE WITNESS: Well, I don't have nothing to do with them unless they come over to the garage. When they come over to the garage, I tell them what to do.

TRIAL EXAMINER: You tell them what to do?

THE WITNESS: Yes, ma'am.

TRIAL EXAMINER: Do you assign them work?

THE WITNESS: When I want someone to help me, I go to Charles and he sends them to me, whoever I want.

TRIAL EXAMINER: He may answer.

MR. BAKER: I do not believe his supervisory status has been established by that, Madam Trial Examiner;

TRIAL EXAMINER: He may answer the question.

MR. BAKER: I would like the record to note my exception, because that witness was on the stand and there is no showing that this man—

MR. JENKINS: I object to Counsel for General Coun-

sel arguing with the Trial Examiner after she has made her rulings.

TRIAL EXAMINER: He may state his reasons for excepting to my rulings just as you state your exceptions to my rulings.

Go ahead.

MR. BAKER: I am reminded of pots and kettles, but I will not go into that.

[fol. 460] He is stating what a witness has said when that witness has heretofore been on the witness stand and it seems to me that the proper way to have gotten evidence as to what Mounts said would have been to ask Mounts about it.

TRIAL EXAMINER: The objection is overruled; he may answer the question.

MR. JENKINS: I will ask the reporter to read the question.

TRIAL EXAMINER: Will the reporter read the previous question and I believe there was an answer.

(The reporter read the previous question and answer.)

Q (By Mr. Jenkins) Now, after he said that, after Mount said that he ran it until it caught on fire, did he make any other statement to you? A Yes, he did, he said, "If it wasn't for a guy like me tearing these trucks up, you wouldn't have no job."

* * * * *

Q (By Mr. Jenkins) Now, after these incidents with respect to the trucks occurred, did you check out the oil supply there to see if you were getting oil with sand in it from the manufacturer; I mean, what was done along that line, if anything? A We taken (sic) a sample of the oil, some oil come out of one of the motors, one that I found sand in, and supposedly they were supposed to have sent it out and had it analyzed.

[fol. 461] We have not heard back on it as yet.

Q Did you check your supply on hand in any of these barrels or containers or wherever you kept it to see if there was any sand in them? A We did.

Q Was there any sand in those? A We taken (sic) a sample of the barrels and taken (sic) a sample out of the truck, and sent them both off and we haven't heard back.

TRIAL EXAMINER: Can you tell me when you sent them, when you sent off the samples?

THE WITNESS: Ma'am, no, I could not.

It was somewhere along in January or February, about when we started having all the trouble.

Q (By Mr. Jenkins) Who did you send the samples to? A I think it was Pure Oil.

Q * * * Where did you actually store the oil before it was put in the individual trucks? A In the garage.

Q What kind of containers did you store it in? A In fifty-five gallon drums.

Q I see.

[fol. 462] Did the employees have access to that container?

I will put it this way.

If an employee had wanted to put sand in that container or those containers, would it have been possible; was it open in such a way that they could have gotten in there? A Yes, it was.

Q These incidents all occurred over approximately how long a period there in January and February? A I would say about six weeks when we had the trouble.

Q Now, you were acquainted with Mounts, were you not? A Yes.

Q You knew him? A Yes, sir.

Q He was a truck driver for the company, was he not? A That is right, sir.

Q Is there any reason that you know of that a truck driver such as Mounts, when a rod broke such as he reported to you had happened to him, would not have stopped their truck rather than running it on until it caught fire and then saying that he was tearing up the trucks to give you a job?

MR. BAKER: I object, that is highly improper, it is an improper question.

What difference does it make what Mounts told him.

TRIAL EXAMINER: What would be the normal practice would be the question.

[fol. 463] Q (By Mr. Jenkins) What would be the normal practice of a driver under these circumstances where he had a rod break or a rod go through the motor such as Mr. Mounts reported to you? A I would not know hardly how to explain it. I don't see any reason why if he is a truck driver, that he would not know or have enough knowledge to pull over and stop when he knew it was going to knock the side of the motor out.

TRIAL EXAMINER: When did this incident happen?

THE WITNESS: Sometime in January.

Q (By Mr. Jenkins) At any time, did the company change its supply of oil from one company to another, this year? A Yes, we did.

Q When did you start buying from a new company, if any? A I don't know, a couple of weeks after we were having all of the trouble. I told Charles it would be a good idea to change oil companies, you know.

Q Right.

Was the oil that was taken from, that you were getting from Keystone, I believe it was at that time, is that correct? A No, we were getting it from Pure Oil at that time.

Q I see. A We are getting it from Keystone now.

Q Yes, I see.

[fol. 464] Was the oil that you were getting from Pure Oil at that time used in other trucks? A Yes, it was.

Q Did you have any trouble with those trucks? A (Nodding negatively.)

TRIAL EXAMINER: You will have to speak up so the reporter can hear you and get it on the record.

THE WITNESS: No, ma'am, we did not.

Q (By Mr. Jenkins) Was the oil bought a barrel at a time or several barrels at a time? A Just one barrel at a time.

Q Was the oil that was in the barrel at the time these incidents occurred used also in other trucks at that same time? A That is right, sir.

Q Did they have any trouble with those trucks? A No.

* * * *

[fol. 465] CROSS-EXAMINATION

BY MR. BAKER:

Q You say you told Mr. Charles Gissel that you should get oil from some other place? A I told him it would be a good idea to change.

Q Why; why did you think it would be a good idea to change? A Well, I didn't know whether it was in the oil or what. I mean, I could not swear there was sand in there but, I mean, there was a whole handful of sand.

* * * * *

Q Go ahead. A I told Charles I thought it was sand. There was a sand pile over by the pumps and it was real gritty, I mean, you are not going to put a whole handful of sand down your motor and expect your motor to hold up.

Q Did you test the oil in the barrel your self to see if it had any sand in it? A We found—we couldn't find anything. I called it to Charles' attention and he came over there and I said, "Charles, we should drain the oil out of the barrel and take the oil we got out of the motor and send it off and have it analyzed."

We did that and we have not heard back as yet.

[fol. 466] Q Did you try to feel of the oil that was in the barrel to see if it had sand in it too? A Yes, we did.

Q Did you feel anything? A No, not in the new oil, no.

Q By the way, this new oil, was it reused oil? A Well, it shouldn't be. I mean, it comes right direct from Pure Oil. It is in fifty-five gallon drums.

Q Do not all oil companies sell reused oil, reprocessed oil? A That, I couldn't tell you.

Q For some reason, you thought you ought to change suppliers? A Well, yes.

Q Now, at the time you thought there was sand in the oil, did you consider then or think that it was put in there by the employees or an employee? A Well, let's put it this way, it did not get in there itself, that is for sure. Somebody had to put it in there.

Who did it, I don't know.

Q If it was in the oil? A That's right.

Q You knew it was in the oil? A That's right.

But I drained the oil out of a new truck, another [fol. 467] truck, I caught it just in time, the—at the time Red's blew up. In fact, I didn't catch it on the truck, the trucks had already blew up, because when it knocked the side of the motor out, there wouldn't be no oil left in them.

Q So, the sand you found was in these trucks that did not blow up, is that right? A One truck, yes.

So, the one that we sent off to have analyzed was the one that Mounts was driving, Truck No. 71.

Q I thought you said— A There was enough oil in the truck when I pulled the pan down, that we got about, I would say, a half pint of oil out of it and that is what we sent off.

Q Is it not true that anytime you take a pan off of a truck, you are going to find a lot of slush and grit and stuff down in there, is that not correct? A We change oil every week on those trucks.

We change it every week.

Q You described what happened to Mount's truck; it started knocking and doing this and doing the other thing.

How do you know what happened to the truck? A Well, he told me personally himself that he threw a rod in it and that is when I said, "Why didn't you pull over and stop?"

[fol. 468] Q I see. A He said he ran it about five miles after the rod started knocking.

He said finally it caught fire and then is when he pulled it over, pulled the truck over and stopped it.

Q That is what he said, what he told you? A Yes, that is what he told me.

Q I see. A That is all I know, what he told me.

Q Is it not possible for a rod to be thrown and instantly go to the side of the motor without causing any preliminary warning or noise? A Well, he have had rods, I have had rods to go out before in different cars.

Unless you keep driving them, they won't go out the side.

Of course, when they start knocking, you can hear them, if you know anything about a truck at all.

Q All right. A Naturally, if you just keep driving it, it is naturally going to come all the way loose and come out the side.

Q Was Mounts a mechanic? A I couldn't tell you, he never did work with me.

Q You do not know what he knows about cars? A No, I don't.

[fol. 469] Q You do not even know, of your own knowledge, whether or not this rod actually knocked or made a noise before it went out, do you? A Yes, I do.

Well, I checked them trucks before they go out.

Q I am asking you, of your own knowledge, you do not know if the rod gave any preliminary warning before it came through the side of the block? A I will say this, It was not knocking when he left with it.

Q I do not believe that is quite the question.

It is possible for a rod to go out without knocking first? A That is right.

Q You do not know, in this situation, whether it did do that or not? A That's right, sir.

Q Now, you say this happened in January? A The latter part of January or the first of February.

Q Did you report to anyone what Mounts had told you? A I told Charles.

Q When? A When he told me.

Q As soon as Mounts told you what had happened, you went to Charles and told him? A I told Charles to pull him off the truck.

[fol. 470] Q Did he? A I guess he did.

Q Did he drive after that? A No, he did not.

Q All right. A He certainly did not.

Q But, he worked after that? A Yes, he did.

Q It was sometime after that before he was let go, was it not? A I don't know how long it was.

I don't have anything to do with the plant across the street, I run the garage only.

Some of the boys, I don't even know their names. I know their faces, but I don't even know their names.

Q You do all the work yourself? A That is right.

Q Who do you get help from, you say when you need help, you get it; how often do you need anybody over

there to help you? A Well, like a spring, a big heavy spring to put in, I call them over to help me lift the spring up in there, I get help for that.

Maybe once or twice a week.

[fol. 471] Q About how often, did you say? A Maybe once or twice a week.

Q Has anybody helped you this week? A Yes.

Q Who? A Rush Moore.

Q Who helped you last week? A Nobody.

Q Who helped you the week before that? A Nobody.

Q Who helped you the week before that? A Nobody, I don't think.

Q How about three of four weeks ago? A Well, I haven't had any major trouble in the last three or four weeks that I know of.

Q How about the last two or three months, besides Rush Moore, who has helped you? A George Collins.

Q When was that? A He helps me every Saturday grease and change oil and do little minor repairs, maintenance work.

Q Where does he work otherwise? A He works over in the sausage room.

Q George Collins, did you say? A Yes, that is right.

[fol. 472] Q He helps you every Saturday? A Every Saturday, but not all day.

Sometimes he helps me all day and some days he does not come over until 10:00 or 11:00 o'clock or noon maybe and then he helps me until around 3:00 or 3:30 o'clock. It is just whenever I get done and close the garage up.

Q And he changes oil and greases the trucks? A Yes, he helps me, yes, sir.

Q Did you take the oil out of all the trucks? A Pardon me?

Q Did you take the oil out of all the trucks when one of them blew up; did you check the oil in all of the trucks? A No, sir, I didn't.

Q You did not bother to see if any of the others had any sand in them? A No.

Q Why did you not do that? A Well, they were running all right, I didn't see any sense of that.

* * * * *

[fol. 474] ROMAN EDWARD LEWIS

was called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JENKINS:

Q What is your name? A Roman Edward Lewis.

Q How long have you worked for the Gissel Packing Company? A Full-time, two or two and one-half years.

Q Did you work for them part-time before that? A Yes.

Q When? A During my high school years.

Q Are you related to any members of the Gissel family? A Yes, sir.

Q To what party are you related and what is the relationship? A Mrs. Gissel is my grandmother.

Q What is her first name? A Paula.

[fol. 475] Q During 1965, what has been your job down at the Packing Company? A I work in the shipping room and whenever needed, on delivery trucks.

Q What do you do in the shipping room? A We fill orders to be shipped out to the packing places.

Q Do you work yourself or do you direct others, other people's work? A Well, I work by myself and, if there is other workers, I can direct them.

Q You are acquainted with Charles Gissel, are you not? A Yes, sir.

Q I want to direct your attention back to a week in April, about April 20, on a Tuesday following a Saturday when there was a union meeting at the Governor Cabell Hotel.

Do you place in your mind the time I am talking about, sir? A Yes, sir.

Q On or about that time, did you have any conversations with Herbert "Red" Counts with respect to his work or where he was working or any such conversations along that line; and, if so, state what was said? A With his work?

Q Yes, or where he was working or where he intended to work? A Yes, I think so.

[fol. 476] Q If you did, state as best you can remember what he said and what you said, if anything. A He was to work with his father-in-law on a plumbing job.

Q How did you get this information? A Well, we were talking at or on break time in the morning.

Q Where abouts in the plant were you when you were talking? A Outside the office or out on the shipping platform.

Q Exactly what did Red Mounts say to you on that occasion, if you remember? A That he was, that his father-in-law was a plumber, and he had made some money, twenty dollars I would say, I am pretty sure, that is what he said he made that afternoon before.

Q Do you remember on what day of the week this was that you had this conversation with him? A No, I couldn't.

Q Do you recall any incidents pertaining to or about when he did or did not show up for work or finish out a day on Wednesday at about this time?

MR. BAKER: I object, that is leading.

TRIAL EXAMINER: Overruled.

Q (By Mr. Jenkins) Can you answer the question? A Will you repeat the question, please?

[fol. 477] Q Do you remember anything or any incident that happened about Mounts either staying or not staying and finishing his day's work about the time of this conversation; either before it or afterwards? A It was Wednesday that he took off, I think, yes, sir, it was on Wednesday I would say.

Q What were the circumstances of that; tell us what happened?

* * * *

A Well, he worked the morning of Wednesday and he had took off Wednesday afternoon without leaving any information that he was going and it was Tuesday that we were talking, the day before.

TRIAL EXAMINER: How do you know?

THE WITNESS: Because I just remembered it was the day before and it was Wednesday which is our busy day and that was the day he took off.

Q (By Mr. Jenkins) Now, did he say anything to you on Tuesday about taking off? A No, sir, he just said he had worked and made twenty dollars in an after-
[fol. 478] noon.

* * * * *

Q What was the schedule at that time, Mr. Lewis, as to what sort of schedule—well, what sort of schedule was Mounts and Frye on at that time? A They were working full weeks but at that time the business, I think, had slacked off and they were sent home a half day early the day that he had made the twenty dollars; and, Wednesday was always a busy day, I mean, we always worked until late in the evening.

Q Was—or, has anybody ever been sent home early on a Wednesday? A No, sir, never on Wednesday.

* * * * *

[fol. 479] Q Was this a regular company rule or policy that everybody had to work on Wednesday, the busy day? A Yes.

* * * * *

Q Now, you say that Mounts and Frye were sent home early.

Were other employees sent home early also by reason of the slack work? A Yes, sir, there were others.

Q Now, what was the first you knew, if this was in April, that Mounts and Frye did not stay and finish out the day on Wednesday?

How did this come to your attention? A We all worked in the shipping room—

Q When you saw "We," who do you mean? A I mean employees that were scheduled to work in the shipping room.

Q Was that Frye and Mounts? A Yes, they were two of them.

Q Was that you? A Yes, sir.

Q Was that other employees too? A Yes, sir.

[fol. 480] Q All right, go ahead and tell us what happened? A We were all working in there in the morning and when noon hour came, everybody took their lunch, and then when it was over, they didn't report back to work.

Q When you say "They didn't report back to work," who do you mean? A Jerry Frye and Herbert Mounts.

Q All right, and you observed that they did not report back to work? A Yes, sir.

Q What did you do, if anything? A There wasn't nothing I could do about it.

* * * * *

[fol. 481] Q After you observed that they were not did you make any investigation to find out where Mounts [fol. 482] and Frye were and what they were doing? A Yes, sir.

Q Now, you tell the Examiner exactly what you did? A I told Charles Gissel that—

TRIAL EXAMINER: This is Charles Gissel?

(Indicating)

THE WITNESS: Yes, ma'am.

Q (By Mr. Jenkins) Go ahead. A I told Charles Gissel about what they, about what Red was telling me, about him working and that he could make more money there and—

Q Now, where was this where he was working? A It was between 18th and 19th Street on or just off of Third Avenue in the rear alley.

Q And Red had told you on the day before that he could make more money working there for his father-in-law? A Yes, sir.

Q All right. Now, you told this to Charles the day on Wednesday that you discovered they were not there, is that right? A Yes, sir.

Q All right. I will ask you whether or not, to your knowledge, Charles knew they were not there until you told him?

* * * * *

[fol. 483] A Well, I don't know whether he already knew that they were gone.

Q What did you do then? A He asked us to go up to where they were supposed to be working and check to see if they was on another job.

Q All right. Did you do this? A Yes, sir.

Q Where did you go? A I went to the address on

the street I gave a while ago, 18th Street off of Third Avenue.

Q Where did you get that address? A It is where he told me they were working.

Q Who told you? A Herbert Mounts.

[fol. 484] Q All right. When you went there, did you—what did you see? A Jerry Frye and Herbert Mounts were working on a plumbing job.

Q What time of the day was it on Wednesday when you observed this? A The time, I couldn't give it definite.

Q Well, when in relevance to noon? A Well, it was two to three hours after dinner, after 12:00.

Q That would make it about what time then? A 2:00 or 3:00 o'clock, 3:00 o'clock, somewhere in there.

Q Between 2:00 and 3:00 o'clock in the afternoon? A Yes, sir.

Q At this time, was everyone else working down at the plant? A Yes, sir.

Q Now, when you saw this, what did you do, if anything? A There were four of us, three besides myself, and I just saw them working and came back to the plant and reported it and went back to work.

Q Who did you report it to? A Charles Gissel.

[fol. 485] Q Who were the other ones who went with you? A Dan Ellis, Rush Moore, and Cliff Carley.

Q When you got up to this job where they were working, during your company business hours down here, did you have any conversation with Mounts or Frye up there? A No, sir.

Q Did you go on to th b site? A Yes, well, they were working just off th alley and we were standing in the alley and looked right at them.

Q Then you went back and reported this? A Yes, sir.

* * * *

Q (By Mr. Jenkins) Tell about any other things where they were asked to do something in their work, if there is such an incident; if there is not, say there is not. A Well, in shaking hides at this time, several of the fellows that was hired for shaking hides had quit and it put them short back there and we were to take em-

[fol. 486] ployees from the plant to finish up the job.

They were asked to go back and refused.

Q Now, when you say "They" who are you talking about? A Kenneth Adkins, Jerry Frye, and Herbert Mounts.

Q Did other employees that you requested to do this work do it or not? A Yes, sir.

Q Had Jerry Frye and Herbert Mounts shaken hides before? A Yes, sir.

Q This time, when you ask them, they refused to do it? A Yes, sir.

Q What did they do, if anything—

MR. BAKER: I object to that type of question, Your Honor.

TRIAL EXAMINER: What did they say?

THE WITNESS: Well, we had had a conversation before, you see, it lasted approximately three days, and I was talking with one of them, Jerry Frye the day before and he said that they did not intend to do it; that they were going to quit first.

So, when I got employees from other parts of the plant and still needed some more, I asked them and they refused.

TRIAL EXAMINER: What time of day?

THE WITNESS: It was approximately 3:00 in the evening.

[fol. 487] Q (By Mr. Jenkins) They had done this work before when requested, is that right? A Yes, sir.

Q Now, for the first time, they refused, is that right? A Yes, sir.

* * * * *

Q (By Mr. Jenkins) Was it or was it not part of your duties the day they were to shake hides, to go around and tell the various employees that they were to do it? A Yes, sir, Mr. Gissel was away at the time and I had been told, he had told me to draw from the plant if needed.

Q Had you ever done this before? A As working over them?

Q Yes. A I had worked with them.

Q I see. No one questioned your authority to direct them, did they? A No, sir.

* * * *

[fol. 488] Q (By Mr. Jenkins) You worked in the same area with Mounts and Frye, did you not? A Yes, sir.

Q During March and April of this year, describe their record as far as whether they would appear on time for work or not? A Well, working time would start at 6:00 o'clock and they were late pretty often and Charles had told them they would be dismissed if they didn't start coming in on time.

Q When he told them this, did this correct the situation? A No, it continued.

* * * *

CROSS-EXAMINATION

BY MR. BAKER:

Q Did they punch a time card? A Yes, sir.

[fol. 489] Q If they were late, the time cards would indicate that, would it not? A Yes, sir.

* * * *

[fol. 493] Q Had he laid [off] Mounts and Frye before at 11:30 before the Monday and Tuesday of this week? A Yes, sir.

Q When? A Before.

Q When? A I don't know exactly.

Q Do you know at all? A Do I know all of what?

Q Do you know at all if he ever let them off, let them go at 11:30 before? A Yes, sir, he had let them go.

Q Tell me when? A Well—

(Pause)

TRIAL EXAMINER: You do not have to know the exact day; you can estimate the time.

Was it a month, three months, six months or a year?

THE WITNESS I could not say to that, just that he had, in the weeks before maybe, just laid them off for a half a day.

[fol. 494] Q (By Mr. Baker) Mr. Lewis, you are not telling us the truth, are you?

MR. JENKINS: I object.

TRIAL EXAMINER: Sustained.

MR. JENKINS: That is grossly improper and I ask that Counsel be reprimanded for making an insulting remark like that to the witness on the stand where he is in a situation where he cannot reply and does not have his own Counsel.

That is grossly improper.

TRIAL EXAMINER: The record will show your statement.

Continue, Mr. Baker.

Q (By Mr. Baker) Now, you went up there to catch these boys working; you knew they were going to be there, did you not?

MR. JENKINS: Objection, argumentative.

MR. BAKER: I am not arguing.

Q (By Mr. Baker) He said on Tuesday that he was going to be up there on Wednesday, did he not? A He said he was—

Q He said he was going to go, did he not? A No, sir, he just said that he had been working there the day before.

Q Now, Mr. Lewis, you knew on Tuesday that he was not going to work on Wednesday afternoon because he was told not to, is that not correct?

[fol. 495] MR. JENKINS: Objection, he is badgering the witness.

Q (By Mr. Baker) I want to remind you are you under oath, sir.

TRIAL EXAMINER: Mr. Baker, ask him what he knew from his own knewledge.

Q (By Mr. Baker) Did you have a conversation with Mounts, you did on the day before, did you not? A Yes, sir.

Q You knew, from that conversation, that he would be working up there on Wednesday? A No, sir, I did not.

Q You went and told Mr. Gissel on the next day that is where he was, did you not? A I said, I said that is where he told me he had worked the day before.

Q He told you he was going to be there, did he not? A I thought so, yes, sir.

Q And you took four people up there? A Yes, sir.

Q To be witnesses? A Yes, sir.

* * * *

[fol. 498] Q (By Mr. Baker) At the time these two men were told to come in at 5:30 and work until 11:30, there were others, other employees who were told to come in at 12:00 and work until some time in the afternoon, were there not? A I don't know about that. I know about they were told to come in at 5:30 and work until I don't know when.

Q You do not know how long they were told to work? A No, sir.

* * * *

[fol. 500] TRIAL EXAMINER: You say that the employees never left on Wednesday, never left early on Wednesday?

THE WITNESS: Yes, ma'am, that is right.

Q (By Mr. Baker) Never in the history of the company did they ever leave early on Wednesday? A I couldn't say to that; I have not been there working through the history of the company. I am not as old as the company.

Q Did Mr. Gissel tell you why he was laying these boys off at 11:30 on Monday and Tuesday? A I said once that he laid them off because of lack of orders to fill.

[fol. 501] REDIRECT EXAMINATION

BY MR. JENKINS:

* * * *

Q My point is, Mr. Lewis, was this schedule worked out for Mounts and Frye alone or were other employees involved in it also? A There was one other that I can recall now.

Q Who was that? A Elmer Maynard.

[fol. 502] Q All right. Did Elmer Maynard work on Wednesday afternoon, the Wednesday afternoon that you

had to go looking for these other fellows? A (Pause.) I think he was.

* * * *

RECROSS EXAMINATION

BY MR. BAKER:

Q Mr. Lewis, is it not a fact that Elmer Maynard came in at noon and worked in the afternoon; he was not coming in at 5:30 in the morning, was he?

He is the man who came in at 11:30 and worked in the afternoons when the other boys were gone, is that not right? A No, sir, I can't quite remember that.

Q You do not know whether he is working in the morning or whether he is working in the afternoons? A No, sir, I don't.

Q You do not know whether he worked on Wednesday morning? A No, sir.

Q You do not know whether he worked Wednesday afternoon? A No, sir.

* * * *

[fol. 505] TERRY LEWIS

was called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JENKINS:

Q Now, Mr. Lewis, it is very difficult to hear in here and please try to talk loudly so that everyone can hear you.

What is your name? A Terry Lewis.

Q Now, if you will talk very slowly, it will be easier for all of use to hear you.

Do you work down at the Gissel Packing Company? A Yes.

Q What is your job down there, Terry? A To work in the shipping room and load trucks.

TRIAL EXAMINER: Please speak up so that I can hear you.

THE WITNESS: To load trucks and work in the shipping room.

[fol. 506] Q (By Mr. Jenkins) How long have you been down there, Terry? A I work part-time, I go to school.

Q How long have you been working part-time? A Off and on?

Q Yes. A I guess about three summers and after school.

Q Do you work down there in the winter at all? A I just work after school in the winter.

Q Do you do the truck loading yourself or do you tell other people what to do? A Well, no, sir, I help load.

Q You just work yourself? A Yes, sir.

Q Are you hourly paid? A I get the same wages as the rest of the employees.

Q I see. Do you have any right to hire or fire anybody? A No, sir.

Q You do not consider yourself the supervisor or a boss of any body down there, is that right? A No, sir.

MR. BAKER: We will stipulate that he is not a supervisor.

Q (By Mr. Jenkins) Now, Terry, in April of this year, this is last April, did you see any notice at any time about a union meeting for any of the employees down there? A Yes, sir.

[fol. 507] Q Where did you see the notice? A In the men's restroom.

Q What did the notice say or what the—what was the substance of it? A "Sehon-Stevenson and Gissel Packing Company and Logan Packing Company."

Q Now, you were saying Sehon-Stevenson, Gissel Packing Company, and Logan Packing Company? A Yes.

Q All right, go ahead. A It said that all employees will meet at the Governor Cabell Hotel on Saturday, I think it was at 2:30.

Q Was this on or about April 17, was this the Saturday or do you remember? A I don't remember the date, but it was on a Saturday afternoon.

Q And it said "All employees meet at the Governor Cabell Hotel", is that right? A Yes.

Q You saw this notice in the men's restroom? A Yes, sir.

Q All right. Now, did you or did you not go down to [fol. 508] the Governor Cabell on this Saturday? A Yes, sir, I did.

Q Were you or were you not going to go to the meeting? A I was going to the meeting but I changed my mind.

Q You were but you changed your mind? A Yes, sir.

Q Tell us what happened? A Well, I saw the employees there and I was afraid of the employees; so—I figured they would say something about it. I was a little worried then.

Q What made you worry when you got down there? A I figured I didn't have a right to be there really because—

Q Well, did anybody say anything or do anything that lead you to that conclusion; did they give you any funny looks or anything?

MR. BAKER: Oh, I object.

Q (By Mr. Jenkins) Tell us what happened?

TRIAL EXAMINER: Just ask him what happened.

Q (By Mr. Jenkins) Tell us what happened.

Terry, tell us what happened then? A Elisha Watts made a smart remark, he asked me what I was doing down there and gave me a dirty look.

Q What conclusion did you draw from this?

MR. BAKER: Objection.

TRIAL EXAMINER: Sustained.

[fol. 509] As a result of this, what did he do, that is your question.

Q (By Mr. Jenkins) As a result of this, what did you do? A I went on outside.

Q I see. A I went outside and stayed.

Q When you went down to the Hotel, did you try to sneak around and hide from anybody? A No, sir.

* * * * *

[fol. 510] Q Did you have a conversation with Watts? A Yes, sir.

Q Now, did you see any of the other employees down there? A Yes, sir.

Q Were you hiding from them? A No, sir.

Q Well, there is testimony here that you, at some stage of the day ran away from the hotel; did you run away from the hotel? A No, sir, I did not.

Q Now, while you were there at the hotel, did you make any telephone calls? A Yes, sir.

Q Who did you call? A I called by girlfriend and my aunt.

Q All right, what was the general purpose of your call to your girlfriend, was it social or did it have any other purpose? A Well, no.

Q Did it have anything to do with the packing company? A No, sir.

Q All right. You called your aunt, is that right? A Yes.

[fol. 511] Q What is her name? A Freda, Alfreda.

Q Alfreda? A Yes, sir.

Q What is her last name? A Alfreda Closterman.

Q Spell that for the reporter, please. A C-l-o-s-t-e-r-m-a-n, Closterman.

Q What did you say to Mrs. Closterman? A She asked me where I was and I told her and then she told me to come on back.

That was it.

Q Did you give anybody a report on who was there? A I don't remember what I said to her now. I just told her I was up there and she told me to come on back.

Q After you got back, where did you go? A I went home.

Q You went to your home? A Yes, sir.

Q Did you ever go inside the meeting? A No, sir.

Q Did you ever hear anything that transpired or happened at the meeting? A No, sir.

[fol. 512] Q Did you ever undertake to give a report to anybody in the management of the Gissel Packing Company as to what happened at the meeting? A No, sir.

Q When you went down there, as I understand it, you

had seen a notice that said, "All employees be there", is that right? A Yes, sir.

Q You were interested, is that right? A Yes, sir.

Q So you went? A Yes.

* * * *

[fol. 512] CROSS-EXAMINATION

Q (By Mr. Baker) Terry, you say you called your girlfriend? A Yes.

Q And you called your aunt? A Yes.

Q Why did you call your aunt? A I called her and told her where I was and she told me to come on back home.

[fol. 513] Q Do you live with your aunt? A No, sir.

Q Who do you live with? A My mother and father.

Q Why did you call your aunt and tell her where you were? A Well, I was going to see if my Mom was there, but I was so scared then that I didn't ask her.

CROSS-EXAMINATION

BY MR. BAKER:

* * * *

[fol. 518] Q Why were you up there if you did not think you should have been there? A Well, it says, "To all employees" and I wanted to see what a Union meeting was like, in the first place.

Q You wanted to see who was there? A No, sir.

Q Then you called your aunt after you found out? A I called my aunt and asked her where my mother was.

* * * *

Q You wanted to see if your mother was down at the plant? A Yes, sir, she works there.

[fol. 519] Q Your mother works there also? A Yes, sir.

Q What does she do? A She writes up orders and figures bills.

Q Was your mother there? A No, sir, I don't think she was there. I was so scared then.

Q Still, because of Watts asking you to go down to Sammys? A Sir?

Q Because Watts had asked you to go down to Sammy's, you were still scared? A No.

Q Now, this did not have anything to do with the Union meeting, did it?

If there had been no Union meeting and Watts had still asked you to go down to Sammy's, you would still have been scared? A Would you repeat that?

Q Well, suppose there had not been a Union meeting and you were just up on the street and Watts asked you to go down to Sammy's, you would have still been scared? A I didn't want to go down there in the first place.

Q The Union meeting did not have anything to do with [fol. 520] you beeing scared, did it? A Well, in the first place, I didn't want to go there because I was afraid I would be pointed out to the head of the Union by the guys there and I didn't want them to run me off from there.

Q You did not want to go to the Union meeting? A I wanted to go, yes, sir.

Q You just said you did not want to go? A I wanted to go at fiirst.

So, then I saw them and I changed my mind; I didn't want to go then.

Q You saw who? A I saw them guys down there and I was afraid they would report me to the Union head, whoever the head of it was, and they would run me off.

Q This sign you saw stated that all employees were going to be there? A Yes.

Q You knew they would all be there? A Yes, sir.

* * * *

[fol. 527]

REDIRECT EXAMINATION

BY MR. JENKINS:

* * * *

Q Now, I want to ask you whether or not Elisha Watts made any threat to you down there?

* * * *

A He accused me of stealing his coat and all that, and that he would get a warrant for me.

[fol. 528] Q Did this conversation take place down at the hotel? A Yes, sir.

Q He accused you of stealing his clothes? A His coats, he has coats in his locker.

* * * *

Q (By Mr. Jenkins) What about it, at the time you had this meeting down there where you saw Elisha Watts down there at the hotel, did you have any reason to be afraid of him? A In a way, I did, because I didn't know what he was going to tell the other employees.

* * * *

[fol. 536] BERNARD SIMON

was called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JENKINS:

Q What is your name? A Bernard Simon.

Q Bernard, how long have you worked for the Gissel Packing Company? A Eight years.

Q Are you working for them now? A Yes, sir.

Q What kind of work do you do for them? A I am in the shipping department.

Q Exactly what work do you do, yourself? A I assemble orders.

[fol. 537] Q Do you work yourself or do you tell other people what to do? A I work myself and tell some of the others what to do too.

Q I want to direct your attention—Strike that.

TRIAL EXAMINER: Off the record for a moment, gentlemen.

(Discussion off the record.)

TRIAL EXAMINER: Back on the record.

MR. JENKINS: Before we continue, I would like to request that a Mr. Frye and I believe it is a Mr. Thomas Burchell or whatever his name is, I object to their presence in the hearing room. I specifically make the objection with respect to Mr. Frye.

TRIAL EXAMINER: Well, your objection to Mr. Frye being in the hearing room is overruled and I assume that Mr. Burchell has testified already.

MR. BAKER: That is correct.

MR. JENKINS: All right.

Could I have my last question or the beginning of the last question read by the Reporter?

TRIAL EXAMINER: Yes, the Reporter will read the last question.

(The Reporter read the previous question and answer.)

[fol. 538] Q (By Mr. Jenkins) Mr. Simon, I want to call your attention to some testimony that has been referred to in this case about a conversation in February on the loading dock at the Gissel Packing Plant here in Huntington, West Virginia, wherein a witness testified that Charles Gissel made the statement in your presence:

"That if the union got in he—" meaning Charles Gissel —"would take his money and leave."

Do you remember any such conversation taking place in your presence? A I do not.

Q Do you have any reason to believe that any conversation of this purport or of this meaning was said by Charles Gissel in front of you at any time? A No.

* * * *

[fol. 540] LOWELL WETZEL BAILEY

was called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JENKINS:

Q What is your name? A Lowell Wetzel Bailey.

Q How long have you worked for Gissel Packing Company? A This November will be a year.

Q In what of—Excuse me, in what part of the plant do you work? A In the sausage room.

[fol. 541] Q What kind of work do you do there? A I work on stuffing.

Q Do you work yourself or do you tell other people what to do? A I work myself.

Q Did you attend a union meeting about April 17, any way, the one on a Saturday that was held down at the Governor Cabell Hotel? A Yes, I did.

Q Did your see a notice in the men's wash room telling you about this meeting?

MR. BAKER: I will object to that question as leading.

TRIAL EXAMINER: Overruled.

He may answer.

Q (By Mr. Jenkins) Go ahead and answer the question. A Yes, I seen it.

Q So, you went to the meeting, is that it? A Yes, I did.

Q I will ask you whether anyone from the Food Store Employees Union was in charge of the union meeting there? A Personally, I don't know the guy.

Q Did he represent himself as being from the union? A I guess he was, he was the one that stood up and done the talking.

Q Is that right? A Yes.

[fol. 542] Q And, he is the one that stood up in front of the meeting? A Yes.

Q Now, I would like to know what statements—Strike that.

Now, were there other employees—

TRIAL EXAMINER: Your last answer was "Yes?"

THE WITNESS: Yes.

Q (By Mr. Jenkins) Will you state whether or not it was your understanding that he was from the union? A That is what I understood.

Q Now, I want to know what this man said, if anything—Strike that question.

Were there other employees from the Gissel Packing Company there? A Yes.

Q Were there employees from other companies in Huntington there? A Logans and I think there was some from Sehon-Stevenson, I think, too.

Q What did this man that you thought was from the union and that was in charge of this meeting, what did he say with respect to things that you all were supposed to do down at the various companies?

MR. BAKER: I object, I do not know what the materiality of this is.

[fol. 543] MR. JENKINS: It will become apparent.

MR. BAKER: When was the meeting held and who did the talking; these things were not brought out.

TRIAL EXAMINER: Is this the meeting at the Governor Cabell Hotel?

THE WITNESS: Yes, I guess it was.

TRIAL EXAMINER: This is the meeting to which the witness is testifying, the meeting at the Governor Cabell Hotel?

MR. JENKINS: Yes, Your Honor.

TRIAL EXAMINER: What day of the week was this meeting?

THE WITNESS: It was on Saturday.

If you want the letter and I can find it, I will just bring it up.

TRIAL EXAMINER: You got a letter?

THE WITNESS: Yes, I got a letter, they invited me in.

TRIAL EXAMINER: All right.

MR. BAKER: I do not see what the materiality is.

This is a good deal after the demand was made and the union had a majority, it was after the company had refused to recognize the union; and, it was a meeting involving at least three employers to which the witness is testifying.

We do not know who it was even who was doing the talking.

[fol. 544] So, I just cannot see the materiality of what the union representative said three or four months after there was an organizing campaign and the union got the majority and made the demand on the company and the company refused recognition.

TRIAL EXAMINER: He may answer the question.

Q (By Mr. Jenkins) The question, Mr. Bailey, is what did this man say down there on the subject of what you all were to do at the various companies; what was said? A He was talking about breaking glass in a parking lot and nails or something in a parking lot, sir.

Q All right. A He told about this, and I don't know whether it was in Charleston or Parkersburg or where it was.

TRIAL EXAMINER: I cannot hear you, Mr. Witness.

THE WITNESS: I don't know where it was at, it was in Charleston or Parkersburg or something—or someplace like that.

TRIAL EXAMINER: Well, I cannot understand the witness.

Q (By Mr. Jenkins) Please repeat it again, and speak loudly. A He was talking about the breaking of glass at a parking lot, or something and it was either a parking—Well, it was at either Parkersburg or Charleston or someplace and he was talking about some men working while they were out on strike and the union was going to go in and get them.

[fol. 545] If they didn't come out, they were going in to get them.

Q What else was said?

MR. BAKER: As I understand it, Madam Trial Examiner, this is apparently, from what he says, it was something that apparently happened at a strike at Parkersburg or Charleston.

THE WITNESS: It might have been.

* * * *

Q (By Mr. Jenkins) Mr. Bailey, what was said down there, if anything, as to what you all at Gissel and the other people at the other companies were supposed to do down there at your companies; what was your understanding of what was said?

MR. BAKER: I will object to his understanding.

TRIAL EXAMINER: What was said?

Q (By Mr. Jenkins) Yes, what was said? A Just like I said, about breaking glass and the parking lot and nails in the parking lot. I don't know whether it was

breaking the glass in the parking lot or whether it was already broke.

[fol. 546] The way I figured it out, he wanted us to do something like that at our plant.

* * * *

TRIAL EXAMINER: * * * He said he figured this is what was meant.

THE WITNESS: That is the way I took it.

Q (By Mr. Jenkins) Do you remember the exact words that were said? A No, personally, I don't.

Q You just do not remember the substance or meaning of what was said, is that it? And, this is the meaning as you understood it, is that correct? A That is what it meant to me.

MR. BAKER: Motion to stike.

TRIAL EXAMINER: Overruled.

Q (By Mr. Jenkins) Now, Mr. Bailey, I want—Strike that.

Do you remember the last day that Red Mounts and Frye were down at the plant on a Thursday, early in the morning, about the week sometime of April 18 or 19, I don't think that it is in dispute, the last day they were [fol. 547] around the plant down there? A I won't say that was the last day.

Q Do you remember the week I am talking about? A I am pretty sure I do.

Q All right. Now, I want to ask you this.

There has been testimony in this case that in your presence in the sausage room on Thursday, of that week early in the morning, that Charles Gissel sitting here at Counsel table said to Frye:

"You can take the union and stick it."

Or, some words to that effect.

Now, did Charles Gissel make any such statement as that in your presence down there? A Charles Gissel was in the office.

Q Did he ever make any statement in the sausage room there to that effect at that time? A No. Not that I heard.

Q Did you ever hear him make that statement at any other time? A No.

MR. JENKINS: You may cross-examine.

CROSS-EXAMINATION

BY MR. BAKER:

Q Mr. Bailey, let us go back to that union meeting and will you tell me what you heard this man say?

[fol. 548] What did he say about this broken glass in the parking lot at Parkersburg that you spoke of? A Well, probably to keep the employees—

Q Now, I am not asking you probably; I am asking you what did he say.

You have testified he said something; you have testified you concluded that this meant other things to you.

Now, just tell me what he said?

MR. JENKINS: Objection, he said he could not remember the precise words.

TRIAL EXAMINER: Tell us as nearly as you can what he said.

Q (By Mr. Baker) Now, speak up so I can hear you; I could not hear you before. A He said there had been glass, broken glass, in the parking lot.

He said they had broken glass in the parking lot.

Q Who? A He didn't say who.

Q He said there had been some glass broken? A In the parking lot, there was nails and stuff like that in the parking lot.

Q Did he say who did it? A No, he didn't say.

[fol. 549] Q Did he say where it was done? A I told you it was either Parkersburg or Charleston.

I don't remember which one he said.

Q How did this business of the nails and the broken glass come up? A That was out of his mouth.

I was way back in back when he said that. I was plumb in back.

Q You did not hear what he said? A Yes, I heard what he said, I told you.

Q How did it come up?

MR. JENKINS: Objection to the question how did it come up.

This man was speaking—

TRIAL EXAMINER: What I think he means is what caused this statement to be made.

Q (By Mr. Baker) What caused this statement to be made, yes, what had been the discussion before, do you know?

TRIAL EXAMINER: What had been said before?

Q (By Mr. Baker) What had he been talking about just before that? A I don't remember just what all he was talking about. He was talking about Logans, he was talking about Sehon-Stevenson, and he was talking about wherever these things happened, I don't know just where that was, and about the employees coming out and if they did not come out they would go in and get them.

[fol. 550] They had a fight out on the street.

TRIAL EXAMINER: They had what?

THE WITNESS: They had a fight out on the street, that is what he said.

He kept talking about this broken glass and nails over and over.

Q (By Mr. Baker) Now, you said you heard him say parking lot, you heard him say nails, you heard him say glass, is that right, you heard those words? A Yes.

Q You do not know just in what context they were said, but you heard him use the word "Glass"? A Yes.

Q You heard him use the word "Parking lot"? A Yes.

Q You heard him use the word "Nails"? A Yes.

Q Now, you said that meant something to you; what did that mean to you? A To me?

Q Yes, to you? A He might have meant for me to do something down where I am working and get the guys mad at me.

Q That is what it meant to you? A Yes.

[fol. 551] Q As soon as it was said? A After I studied it over, it did.

Q Did he ever say anything like that, that is what he wanted you to do or say that is what he wanted the people to do there? A He did not personally look right at me and say he wanted me to do it.

Q Did he single out anybody in the room? A Everybody in the room I guess heard it.

Q Did he say: "This is what we want you to do?" A No, he didn't say nothing like that.

Q But, you concluded that, without benefit of a dis-

cussion with anybody else, that that is what he wanted you to do; that he wanted you to put nails in the parking lot and glass, break glass in the parking lot? A That is what I took it to me, from what he said, I took him to mean that by it.

Q That is what it meant to you? A That is the way I took it. I don't know how the rest of the guys took it.

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[fol. 555] Q (By Mr. Baker) Did you tell Herbert that you went to that Union meeting? A Yes, I told him I went to the meeting.

Q Did you tell him what the union man said? A No, sir.

• • • •

[fol. 563] LE ROY HUTCHISON, JR.

was called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JENKINS:

Q Please state your name? A Le Roy Hutchison, Jr.

Q How long have you worked at Gissel Packing Company? A Thirteen years.

[fol. 564] Q What is your job there? A I am a sausage maker's helper.

Q Sausage maker's helper? A Yes, sir.

Q You do—do your do any of the direct work yourself or do you spend any portion of your time telling someone else what to do? A I do my own work.

Q There has been a testimony in this case that sometime earlier this year, and before a union meeting that was held down at the Governor Cabell Hotel in April, that there was a conversation that took place between you and Charles Gissel about that meeting.

I will ask you this.

Do you have any recollection or do you remember any conversation between you and Charles Gissel about a meet-

ing, a union meeting, down at the Governor Cabell Hotel before this meeting actually occurred?

Do you remember him talking to you about that meeting at all? A No, sir.

Q Did Charles Gissel ever tell you before the meeting in April that he was going to have somebody at that meeting who was going to call in or report who was there; [fol. 565] did he ever make that statement to you? A No, sir.

Q The week following this union meeting down at the Governor Cabell Hotel, did Wetzel Bailey ever make a statement to you about things that the union organizers stated to the employees at that meeting? A He told me something that happened at other places.

* * * *

[fol. 573] CHARLES GISSEL

having been recalled as a witness by and on behalf of the Respondent, and having been previously duly sworn, resumed the witness stand and testified further as follows:

REDIRECT EXAMINATION

BY MR. JENKINS:

Q You are the same Charles Gissel who testified earlier in this hearing? A Yes, sir.

Q Mr. Gissel, sometime in January of this year, did you get a telephone call from a Sherwood Spencer, who is an organizer for the Food Store Union? A There was a man who called by that name, he told me he was Sherwood Spencer, and not knowing the man, I just would not answer him.

MR. BAKER: You would not answer him?

[fol. 574] THE WITNESS: I answered him and when he told me he was Sherwood Spencer and wanted to talk about the Union, I refused to answer him, I refused to answer his questions.

Q (By Mr. Jenkins) After that conversation, he wrote you a letter that has been introduced here in evidence, did he not? A Yes.

Q Well, Mr. Gissel, did you have any knowledge or

information, as to whether or not, at the time you had this letter from Mr. Spencer, his Union, in fact, did represent a majority of the employees in your plant in an appropriate bargaining unit? A I never heard of a Union campaign until after he called me.

Q Well, have you had any previous dealings with this Union in years earlier? A I believe it was back in 1961.

Q At the time of that situation back in 1961, did, at that time, Mr. Spencer make any representations to you as to whether he did or did not represent a majority of the employees in the appropriate unit? A I do not know if it was Mr. Spencer but this Union said they represented a majority of employees.

[fol. 575] Q There was an election held? A Yes.

Q Did they, in fact, represent a majority of the employees? A No.

Q Now, after you got this phone call and this first letter from Mr. Spencer here in 1965, what did you decide to do with respect to whether or not the Union really represented a majority of these employees, if anything? A We talked it over among ourselves and decided that maybe they might not have a majority because the other time he did not, he did not the time before.

They lost the election.

Q They lost the election? A Yes.

Q Did Mr. Spencer agree to have a free and fair election of these employees down here? A No.

Q Now, the fact that he refused to have an election, did you draw any conclusions from that?

MR. BAKER: We object.

TRIAL EXAMINER: You can make any argument you want on that.

Q (By Mr. Jenkins) What did that mean to you?

MR. BAKER: Objection.

TRIAL EXAMINER: Overruled.

[fol. 576] You may answer.

Q (By Mr. Jenkins) Go ahead and answer the question. A If he did not want to have an election, it seemed to us like he didn't have the majority.

Q If he represented, if his Union really represented a majority, the employees down there in an honest elec-

tion, were you willing to recognize them? A I suppose we would have had to.

MR. BAKER: The question is, if the Union had won the election, would you have recognized them?

THE WITNESS: Yes.

TRIAL EXAMINER: That is what the question was, that is what I understood the question to be.

Q (By Mr. Jenkins) Well, at any time subsequent to that original demand, did Mr. Spencer ever agree to let these employees vote in a Board conducted election? A No, he just wrote those letters, those two letters that I received from him.

Q Those are the ones that have been introduced here as exhibits? A Yes.

Q Other than those, you have never had any contact with him yourself, is that right? A No.

[fol. 577] Q So far as you know, no one at your company has ever had any dealings with Spencer? A No, I never met him until the day we had the first trial.

Q Now, I want to ask you some questions—you have been here at the hearing—and I would like to ask you some questions with respect to some testimony that has been given at this hearing.

There was testimony at this hearing by a witness named Mounts that, back in April of 1963, you made a statement:

> "If you talk to a Union representative, you will be fired."

Did you ever say that to Mounts? A In 1963?

Q That is what my understanding of it is.

Let me put it this way.

Did you tell him in April of 1963 or at any other time, did you ever tell Mounts that if he talked to a Union representative, you would fire him? A You are talking about two years ago. I never told any employee that.

Q You never told any employee anything like that? A No, we had had trouble at one time. I knew better than that.

[fol. 578] Q Now, in September of 1964, Mounts testified in substance that you said to him:

"If you are caught talking about the Union, you will be fired. If we have a Union, I will pack up my things and go."

He says this was when some Buckeye loading van was up there in the plant.

Do you remember any such conversation with him about that? A No.

Q Now, there was further testimony that about February or March of this year, you had a conversation with one of your cattle haulers in front of the plant within the hearing of Mr. Mounts and said:

"I can shut down the slaughter house and do away with the men."

Do you remember any conversation at that time and place? A There was a conversation but he twisted the words.

Q What was actually said? A I was talking to my cattel buyer and—

Q Who is your cattle buyer? A Ernest Lang.

Q All right. A We were talking about hauling dressed hogs from Greenfield which is one hundred and [fol. 579] twenty-three miles from here we could kill more cattle and haul dressed hogs in by freight and use the same crew in the cattle kill and use the same crew in the slaughter house, because we were not killing enough cattle.

Q Did this have anything to do with the Labor Union? A No, I was not talking about a Labor Union or nothing.

We were talking about the men hauling the cattle into here.

That is what the conversation was about; not about the Labor Unions.

Q The idea of doing business this way by making these purchases over in Ohio how long had that been under consideration by your company? A I believe Jack Collins came to us approximately about four or five years ago.

Q And he brought this subject up to you at that time? A Yes.

Q Now, there is a further conversation that in March of 1965, out front, which I presume means out in front of the plant, you had a conversation with Rush Moore and a Ken Adkins may have been there and the testimony of Mr. Mounts was that you asked Rush Moore to find out about the Union and report back to you.

Did you ever make that statement to Mr. Moore? A Let me put it this way.

During the time we had this Union trouble or however [fol. 580] you want to put it, a Government man who handled the election came to us and cautioned us not to comment, not to mention the Union at all.

He said when any of the employees mentioned Union, not to say anything.

When any employees did mention the Union, I walked away.

Q This was back in what year? A 1961, I believe.

Q All right. A We made a mistake that year of talking against the Union. This time, we did not, we knew better.

Q Were you personally involved in it at that time? A No.

Q You were not personally involved? A No.

Q Did you follow that advice this time? A Yes, we sure did.

Q As a matter of fact, Mr. Gissel, did you consult with me in January, after you had received this letter and a phone call from Spencer? A I called you the minute he called me.

Q I will ask you whether or not I told you at that time that it was a method of this Union in their operation to put people in the plant to make statements and misquote you; did I not warn you against this even-[fol. 581] tuality?

MR. BAKER: Now, I move that that not only be stricken but that it be stricken physically from the record.

The reason for that is that if the Counsel wants to personally malign the Union, he may do so, that is his prerogative.

But, I do not think this is the proper place to do it.

TRIAL EXAMINER: Well, this certainly will be contested.

MR. BAKER: It is a leading question also.

MR. JENKINS: I realize it is a leading question.

TRIAL EXAMINER: Well, rephrase your question and if you want to ask him what you said to him, he may answer it that way.

MR. JENKINS: Yes, Your Honor.

Q (By Mr. Jenkins) What was said to you at that time as to the mode of operation of the Union and what you should do about it?

MR. BAKER: Now, I will object to this question. What difference does it make what Counsel tells him? What value does that have in this record?

TRIAL EXAMINER: I do not know that this is offered to prove that the Union in fact operated this way. This—is it offered to prove that the Union in fact op-
[fol. 582] erated in this manner?

MR. JENKINS: Your Honor, it goes to show the basis upon which he acted during the period in which General Counsel is bringing these charges.

TRIAL EXAMINER: Well, if you are getting it in for background, I will receive it for that; I will not receive it for the truth of a statement or any of the statements contained.

What did he tell you?

THE WITNESS: Jack told us to keep our mouths shut about the Union and not say anything about it and to watch the men coming in because the Union usually put men in to make trouble.

I also talked to Mr. Logan about it, about the things that were happening to us and he told us the same thing; he said to watch how—all the men coming in and not to say anything about the Union. He said not to let them make me mad.

Q (By Mr. Jenkins) In April of 1965, there was testimony here by Mounts that you talked to Charles Hutchinson about a Union meeting to be held on April 17, and that you made the statement to Charles Hutchinson:

"Yes, that you would have someone there to call in and to check and to see who was there."

[fol. 583] Did you make that statement? A No, sir, because the Government man told us better than that.

Q Did you or anybody in your company send any representative to that Union meeting? A No.

Q Now, on April 19, it would have been on Monday following the Union meeting on Saturday, do you have any recollection of a conversation in the parking lot near your automobile between you and Frye and Mount? A No, sir.

MR. BAKER: The answer was "No, sir?"

MR. JENKINS: That is right.

THE WITNESS: That is right.

Q (By Mr. Jenkins) Now, in the week of April 19, who set up the schedule for the men working at that time in the shipping room and in the plant where Mounts and Frye were working? A I did.

I do that.

Q Now, could you explain to the Trial Examiner what the situation was at that time with respect to the amount of work and the problems you had of scheduling your people? A Well, business had been bad for six months or better. We were laying off some of them on Friday evenings and some on Mondays, some we were letting off full days.

[fol. 584] We worked all day on Wednesday and Thursday.

Q Can I interrupt you? A Yes, sir.

Q Why was it that Wednesday and Thursday were busy days? A These are the days we load all the trucks and these is the days the customers wanted the stuff.

We could not get it all on, we could not get the boys organized like that, and I figured I would let some come in the mornings on Mondays and Tuesdays, Monday and Tuesday mornings, and some come in on Monday and Tuesday evenings and then some would come on Friday and we would lay off on Friday evenings.

Q What was the purpose of letting people work part time? A Well mostly to give them more even time be-

cause the way we are working, some were getting more time than others.

Q Now, starting—Strike that.

One the week of April 19, 1965, what was Mounts' and Frye's working schedule for that week? A 5:30 in the morning on Monday and Tuesdays and until noon, and all day Wednesday and all day Thursday and a half day Friday from 5:30 until 11:30.

Then on Saturday, from 6 to whenever we got done around 10:00 or 11:00 o'clock.

Q Now, were there other employees who were working the same schedule? A Bernard Simon came out at [fol. 585] 5:30 and Eddie Lewis, twice a week, he came out at 5:30. Maynard came out noon and worked in the evening. He came out Wednesday morning at 5:30 and worked all day until we got done. Thursday he would come out at 5:30 and work until we got through.

Q Now, at any time, did Mounts and Frye ever make any objection or did any of these other people make any objection to this time schedule? A No.

TRIAL EXAMINER: What was this week?

THE WITNESS: April 19.

Q (By Mr. Jenkins) Now, had you been working on this schedule for some time before that or not? A We had been working on it for two weeks.

Q Before April 19? A Yes, sir.

Q Now, had Mounts and Frye been told or had they not been told as to their hours of work on Wednesday and Thursdays? A Right.

Q They had been told? A Right.

Q Now, when is the first time that you knew that they had disappeared from the plant around noon on [fol. 586] Wednesday, the week of April 19, that week? A About 1:00 o'clock.

Q And how did you find this out? A I came into the shipping room and they were not there so I asked questions. The boys told me they had not come back.

Q Did you talk to anybody particularly in there? A I just asked different ones and nobody knew, but then Eddie Lewis told me that Red had told him that the day before he had made twenty dollars on Tuesday evening working for his father-in-law.

Q What did you do then, if anything? A I piddled around a half hour filling orders and then I got to studying and I knew his father-in-law's name so I called his father-in-law and he told us that they were working for him.

I told these four men to go over there and to find out if they were working.

So, they did.

Q Why did you send four men? A For witnesses.

Q You wanted to be sure? A Absolutely.

Q This was not your first trouble with Mounts, was it? A No.

[fol. 587] Q Well, when you found out about 1:00 o'clock when you came in there that they were gone from their work stations, will you state whether or not you were suprised or not? A Yes, I was.

MR. BAKER: He was what?

TRIAL EXAMINER: Surprised.

MR. BAKER: Surprised about what?

TRIAL EXAMINER: You mean, surprised at their not showing up?

THE WITNESS: Because they never did that before.

TRIAL EXAMINER: What?

THE WITNESS: They had never pulled a trick like that before.

Q (By Mr. Jenkins) Had you ever told them that they were only to work until 11:30 in the morning until further notice? A No.

Q Now, did you subsequently, I believe it is undisputed, receive a report that they were working on another job? A Right.

Q Do you know whether or not this was the same job Mounts was working on when he did not show up for two days after his vacation was over? A I don't know about that. He told some of the boys that he was work-[fol. 588] ing on his own home, until two days after his vacation was over.

Q Now, what happened then on Thursday following the day that Mount and Frye did not work on Wednesday afternoon? A They came in about twenty minutes

until 6:00 and wanted to know where their time cards were.

Q Was this on time for work? A No, sir, they were late.

Q What time were they supposed to be there? A 5:30.

Q What did you say, if anything? A I told them I figured they had quit and were not working for me anymore.

Q Now, what did they say when you told them you figured they had quit? A Well, they tried to tell me they did not and they got mad.

They said they would see me in court.

Q They would see you where? A They said they would see me in court.

[fol. 589] Q What happened next, if anything? A They went out storming, I guess they threw a fit, I don't know, they went outside and some of the boys in the shipping room saw them.

Q Did they then leave the plant? A No, they stood around three or four more minutes arguing and raising cain.

Q Then they left? A Yes.

Q That is the last time they were at the plant as far as you know? A Until they came back for their checks.

Q Now, there has been testimony here that that morning, you made some statement to them that they could:

"Take the damn union and stick it"

Or, something like that.

Did you make any statement that you recall to them like that on that occasion? A No, sir.

I knew that is what they wanted me to say so I would not say it.

* * * *

[fol. 590] Q (By Mr. Jenkins) * * * You testified a moment ago, Mr. Gissel, that the company down there had had other problems with this fellow Mounts right along. A Yes, right.

Q Would you tell the Trial Examiner if you can exactly the problems you were then having with this man

after the or in the last couple of months there before he finally quit? A In February, right after Spencer called, he was boning hams in the basement and the temperature down there is only forty degrees and his job is to clean it up after he gets through and take the trimmings up in the cold cooler, another cooler.

He left them down there three times. My brother Herbert wanted to fire him and I told him not to.

I told him not to fire him.

Q Why? A Well, I figured he wanted an excuse to get us in trouble with the union.

So, I would not let him fire him.

[fol. 591] Q All right. A Then, on Friday I told him and Elmer Maynard to bone hams and be out by 11:30. I went down at 11:30—I mean, I went down at 11:20 and he was still boning hams and he worked for another two and a half hours there.

So, I just got mad and fired him. So, my sister talked me into hiring him back.

Q And what was the reason for that? A The same reason; we were afraid of the union.

Q All right. A So, we hired him back again.

Q You put up with him again? A Yes.

MR. BAKER: I object to the remarks of Counsel.

I object to the comments of Counsel to his own witness. It is leading and suggestive and I object to it.

TRIAL EXAMINER: It will be decided on the weight.

Q (By Mr. Jenkins) Go ahead. A He came in late and he was never on time and I expect from November until the day he quit, he was on time only five or six times.

He was always late from five minutes to forty-five minutes to an hour.

Q Did he ever call in with an excuse for being late? A No, he never called in with an excuse.

[fol. 592] Q Did you in fact ever write him a letter about this trying to get him to change his ways? A No, but in front of witnesses, I told him I was tired of it and couldn't put up with it any longer; I told him this five or six times.

Q Did he make any response to your request? A No, he never said a word.

He just kept right on doing it.

Q Well, back as early as February 19, I will ask you if Mrs. Closterman at your office wrote him a letter telling—or, calling his attention to the fact that he was always late?

(Handing document.)

A (Examining document.)

Yes, she wrote that.

She wrote that letter.

Q Did you—Strike that.

This letter, I believe, is in evidence as Respondent's Exhibit No. 1? A She did—Yes, sir, it is.

Q Did you have any discussion with Mrs. Closterman before this letter was written? A No.

Q Now, what other troubles did you have with Mounts during this period? A Well, he wouldn't go back and help the boys shake hides on the Monday we were in Charleston.

[fol. 593] Q Had he done this before? A They were not shaking, they were loading boxcars.

Q But, now he refused? A Yes, four of them told Eddie on Saturday, the Friday or Saturday before, that they were going to refuse to work, refuse to do it, if they were asked to do it, and they said they would quit.

Q Mounts and Frye? A Yes, and Maynard and Ken Adkins.

Q Did you decide to fire them then? A I started to and I thought, I talked to you, and you said not to and I decided to let it go for a while.

Q I told you not to fire them, did I not, that the union would claim he was—or, that it was for union activity, did I not? A Right.

Q You asked me how long you had to put up with this, did you not? A Yes, and you told me to take it as long as I could.

Q So you did? A That is right.

Q Then what happened?

MR. BAKER: I am going to object to this.
[fol. 594] Counsel is making this record for the Court of Appeals, that is obvious, and I do not think the Court of Appeals is entitled to anymore illegitimate evidence than the Trial Examiner is.

As far as I am concerned, this is not evidence.

TRIAL EXAMINER: It is true that Mr. Jenkins is making statements and the witness is agreeing with them.

MR. BAKER: Maybe the Trial Examiner can weigh that evidence.

But, sometimes when it is in black and white before a higher Court, the statements at that time may be given more weight than is justified.

TRIAL EXAMINER: Well, I will give them the weight to which they are entitled. I request you do not lead the witness.

Q (By Mr. Jenkins) Did you have any problems with Mounts about returning from vacation when he was supposed to? A He was supposed to get back on Monday and he did not show up until a Wednesday.

Q Did he send any notice into the plant? A He sure didn't.

Q Was any effort made to locate him when he did not show up when he was supposed to? A Yes, I told Jerry Frye to, Jerry was one of his friends, I told Jerry to get hold of him and that I wanted to know what was the matter with him.

[fol. 595] Q Did he have any excuse when he came back to you? A No.

Q Was there any understanding down there that if a fellow wanted to go off and work on his house when he was supposed to be at work, or do work for somebody else for more money, that he has a right to do that? A No, of course not.

Q Do you deal in perishable commodities down there? A Right.

Q Did you have any trouble with Mounts about his vehicle, his truck? A The only one was when he blew the motor when he was running a truck on the turnpike and he blew the motor out of it.

Q Now, when Mounts finally, and Frye walked off of the job on Wednesday during a busy day, did they give you any notice that they were leaving that Wednesday in April there when they did not show up for work that afternoon? A No, they did not.

Q There was testimony in this case that when they left before lunch, they walked right by you and left in your sight or presence?

Did you see them leave? Or, did you know they were [fol. 596] leaving? A I saw them walk to their car with their lunch.

They always ate their lunch in the car.

Q Did you have any reason to believe from that that they were not going to return to the regular job at the regular time of work? A No.

Q Now, there has been testimony from a man by the name of Jerry Frye, that on Thursday before April 17, that you said there would be somebody at a union meeting watching.

Did you make that statement? A No.

Q Did you send anybody to the union meeting to watch anybody? A No.

Q I will ask you whether or not, on April 18, or April 19, which was Monday, after the union meeting, did you make the statement to either Frye or Mounts or direct a question rather:

"Did you go to the union meeting," and then make the further statement to them that "I know that you did go to the meeting."

Did you make that statement? A No.

Q Did you have any conversation on that Monday with Frye or Mounts about their going to the union meeting and that you were changing their work schedule or anything like that? A No, sir.

[fol. 597] Q In fact, there was—In fact, their work schedule was not changed, was it? A No.

TRIAL EXAMINER: Had they been working from 5:30 to 11:30 the previous week?

THE WITNESS: They were coming in at 5:30 on Mondays and some other days, we would bring them in at 5:30.

TRIAL EXAMINER: Until when?

THE WITNESS: Until noon.

Then, every Wednesday, they would come in at 5:30, we would bring in three boys to try to get the trucks loaded, trying to get the trucks out of there at 6:00 o'clock.

TRIAL EXAMINER: Yes, but before this final week or at least one week or more prior to that, they had been working from 5:30 a.m. to 11:30 on certain days?

THE WITNESS: Yes, ma'am, on just certain—one or two days a week; we had not set it up completely at that time.

MR. BAKER: Is it the testimony of the witness that the rest of the plant did not work in the afternoon?

THE WITNESS: What day?

MR. BAKER: On any day before April 19?

TRIAL EXAMINER: Before that Monday after the union meeting?

[fol. 598] THE WITNESS: Yes, they went home at noon.

TRIAL EXAMINER: They went home at noon?

THE WITNESS: They sure did.

TRIAL EXAMINER: Now, the previous week they had been doing the same thing on Monday, Tuesday and Friday?

THE WITNESS: Tuesdays, yes, they went on home on Tuesdays and Friday of the prior week.

On Mondays, we hadn't changed Monday yet.

Q (By Mr. Jenkins) Back in September of 1964, Frye testified that in the office you asked him if anyone had asked him about the union and made the statement something to the effect that you would fire him if he had anything to do with the union.

Did you ever make any such statement to Frye back in September of 1964?

THE WITNESS: Why should I, Your Honor, there was no union campaign going on back then.

TRIAL EXAMINER: Answer the question.

Q (By Mr. Jenkins) Would you answer my question?

A Well, like I said, there was no union campaign going on back then.

Q Then you did not have any conversation with him like that? A No.

Q Now, Frye testified that about February 10, at the garage you asked Rush if he knew anything about the [fol. 599] union, you asked him if he knew anything about Don Kidd and made the statement that if Kidd was found out to be the ringleader of the union, that he would be fired.

Did you ever have any such conversation with Rush? A No, I would not have made—no, I would not have mentioned the union there.

Q Now, on this same day, Frye testified that in the afternoon that you asked him if he knew anything about the union and asked him what they were offering him and that you could offer him more than they could.

Do you remember any such conversation as that? A No, sir, I do not. That Government man had told us better than that.

Q Now, there was a witness named Tommy Burchell who testified in substance that in February, about a week after he started working on the second floor of the plant down there, that you asked him where he knew Red Mounts from and that you told him to stay away from him, meaning Red Mounts, because he could cause him trouble.

Do you remember that conversation? A He didn't come to work in February and there was no such conversation as that because I knew who he was and how he knew Red.

Q All right, sir.

Did you ever have any conversation with Burchell about [fol. 600] Mounts? A No.

Q Burchell also testified that in April, in the sausage room, that he—that is Burchell—and a fellow by the name of Lawrence Hysell were talking and that you went up to Burchell and asked Burchell if Hysell was talking to him about going to a union meeting or signing up.

Did you have any such conversation as that? A No, I went to Red that day when he was talking to Hysell and I told him he had no business in the sausage room; he was working in the shipping room.

Q Was there any discussion about a union meeting? A No.

Q Now, there has been some testimony here by a fellow, an employee, by the name of Elmer Maynard that about February 18 or sometime in February, that you made the statement to him that you did not give a damn about the union.

Do you remember making any such statement as that? A No, sir.

Q There was testimony here by this fellow Maynard that as far as giving instructions to Mounts back in February about his work assignment, namely, putting hams in cans before noon, that you gave him these instructions to Maynard and not Mounts?

What happened? A I would not give them to Maynard [fol. 601] because Maynard was a new man.

Mounts was in charge of the hams.

It was his job to see that it was done.

He was teaching Maynard and I gave the instructions to Mounts.

Q Who did you give the instructions to? A To Mounts.

TRIAL EXAMINER: When did Mounts come with the company; I do not believe the record shows that?

Could you give us that information?

Q (By Mr. Jenkins) Do you remember when Mounts came with the company? A I believe it was about a year and a half.

Q I believe Mounts said about two years, as I recall; I am not real sure. A I believe it was about a year and a half.

Q A fellow by the name of Elisha Watts testified that on one Saturday morning, he remembered you making a statement to this effect:

> "To hell with the union. I am going to give it to the union."

Do you remember any such statement as that? A No.

Why would I give it to the union; I have money in that plant.

[fol. 602] Q Did you ever make a statement to Kenneth Adkins in about February of 1965 that if the union got in you were going to take your money and leave? A When was that?

Q In February of 1965? Did you make any such statement to Kenneth Adkins? A That I was going to take my money and leave?

Q Yes. A No, sir.

Q Did you have any knowledge or any reason to belive that this labor union was active or doing anything about organizing the company there prior to the time that you heard from Spencer in February? A No, because the union had not been mentioned.

Q Did you have any problems with Jerry Frye with respect to the performance of his duties, how he handled the meat? A He came in late all the time, he rode with Mounts, and he came in late all the time and I told him one time that he better get another way in so he could be on time.

He could read a bill as well as I could and he would come to the office there for me to read the bill for him.

He would not pack the meat good in the boxes and he would not put the paper in them and sometimes he would stack them on the flat truck and leave them on the trucks, then the load would spoil.

[fol. 603] Q Did you have any trouble with him in February about the handling of the boiled hams or anything of that sort? A No, I don't think Jerry had anything to do with that, it—well, he had never worked on them.

Q Did you have any unusual incidents down at the plant beginning in say the first of February or in January after you heard from Spencer, have you had any unusual incidents happen down there? A Well, we lost four trucks, four truck motors, in about six week's time. Someone left the cooler open and they cut up six carcasses of beef and we lost about twelve hundred dollars; little things like that.

Q When you asked Mounts and Frye to report for work on time, what did they do, if anything? A Well, they never did do it.

Maybe one day they would and then it would start all over again.

[fol. 604] Q Now, when you were determining whether or not to recognize the Union after you heard from Spencer in January of this year, will you state what, if anything, you determined with respect to your peddle drivers? A The peddle drivers are on a salary and commission; they are salesmen and we do not figure salesmen should be in the Union.

Q Was Mr. Spencer insisting or was he not insisting that these peddle drivers, these driver salesmen, be in the Units? A Right.

Q These peddle drivers, how are they paid? A They are paid so much a week base salary and then a commission.

Q How are the other employees down there paid? A Hourly.

Q Do these peddle drivers work with the other employees? A No, the only thing they do is we bring the stuff out and put it on their trucks.

They watch us load it or sometimes they will help us load it on the trucks to see that it is properly located.

Q Do these peddle drivers work inside the plant? A No, sir.

Q Do they spend their lunch hour socializing with the other employees of the plant? A No, sir, they are not around the plant.

[fol. 605] MR. BAKER: Did the witness say that Mr. Spencer was insisting on the inclusion of these peddle drivers in the unit?

Did I hear his answer correctly?

TRIAL EXAMINER: Yes, that was the answer of the witness, that Mr. Spencer was insisting that upon the inclusion of the peddle drivers; that was the question and the witness said yes.

MR. BAKER: We will object to the witness testifying with regard to any conversations he had with Mr. Spencer in that connection.

MR. JENKINS: Well, it is reflected in the correspondence. It is reflected in the letter; he said truck drivers.

MR. BAKER: Well, the letter is the best evidence.

TRIAL EXAMINER: Well, I think he was talking about the correspondence that are in evidence; the letter that is in evidence.

MR. BAKER: Well, I think the testimony should be stricken because the best evidence of what Mr. Spencer was insisting upon is contained in the letter which is in evidence.

TRIAL EXAMINER: It may remain.

MR. JENKINS: I would like to see the exhibits, please.

TRIAL EXAMINER: Yes, of course you may.

[fol. 606] (Handing document.)

Q (By Mr. Jenkins) Now, do these peddle drivers have a supervisor and who is that? A Cliff Carley.

Q Do these peddle drivers, do they work on a schedule like the people in the plant? A No, they leave when their truck is finished, they leave and when they get finished, they come in.

Q For example, who determines when they take a break or a lunch period or anything like that? A I suppose they determine it themselves.

They are out on the road and you can't see them.

Q What is Mr. Carley's title? A I suppose sales supervisor.

* * * *

RECROSS-EXAMINATION

BY MR. BAKER:

* * * *

[fol. 607] Q Well, what did you mean when you said [fol. 608] that Mr. Spencer was insisting on the peddlers being in the unit? A Well, he asked me if he was insisting on, or if he wanted the truck drivers and peddlers, peddler drivers in the same unit as the rest of the plant. He called them truck drivers and he also called them peddler drivers and he also called them salesmen, and we call them truck salesmen.

Q Did he ever once mention anything in the letter about the truck driver salesmen or driver salesmen? A He called them truck drivers. We figured he meant ped-

dlers because we call them peddlers, truck drivers and salesmen.

* * * *

[fol. 609] Q Now, the Board says truck drivers, truck driver salesmen; they have two words in there; there are two classifications?

MR. JENKINS: I object, what difference does it make what the Board said about it back in 1961?

MR. BAKER: I am just trying to see; this witness has testified to the fact that Mr. Spencer was insisting on these peddlers and there was nothing in here concerning that and—

THE WITNESS: I am trying to explain to you that we call them truck drivers, peddlers, salesmen and peddler salesmen; we have four names for them.

TRIAL EXAMINER: Did you say that you had some drivers who are not salesmen?

THE WITNESS: Yes, ma'am.

* * * *

[fol. 611] You say that Elmer Maynard came in on Wednesday morning and worked? A He came in on Monday—on the 19th, on the week of the 19th, is that when you are talking about?

Q This week now that you told Frye and Mounts to start coming in at 5:30 and work until 11:30? A They came in every Wednesday at 5:30 or they were supposed to.

Q You mean that week Elmer came in— A Elmer was supposed to come in on Wednesday at 5:30.

Q But he did not, did he? A He did, yes.

He might have testified at this hearing that he did not, but I can get his time card and show you.

I can show you that he came in at 5:30.

Q I said, he did not come in until Thursday; but, after you discharged Mount and Frye, you told him to start coming back in at 6:00 in the morning on Wednesday; that is his testimony? A I don't care what his testimony is. I can get his time card and show you. The time card will show that he came in at 5:30.

[fol. 612] Q On the 21st? A On the 21st, Wednesday.

Q Do you have that time-card with you? A No, sir, it is at the plant.

Q Now, you say that you told Frye and Mounts when to come in, when did you tell them?

Had you posed a schedule telling them to come in from 5:30 until 11:30? A I didn't post a schedule, I tell my men.

I don't post a schedule.

Q When did you tell them about this 5:30 to 11:30 on Monday and Tuesday and then on Wednesday, they would come in at 5:30 and work all day?

We are talking about the Wednesday that you canned them? A Well, I did not can them, they quit.

TRIAL EXAMINER: This is the critical week; he calls it one thing and you call it another.

THE WITNESS: I told them on Monday morning to start coming in at 5:30 and to work until 11:30 and also to come in at 5:30 and work until 11:30 on Tuesday.

Then, on Wednesday and Thursdays they would come in at 5:30 and work all day on Wednesday and all day on Thursday and then, they would work a half day on Friday. On Saturday, they would come in at 6:00 o'clock and work until whenever we got through, probably around [fol. 613] 10:00 o'clock or 11:00 o'clock.

Q (By Mr. Baker) What was the first day you told them about this new schedule, if you know? A Every Friday, we were laying off at noon every Friday and I would send them home on Tuesday and sometimes on Monday; but, never on Wednesday or Thursday.

Q You say you called Mr. Logan? A I did not say I called Mr. Logan.

Q I believe you did? A I don't believe I did; I said I talked to him.

Q You talked to him about the Union? A We were talking business and he asked me if Sherwood had called me.

Q This was after Sherwood had called you? A It was after he called me, it was about three or four weeks after he called me.

Q You knew about last September there was an organizational campaign going on in the Logan plant? A I think it started before September; I think his trial was before September.

It was last summer sometime in June or July.

Q What this conversation you had with Spencer; do you remember what Spencer said? A Spencer called up and said:

[fol. 614] "My name is Spencer; do you know me?"

I said, "I do."

I have a customer in the west end called Spencer's Market. He said he knew of that.

He said, "I represent a majority of your employees in a bargaining unit."

I said, "You will have to talk to my lawyer."

I gave him the name of Mr. Greene and I told him that I would give him the name of the others later; that we had five lawyers.

Q Did you ever give them to him? A No, I gave him the name of Greene and Jack Jenkins.

* * * *

[fol. 615] HERBERT G. GISSEL

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JENKINS:

Q What is your name? A Herbert G. Gissel.

Q What is your connection with the Gissel Packing Company, Incorporated? A I am a sausage maker in the sausage room and I am Vice-President.

Q How long have you been connected with the company? A All my life, about thirty years.

Q Mr. Gissel, in the Complaint, the first Complaint that was filed in this matter, there is an allegation in here that says that during the first week of February,

1965, the Regional Director does not know the date, that you accused some employee down there of being the instigator of the Union campaign and that you threatened some employee that the Respondent, that is, your company, would prevent the Union campaign from being successful.

[fol. 616] Did you ever make any such statement as that? A I did not.

Q Mr. Gissel, there was testimony in this case from a man by the name of Elisha Watts to the effect that sometime you made the statement to him, that:

"I don't want to hear no more about this Union stuff. If you can't do your job, get out."

Do you remember any such conversation? A No, sir, I never talked about the Union in the plant.

Q Well, this man Elisha Watts, tell the Trial Examiner about his temperment and describe his general conduct? A Well—

MR. BAKER: I object to his temperment, it is—a description of his temperment.

Of what purpose is this going in. He is not a psychologist or a psychiatrist or anything like that.

I do not see the relevance.

MR. JENKINS: Well, Your Honor, the purpose of this is one of the witnesses this morning testified that he had a conversation with this man that he was afraid of him.

I think it would be helpful if you had the background, to understand why the witness was afraid of him by reason of his temperment and disposition.

TRIAL EXAMINER: Was Mr. Watts a witness?

MR. JENKINS: I don't believe so.

[fol. 617] MR. BAKER: Well, if there is anything regarding his temperment, it ought to come from the witness, not from someone else.

TRIAL EXAMINER: Well, you could get it through any incidents that might have happened.

Q (By Mr. Jenkins) Well, tell us anything you know, about any incidents that have happened? A Incidents he had with me?

Q Yes. A Well, I asked him—I am over the bacon department—and he was cutting hogs and trimming the bacon and leaving the back fat in the hogs; when you slice this bacon it just smears all over. I asked him to get it out.

So, he started taking it out and I come back the next day and he was still taking it out and then I checked back a little later and he was leaving it in.

I got back on him again. He said, "I can't do three jobs at once."

I asked him who else's job he was doing. He didn't answer me.

I said, "You are not doing the boning?"

He said, "No."

I said, "Then, you are not doing three men's work, you can't be doing three men's work."

It went on until he got over on the other side of the room and then the argument kept on and he had a meat [fol. 618] cleaver in one hand and a knife in the other. He wanted me to hit him.

He actually wanted me to hit him.

He told me that I was on his back.

So, I told him I was not on his back.

He actually still wanted me to hit him, so I walked out.

He has always got everybody in an uproar, he was always talking from one side of the room to the other. He keeps everybody stirred up.

Q Is this well known around the plant there? A It is well known.

Since he has left, it is quiet.

MR. BAKER: I move that be stricken, there is no basis for that testimony.

He wanted him to hit him, he said, he had a knife and a cleaver, he is working in a butcher's shop.

He uses his knife and cleaver in his work.

TRIAL EXAMINER: This will be taken into consideration in weighing the evidence.

Q (By Mr. Jenkins) Was he threatening you with these instruments? A He threatened to cut me.

MR. BAKER: He threatened to do what?

THE WITNESS: He threatened to cut me.

[fol. 619] TRIAL EXAMINER: What did he say?

THE WITNESS: He threatened to cut me.

TRIAL EXAMINER: What did Mr. Watts say?

THE WITNESS: Well, he was going to cut me.

Q (By Mr. Jenkins) What did Mr. Watts actually say to you? A He wanted me to hit him I said, "I know better than that."

He threatened to cut me.

TRIAL EXAMINER: What did he say, did he say "I want you to hit me?

THE WITNESS: Yes, he wanted me to hit him, he said, "Hit me."

[fol. 620] Q (By Mr. Jenkins) Did you have any difficulties with Jerry Frye in 1965 in performing his work in your department? A Who is Jerry Frye?

Do you mean "Bruiser?"

Q Yes. A Yes, he was putting hams in the sausage room in the pans and putting lids on under pressure.

The meat comes out from under the lid and they always trim it off.

That is a ruined part of the ham and at that time, hams were selling for eighty cents a pound.

I didn't pay too much attention to it. I went out and saw this all laying on the floor and there was about four pounds of it laying on the floor.

So, I went back in and got Bruiser and Pork Chops—

Q Now, you are going to have to identify who "Pork Chops" is? A I don't know their names.

Q Who is Pork Chops? A I don't know their names, I said.

Q Well, is "Pork Chops" in, is he a man by the name of Maynard? A Yes.

Q Now, just so we have it clear, Bruiser is a man by [fol. 621] the name of Jerry Frye? A Yes.

Q All right, sir.

TRIAL EXAMINER: Well, let me get it clear; Jerry Frye is Bruiser and Pork Chops is Maynard?

THE WITNESS: That is correct.

MR. JENKINS: That is correct, Your Honor.

TRIAL EXAMINER: All right, continue.

Q (By Mr. Jenkins) Go ahead. A So, I went in and I asked them, I said, "Now, I want to know, I want an answer from you boys and I want it quick. If you went home, would you take a slice of meat or a slice of bread and throw it in the floor."

They looked at me and I said, "I want that answer and I want it now."

So, Pork Chops said, "No, I would not."

And then I turned to Bruiser and asked him and he said, "I wouldn't."

I said, "What about that four or five pounds of meat you threw on the floor in the sausage room?"

They never done it before.

Q About what time did this happen, about what month, the date? A I cannot give you the exact date.

* * * *

[fol. 622] TRIAL EXAMINER: Do you have any recollection of about what time it was?

THE WITNESS: It was about February 18, maybe around the 15th.

Q (By Mr. Jenkins) Of 1965? A 1965, yes.

So, they went out and got it and I said to them, "So, you want to join the union; your union would not back you up on that."

That is the only time I ever mentioned the union.

I just said that the union would not back them up on throwing that meat in the floor.

MR. JENKINS: You may inquire.

CROSS-EXAMINATION

BY MR. BAKER:

Q You say Watts was tempermental? A Yes.

Q Everybody was afraid of him? A I don't know whether everybody was afraid of him or not.

Q Were you afraid of him? A No.

Q Are you tempermental, Mr. Gissel? A Oh, I get mad.

Q Did you get kick a bologny around the plant? A Did I do what?

[fol. 623] Q Did you ever kick a bologny around the plant? A No.

Q You never did? A No.

Q As a matter of fact, they are all pretty loud down there, are they not, at the plant? A Oh, I don't know about that.

Q They all go about yelling and cursing? A Yes.

Q The Gissels too? A Yes, you are talking over machines down there, you know.

Q Doing what? A Talking over machines, the noise.

Q That is just sort of the modis operandi of the way you work, is it not?

Is not that pretty much true of all packing houses? A Oh, I don't know, I haven't been in all packing houses.

Q It is kind of a boisterous crew, is it not? A No.

Q But, the Gissel Packing Company is quite loud, is it not? A You can put it that way, if you want to.

[fol. 624] Q Now, Watts had that meat cleaver in his hands because he used it in his work, did he not? A When I was talking to him, he was out in the middle of the floor and then he went over and got it.

Q Do you think he was threatening you? A He said he would cut me.

Q Why did you not have him arrested? A Just because, why stir it up?

I have been cut twice.

Q At the plant? A No, when we were kids.

Q Actually, in a packing house probably there are some of the sharpest knives in the world used there, boning knives which are razor sharp? A Yes.

Q If people had a tendency to cut somebody, that would be an excellent opportunity? A It would be.

Q There are plenty of opportunities with people working there in close quarters wielding knives? A Yes.

Q Has it ever happened that Watts cut anybody? A No.

Q Nobody even thought he would cut anybody, did they? A I don't know what was in his mind.

* * * *

[fol. 626] ALFREDA CLOSTERMAN

was called as a witness by and on behalf of the Respondents and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JENKINS:

Q What is your name? A Alfreda Closterman.

Q What is your connection with the Gissel Packing Company? A I am Secretary-Treasurer.

Q How long have you had that job? A About thirty-one years.

MR. JENKINS: Your Honor I would like to have marked for identification as Respondent's Exhibit, these documents to be marked as Respondent's Exhibits 3, 4, 5, and 6.

TRIAL EXAMINER: They will be so identified.

(Whereupon, the documents above-referred to were marked Respondent's Exhibits Nos. 3, 4, 5 and 6 for identification.)

Q (By Mr. Jenkins) Mrs. Closterman, is there an employee of the Gissel Packing Company—

MR. BAKER: May we see those?

MR. JENKINS: Yes, of course.

MR. BAKER: (Examining documents.)

[fol. 627] Thank you.

Q (By Mr. Jenkins) Mrs. Closterman, is there an employee of the Gissel Packing Company by the name of Ralph Hysell? A Yes, there is.

Q I hand you here a document noted as Respondent's Exhibit No. 3 and I hand you the original, and one further copy of that exhibit I will give to Counsel for General Counsel, which is a photo copy of it, and I will ask you what that is?

(Handing document.) A (Examining document.)

It is an employees' withholding exemption certificate.

Q Does the name of Ralph Hysell appear on it? A (Examining document.)

Yes, it does.

Q That is signed to that document? A Yes, it is.

Q Who placed it on the document? A Ralph Hysell himself.

MR. BAKER: Is Counsel—does Counsel intend to offer this document?

MR. JENKINS: Yes, I do.

MR. BAKER: For what purpose?

MR. JENKINS: We want to show that Mr. Hysell is [fol. 628] capable of signing his name.

I was indicated that he was not.

* * * *

[fol. 629] Q (By Mr. Jenkins) Is this slip here, Respondent's Exhibit No. 3, is this the record of the company contained in the usual course of business and retained under your supervision and control? A Yes, as soon as they are hired.

MR. JENKINS: We move its admission into evidence.

TRIAL EXAMINER: Well, is Mr. Hysell present at the hearing?

MR. JENKINS: May I suggest, Your Honor, that you reserve your ruling on this and maybe I can connect it up later?

TRIAL EXAMINER: All right.

Q (By Mr. Jenkins) I hand you now Respondent's Exhibit No. 5, and give a copy of Respondent's Exhibit 5 [fol. 630] also to the Counsel for the General Counsel and I will ask you what that is?

(Handing document.) A (Examining document.)

It is a freight bill, Borden Truck Company.

Q Does the name of Mr. Hysell appear on that? A Yes, the name of Ralph Hysell is on that.

Q Was this done in your presence? A No.

Q Now, I hand you here the original of a copy of Respondent's Exhibit No. 4 and I give a copy of Respondent's Exhibit No. 4 to Counsel for General Counsel and I ask you what this is?

(Handing document.) A (Examining document.)

It is an employees withholding exemption certificate.

Q Pertaining to whom? A Tommy Lee Burchell.

Q When did Mr. Burchell first become an employee of your company? A March 4, 1965.

MR. JENKINS: We move to introduce Respondent's Exhibit No. 4 into evidence.

* * * * *

[fol. 633] Q (By Mr. Jenkins) Mrs. Closterman, I hand you Respondent's Exhibit No. 6, and ask you to state what that is?

(Handing document.) A (Examining document.)

You mean, you want me to—

Q Just state generally what it is? A It is a notice that was put on the bulletin board.

Q Was it signed by anybody in your company? A It was signed by Karl Gissel.

Q And is what you have here a copy of it? A It is.

MR. BAKER: I think I have the original of that.

MR. JENKINS: I will offer—I would like to have the original.

I would like to offer it into evidence.

Perhaps we could do it by stipulation.

[fol. 634] MR. BAKER: Here is the document.

(Handing document.)

MR. JENKINS: Thank you.

Counsel for General Counsel has gotten the notice from the Bulletin Board apparently and it is the same as Respondent's Exhibit No. 6, I think.

MR. BAKER: I did not get that from the bulletin board. It is a notice from the bulletin board, but I did not get it from the bulletin board.

I had the notice in my file and I could not have obtained it from the bulletin board personally.

MR. JENKINS: Where did you get it from?

MR. BAKER: It came from the file.

MR. JENKINS: It is an official file from the bulletin board of the company and I would like to know where the General Counsel got this.

MR. BAKER: We got it from our file.

Q (By Mr. Jenkins) Is this the original of Respondent's Exhibit No. 6 which has been furnished by the General Counsel, I will hand it to you, and then I will ask you

if this is the notice which was posted on the bulletin board of the company?

(Handing document.) A (Examining document.) Yes, it is.

[fol. 635] Q I see.

Was it put on the bulletin board on or about February 12, 1965? A Yes, it was.

* * * *

[fol. 636] TRIAL EXAMINER: Yes, it is received.

(Whereupon, the document previously marked as Respondent's Exhibit No. 6, for identification, was received in evidence.)

Q (By Mr. Jenkins) Are you familiar with the way Ralph Hysell signs his name? A Yes.

Q I will ask you, has he ever signed his name in your presence before? A Yes.

Q I will ask you if the signature which appears on Respondent's Exhibit No. 5 and the signature which appears on Respondent's Exhibit No. 3, will you state whether or not they appear to you to be the same signature of Ralph Hysell? A Yes, it does.

MR. JENKINS: We move into evidence Respondent's Exhibit 3 and Respondent's Exhibit 5.

* * * *

[fol. 638] MR. JENKINS: Yes, after all the Respondent's Exhibit here where he signed his withholding statement says "Signed" and his name appears there.

TRIAL EXAMINER: Well, they will be received.

Respondent's Exhibits 3, 4 and 5 are received in evidence, and the record will indicate that Respondent's Exhibit No. 6 has heretofore been received.

(Whereupon, the documents previously marked as Respondent's Exhibits Nos. 3, 4 and 5, for identification, were received in evidence.)

* * * *

[fol. 640] Q (By Mr. Jenkins) Now, Mrs. Closterman, I want you to direct your attention please to an employee of the company by the name of Herbert Mounts,

and I want you to direct your attention back to a time of February 15, 1965, on Monday, when he was due back at the company from a two weeks vacation.

Can you state whether or not you received any notice on Monday, February 15, 1965 or on Tuesday, February 16, 1965 as to the whereabouts of Mr. Mounts?

* * * * *

[fol. 641] MR. BAKER: As to that, there is no dispute; he says he did not come back to work until Wedesday.

* * * * *

[fol. 642] Q (By Mr. Jenkins) What efforts, did you make, if any, Mrs. Closterman, to try to locate him? A Well, I didn't myself, but one of the girls did in the office.

Q Was this under your supervision? A It was under Charles' supervision.

Q What was done, to your knowledge? A Well, he had—

MR. BAKER: I will object.

TRIAL EXAMINER: Do you know, were you present when it was done?

THE WITNESS: I was present when Charles told this person to try to find him.

Q (By Mr. Jenkins) Was it in your presence? A Yes, it was.

Q What happened? A Well, she tried to find him.

Q How did she go about it? A She called his mother-in-law.

* * * * *

Q Did you see her making the call in response to his [fol. 643] directions? A Yes.

Q But you do not know who she talked to or what was said? A No.

* * * * *

[fol. 646] JOHN E. JENKINS, JR.

was called as a witness by and on behalf of the Respondent and, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

THE WITNESS: I am Johnny Jenkins, Jr., and I am an attorney practicing law in Huntington, West Virginia, and I have been retained along with my firm, to represent the Gissel Packing Company in connection with this labor case coming before the Trial Examiner in the National Labor Relations Board.

In the course of the hearing of this case, it is my understanding as I was present when a witness by the name of Jerry Lee Frye testified, Mr. Frye testified that I interviewed him and that I represented to this witness that I was:

"Number one, that I was in Cincinatti; and,

Number two, that I was a representative of the National Labor Relations Board."

I never made a statement to Jerry Frye, directly or indirectly, that I was from Cincinatti.

[fol. 647] I never made a statement to this witness in any way that I was a representative of the National Labor Relations Board or an employee of the Federal Government or a representative of any Government agency.

I interviewed Jerry Frye at the offices of Gissel Packing Company on April 1, 1965, and none of these things that Mr. Frye alleges to be my representations to him are correct and I am denying them.

That constitutes my direct testimony.

I am available for cross-examination.

CROSS-EXAMINATION

BY MR. BAKER:

Q What did you tell Mr. Frye, Mr. Jenkins? A I told Mr. Frye, if my recollection is correct, that I was investigating a case and I asked him questions concerning incidents about his refusal to shake hides, along with other employees, and I asked him questions as to whether or not anyone had made threats to him or not, as had been alleged in the Complaint in this hearing.

Q Did you tell him who were were? A I told him what my name was and I introduced the court reporter.

Q Did you tell him you were an attorney for the company? A I do not recall whether I told him that I was the attorney for the company or not.

Q Did you tell him why you wanted to ask him any [fol. 648] questions other than that you were just investigating, what did you say, unfair labor practice charges? A I do not remember the exact words I used, but I told him what the general purpose of my investigation was.

Q Did you tell him or in any way indicate to him that you had been retained by the Gissel Packing Company as their attorney? A I do not remember whether or not I told him that I was working for the Gissel Packing Company or not.

It is my recollection that I did, but I am not sure that I did.

I interviewed a lage number of witnesses on this day.

Q Did you advise at—advise him at any time—in any way that he did not have to answer your questions and that no retaliation would be made by the company? A It is my recollection that I just asked him to tell me the truth and there would be nothing else involved.

Q Did the reporter reduce to writing everything that was said or only the part after you began to ask questions? A The reporter reduced to writing every word that was said.

Q Including your introduction? A Correct.

Q And who did you say the reporter was? A Mr. [fol. 649] Glen Matthews, who is the official reporter for the Domestic Relations Court in Cabeel County.

Q Did you have such a transcript prepared? A Yes.

Q Do you have it in your possession? A That is correct.

* * * *

GENERAL COUNSEL EXHIBIT NO. 2

January 22, 1965

Mr. Charles Gissell
Gissell Packing Company
Huntington, West Virginia

Dear Mr. Gissell:

This letter will serve to confirm our telephone conversation earlier today in which I requested recognition and bargaining for the eligible employees in your plant. Our Union represents a majority of your eligible employees and we are prepared to deliver to you our signed application cards for the purpose of checking them against your payroll so that there will be no possible doubt as to our majority status. We stand ready and willing at any time to deliver these to you or to your representative for the purpose of ascertaining our majority status.

Please advise.

Very truly yours,

/s/ Sherwood M. Spencer

SMS:d

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

P.S. Eligible employees of your plant includes truck driv-ers.

/s/ Sherwood M. Spencer

[Registered Receipt No. 740264
Dated January 22, 1965
Sent To—Charles Gissell
Gissell Packing Co.
Huntington, West Virginia
Signed—Charles Gissel
Date Delivered—January 25, 1965]

GENERAL COUNSEL EXHIBIT NO. 3

GISSEL PACKING COMPANY, INC.

720 West Fifteenth Street
HUNTINGTON 4, WEST VIRGINIA

January 26, 1965

Mr. Sherwood M. Spencer
Food Store Employees Union
Post Office Box 2751
Charleston, West Virginia 25330

Dear Sir:

We acknowledge your letter of January 22 and your telephone conversation of the same date at which time you advised us you would contact us further about your Union's interest in representing employees of our Company.

We refuse to recognize your Union as the representative of our emplowees because you do not represent a majority of them. At an earlier election conducted by the National Labor Relations Board you contended that you represented a majority of our employees, but when the election was held an overwhelming majority of the employees rejected your Union and we do not believe there has been any change of circumstance or opinion of our employees since that time.

We are advised that it is the current organizing technique of your Union to obtain signatures on so called application cards by a variety of means and representations which are not compatible with a free exercise of and employee's choice. We are advised of instance of direct misrepresentation in obtaining employees signatures by your Union under such circumstances. Employees signatures are not a free expression of employees sentiments with respect to Union representation as provided for under the National Labor Relations Act.

Your Letter of January 22 suggests that you desire to represent certain employees of our plant including truck drivers and we do not know who "eligible employees" are

as used in your letter and we further do not think that [illegible] drivers are a part of any appropriate bargaining unit.

If you really represent in your opinion a majority of the employees of our plant, we think that you would have [illegible] petitioned the National Labor Relations Board to hold a fair and honest election, giving our employees the right to express their opinion as provided for under Section 7 of the Act, and their choice could be made in an appropriate bargaining unit in a fairly conducted election.

Your very truly,

GISSEL PACKING COMPANY, INC.

By /s/ K. H. Gissel (Charles)
Vice President.

GENERAL COUNSEL EXHIBIT NO. 4

February 10, 1965

Mr. K. H. Gissell, Vice President
Gissell Packing Company, Inc.
720 West 15th Street
Huntington, West Virginia

Dear Sir:

This letter will acknowledge your reply to our letter of January 22, showing date of January 26, 1965.

We note that you are refusing to recognize our union as a representative of the employees because you claim we do not represent a majority. You further advise us that it is your understanding that it is our current organizing technique to obtain authorization cards from the employees in order that we may claim representation. You go on further to say that we previously indicated we represented a majority of the employees and when an election was held the Union was overwhelmingly defeated. All of this is true.

1. We are certain that the employees of your plant understand well what representation by our Union means to them and when they sign one of our authorization cards they are giving us the right to bargain for them.

2. There is nothing illegal in our requesting representation and bargaining without an election of the employees.

3. The coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election by the employers is most difficult for us to combat. The N. L. R. B. and the courts have recognized that an election is no longer necessary when we actually represent a majority of the employees.

We are again offering to deliver to you or to your representative copies of our signed authorization cards which have been signed by a wide majority of your employees. There can be no doubt as to our position with regard to representation if you accept our offer and check these signed authorizations against payroll records in your office.

We are certain that your claim that the employees do not know what they are doing with respect to signing these cards is in error. We hold a much greater regard for the intelligence of your employees. Therefore, we find we have no choice except to file charges against the company for failure to recognize our Union and failure to bargain with us as representative of the employees because you can no longer express any good faith doubt as to our representation.

Very truly yours,

/s/ Sherwood M. Spencer

SMS:d

GENERAL COUNSEL EXHIBIT NO. 5

GISSEL PACKING COMPANY, INC.

720 West Fifteenth Street
HUNTINGTON 4, WEST VIRGINIA

February 12, 1965

Mr. Sherwood M. Spencer
Food Store Employees Union
Post Office Box 2751
Charleston, West Virginia 25330

Dear Sir:

We acknowledge Your Letter of February 10.

You recite that there is nothing illegal about your requesting representation in bargaining for our employees, and there is nothing illegal about our refusing your request because we honestly do not believe you represent a majority of our employees. Under such circumstances, the National Labor Relations Board may conduct a fair and impartial election wherein the employees may determine for themselves whether or not your union is entitled to represent them.

Your reference to "coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election by the employer" certainly does not apply to us. If you intend to imply that these factors exist in the present situation, you are completely mistaken and your approach further bolsters our opinion that you do not really honestly represent a majority of the employees in our plant. We are convinced that you are resorting to these pressure and scare tactics and implied intimidation in order to get around and expression of the true wishes of our employees which the law says that are entitled to express.

We sincerely regret that you are apparently going to subject us to becoming involved with unfair labor practice

charges, however since we do not believe that your union represents a majority of our employees, we see no alternative except to let the matter be determined according to the law.

Sincerely,

GISSEL PACKING COMPANY, INC.

By /s/ Karl Gissel
Vice President.

GENERAL COUNSEL EXHIBIT NO. 6

February 16, 1965

Mr. Carl Gissell, Vice President
Gissell Packing Company, Inc.
720 15th Street
Huntington, West Virginia

Dear Mr. Gissell:

Our Union has no intention of engaging in a series of ord battles by the way of communications, to or from the other. Our offer to present to you the signed authorization cards for representation still stands and will continue to stand.

I am certain that the employees of your plant knew what they were doing when they signed those simply worded authorization cards. They are still available and will be available for your inspection at any time.

Very truly yours,

/s/ Sherwood M. Spencer

SMS:d

GENERAL COUNSEL EXHIBIT NO. 7

GISSEL PACKING COMPANY, INC.

720 West Fifteenth Street
HUNTINGTON 4, WEST VIRGINIA

February 17, 1965

Mr. Sherwood M. Spencer
Food Store Employees Union
P. O. Box 2751
Charleston, W. Va. 25330

Dear Sir:

Referring to your letter of February 16, 1965, Our position is clearly set before you on our proceeding Correspondence.

Gissel Packing Co., Inc.

/s/ Karl Gissel
Karl H. Gissel

KHG:e

GENERAL COUNSEL EXHIBIT 9-C

GISSEL PACKING CO., INC.
720 W. 15th St.
Huntington 4, W. Va.

List of everyone on our payroll as of January 22, 1965:

Mrs. R. E. Gissel
F. W. Gissell
H. L. Gissel
K. H. Gissel
A. L. Closterman
H. B. Martin
Harriett Curtis
Edith Lewis
Marie Snead
Leoris Gissel
Siddy Caldwell
Nell Charles
Evelyn Collins
Emogene Ellis
Alfreda Hutchison
C. P. Adkins
K. R. Adkins
L. W. Bailey
D. F. Billups
J. J. Bonham
I. H. Caldwell
George Collins
R. L. Curry
D. W. Ellis
Earl Fortner, Jr.
Francis Fortune
I. R. Hutchison
I. R. Hysell
R. H. Hysell
J. K. Johnson
D. C. Kidd
H. C. Lewis
C. F. McComas, Jr.
E. B. Maynard, Jr.
Donald Meadows
J. T. Mollohan
W. R. Mollohan
R. D. Moore
W. D. Moore
Dewey Parsley, Jr.
Curtis Queen
F. D. Rowe
J. M. Vance
Elisha Watts
R. B. Simon
J. I. Ellis
J. I. Frye
R. F. Lewis
H. F. Mounts, Jr.
J. F. Robinson
S. H. Rowe
J. B. Scott
Clifford Carley
W. W. Bowyer
N. A. Gibson
J. B. Harless
T. I. Jordan
C. R. Kitchen
E. M. Osborne
C. F. Sprigle
I. E. Turpin

GENERAL COUNSEL EXHIBIT 10-A

APPLICATION

Food Store Employees Union, Local #347

P. O. Box 2751 Charleston, W. Va.

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions.

Employer's Name—Gissell Packing Co.

Employer's Address—

Date—1/21/65

Your Name—Jessie J. Bonham

Yor Street Address—1745 Jefferson St.

City and State—Huntington, W. Va.

Your Phone Number

RESPONDENT'S EXHIBIT NO. 1

GISSEL PACKING COMPANY, INC.
720 West Fifteenth Street
HUNTINGTON 4, WEST VIRGINIA

February 19, 1965

Mr. Herbert F. Mounts Jr.
121 Marion Street
Huntington, W. Va.

Dear Sir:

Your refusal to follow orders today with respect to having the hams put in the pans by 11:30 A.M. has been called to our attention. You have advised Mr. Karl Gissel that you misunderstood instructions, although we are satisfied that you did not misunderstand your orders. As you know, this has happened on earlier occasions.

You were due to return and report for work after your vacation on Monday, February 15, and you did not appear until Wednesday, February 17. We attempted to contact you unsuccessfully, and you have no excuse for your failure to appear for work as scheduled.

In addition, you have been regularly late for work on a number of occasions.

Your discharge for failure to report for work and insubordination has been recommended, but the company has decided to retain you as an employee. You are directed to report for work at the regular time on Monday, February 22. However, this letter will be a final warning to you that in the event you are late for work or refuse to appear for work without a proper excuse and without advanced warning, or in the event that you refuse to follow orders of your superiors, severe disciplinary action will be taken against you.

Yours very truly,
GISSEL PACKING CO., Inc.

/s/ Alfreda L. Closterman

ALC/e

RESPONDENT'S EXHIBIT NO. 2

STATE OF WEST VIRGINIA)
) ss:
COUNTY OF CABELL)

AFFIDAVIT

I, Elmer (Pork Chop) Maynard, being duly sworn on my oath state: I reside 1330 Madison Ave., Huntington, W. Va. I can not be reached by phone at home.

I started working for Gissel Packing in about September, 1964 and I now bone hams and pack boiled hams.

On or about January 21, 1965 two Union agents from the Food Store Employees Union came up to me after work while I was the Boys Club in Huntington, W. Va. One of the employees, I don't remember his name, had asked me the day before if I wanted to sign up for the Union. I told him yes, I'd be glad to sign up. He said he would have the Union men come to meet me. I told that employees that I would-be at // E.B.M. the Boys Club that night of January 21, 1965 if they wanted to see me. That employee and two agents met me that night at the Boys Club, asked me to sign a union—which I did—and they then left. They didn't promise me anything if I would sign and they didn't say anything would happen if I didn't sign.

On or about February 18, 1965, the day before Red Mount was fired, Charles E.B.M. Gissel came up to me while I was boning hams and asked me if I was aiming to walk out when the rest of the employees walked out over the Union. I said I didn't know anything about any Union. He then walked away. No one else was around when Charles Gissel asked me that.

On Monday, February 22, 1965 Jerry Frye and I were trimming hams in pans to be boiled. We pushed the trimmings on to the floor. Herbert Gissel, head of the sausage floor, jumped us about throwing the trimmings on the

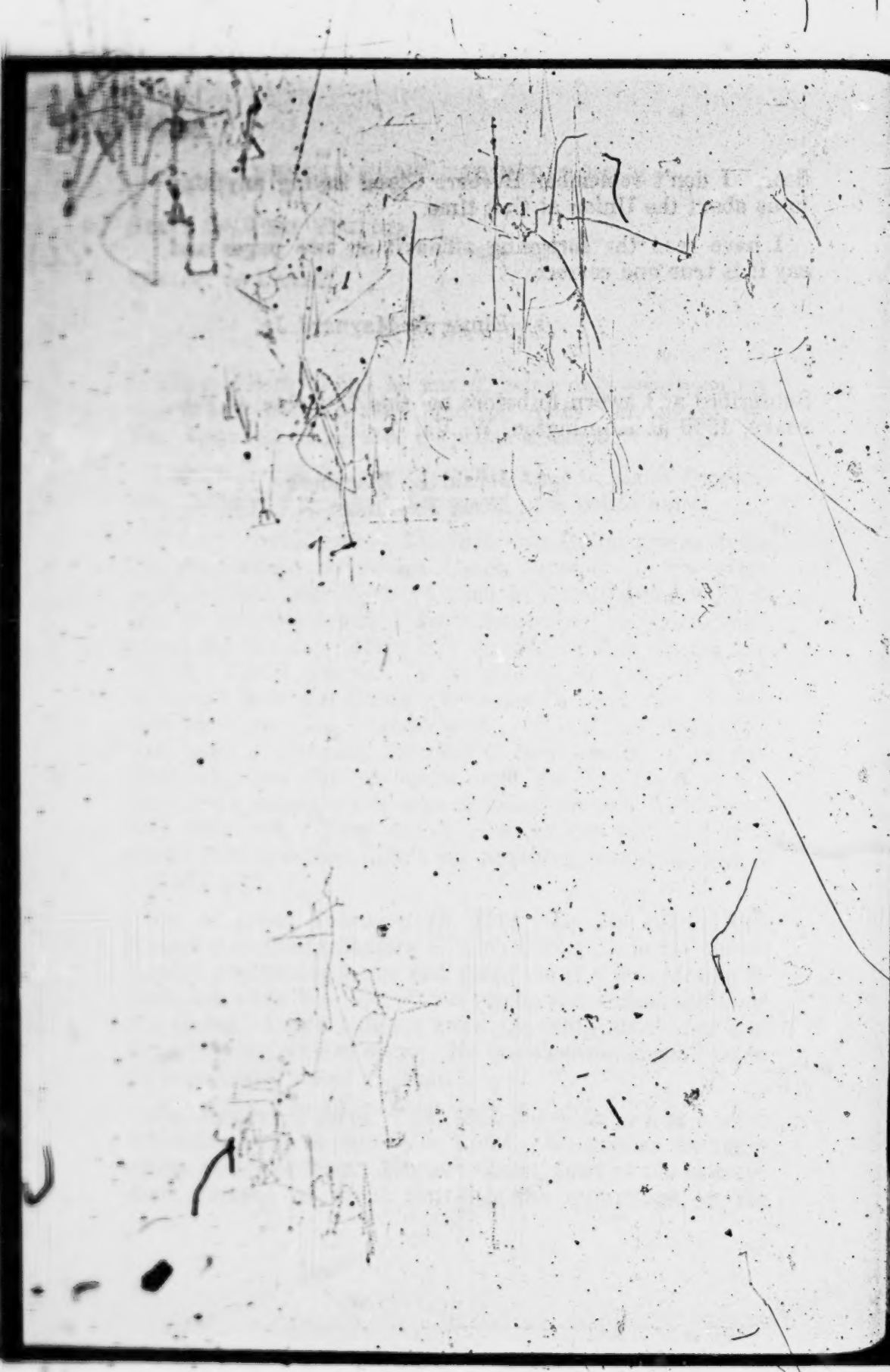
floor. I don't remember Herbert Gissel saying anything to us about the Union at that time.

I have read the foregoing affidavit on two pages and say it is true and correct.

/s/ Elmer B. Maynard Jr.

Subscribed and sworn to before me this 24th day of February, 1965 at Huntington, W. Va.

/s/ Jerald L. Eisenberg
Field Examiner, N.L.R.B.



Form W-4 (Rev. June 1959)

EMPLOYEE'S WITHHOLDING EXEMPTION CERTIFICATE

Type or print full name: Ralph Hysell

Social Security No. 236-62-7437

Print home address: 1201 3rd Ave

City: Huntington Zone: State: W. Va.

HOW TO CLAIM YOUR WITHHOLDING EXEMPTIONS

1. If SINGLE, and you claim no exemption, write the figure "1" 1

2. If MARRIED, one exemption each for husband and wife if not claimed on another certificate.
   (a) If you claim both of these exemptions, write the figure "2"
   (b) If you claim one of these exemptions, write the figure "1"
   (c) If you claim neither of these exemptions, write "0" 1

3. Exemptions for age and blindness (applicable only to you and your wife but not to dependents):
   (a) If you or your wife will be 65 years of age or older at the end of the year, and you claim this exemption, write "1"; if both will be 65 or older, and you claim both of these exemptions, write "2" . . . . .
   (b) If you or your wife are blind, and you claim this exemption, write the figure "1"; if both are blind, and you claim both of these exemptions, write the figure "2" . . . . .

4. If you claim exemptions for any of your dependents, write the number of such exemptions. (Do not claim exemption for a dependent unless you are qualified under instruction 4 on other side.) . . . . .

5. Add the number of exemptions which you have claimed above and write the total 1

6. Additional withholding you have agreed upon with employer. *See* Instruction 1 . . . . . $ .....

I CERTIFY that the number of withholding exemptions claimed on this certificate does not exceed the number to which I am entitled.

(Date) 10/1/16 , 19.... (Signed) RALPH HYSELL

RESPONDENT EXHIBIT NO. 8

246

RESPONDENT EXHIBIT NO. 4

247

EMPLOYEE'S WITHHOLDING EXEMPTION CERTIFICATE

Print full name Tommy Lee Burchell Social Security Account Number [illegible]

Print home address [illegible] City [illegible] Zone ..... State .....

HOW TO CLAIM YOUR WITHHOLDING EXEMPTIONS

1. If SINGLE, and you claim no exemption, write the figure "1" .....
2. If MARRIED, one exemption only is allowable for husband and wife if not claimed on another certificate.
   (a) If you claim both of these exemptions, write the figure "2"
   (b) If you claim one of these exemptions, write the figure "1" 2
   (c) If you claim neither of these exemptions, write "0"
3. Exemptions for age and blindness (applicable only to you and your wife but not to dependents):
   (a) If you or your wife will be 65 years of age or older at the end of the year, and you claim this exemption, write "1"; if both will be 65 or older, and you claim both of these exemptions, write "2" .....
   (b) If you or your wife are blind, and you claim this exemption, write the figure "1"; if both are blind, and you claim both of these exemptions, write the figure "2" .....
4. If you claim exemptions for one or more dependents, write the number of such exemptions. (Do not claim exemption for a dependent unless you are qualified under instruction 4 on other side.) .....
5. Add the number of exemptions which you have claimed above and write the total 2
6. Additional withholding per pay period under agreement with employer. See Instruction 1 ..... $.....

I CERTIFY that the number of withholding exemptions claimed on this certificate does not exceed the number to which I am entitled.

(Date) March 4, 1965 (Signed) Tommy Lee Burchell

EMPLOYEE: Keep this certificate for your records. If you claim more than 14 exemptions, you must furnish your employer a copy of this certificate.

EMPLOYER: Keep this certificate with your withholding tax records. If the employee is entitled to more exemptions than he claims, he may file a new certificate with you. If he is entitled to fewer exemptions than he claims, he must file a new certificate within 10 days.

Petitioner's Exhibit No. 19

249

BORDEN TRUCK WAYBILL — DELIVERY RECEIPT No. 68175

From Borden Co Date 8/3 19

Deliver to Geo. A. Hormel & Co. Huntington Ind

Prepaid / Collect

No. Packages	Description of Articles	Weight	Rate	Freight
86	Cartons of Cheese	1712		
	Boxes of Cheese			
	Cartons of 5 oz. Cheese in Glass			
	Cartons of Prepared Dough			
	Cartons of Salad			
	RALPH HSEI			

This shipment is correctly described. Correct weight is 1712 lbs. Weight on certain items to be inserted by office

ACKNOWLEDGMENT OF SHIPPER AND BORDEN TRUCK

Shipper Borden Co. Borden Truck No. 46

Per H. Osnick Per W. Johnson

DELIVERY RECEIPT

Receipt of above shipment in good order is hereby acknowledged

Consignee Per

RESPONDENT EXHIBIT NO. 5

248

RESPONDENT'S EXHIBIT NO. 6

February 12, 1965

NOTICE

ALL EMPLOYEES ARE NOTIFIED THAT NO ONE IS AUTHORIZED TO REPRESENT THE VIEWS OF THE COMPANY OR ANY LABOR OR UNION MATTERS, EXCEPT ALFREDA CLOSTERMAN. IF ANYONE ATTEMPTS TO DO SO, YOU ARE TO REPORT IT AT ONCE TO ALFREDA CLOSTERMAN IN WRITING.

GÍSSEL PACKING CO., INC.

POSTED 2/17/65
11:25 a.m,

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon charges filed on February 11 and May 12, 1965, by the Food Store Employees Union, Local # 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, the General Counsel, acting through the Regional Director for the Ninth Region, issued complaints on March 31 and June 21, 1965. On the latter date, the Regional Director also issued an order consolidating the two cases for hearing. The complaints alleged that Respondent had engaged in conduct which violated Section 8(a)(1), (3) and (5) of the Act. In its answers, Respondent admitted certain allegations of the complaints, such as the commerce allegations, but denied having committed any unfair labor practice.

Thereafter, pursuant to due notice, a hearing was held before the undersigned Trial Examiner at Huntington, West Virginia, on August 4, 5, 6, and 17, 1965. All parties were represented and were given full opportunity to present evidence, to examine and cross examine witnesses, to argue orally and to file briefs. The parties waived oral argument and no briefs were filed.

Upon consideration of the entire record and upon my observation of the witnesses while testifying, I make the following:

Findings of fact

I. The business of Respondent; the labor organization involved

Gissel Packing Company, Inc., herein at times called the Company or the Respondent, is a West Viriginia corporation with its principal office and place of business in Huntington, West Virginia. It is engaged in the slaughtering, processing, and non-retail sale of beef and pork products. In the 12 months prior to the issuance of each of the complaints, each a representative period, Respondent had a direct inflow of products and livestock, in interstate commerce, valued in excess of $50,000, which was

purchased and shipped directly to its plant from points outside the State of West Virginia.

Upon the foregoing undisputed facts, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also undisputed and I find that Food Store Employees Union, Local # 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II: The alleged unfair labor practices

A. *The issues*

The complaints allege that Respondent engaged in conduct, such as interrogation, threats, and surveillance, which constituted interference, restraint, and coercion, that it discharged two employees because of their Union membership and activity, and that it violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union which represented a majority of its employees in an appropriate bargaining unit. In turn, Respondent contended that it had not engaged in any conduct which violated Section 8(a)(1) of the Act, stated that the employees were not discharged but quit, and asserted that it refused to bargain with the Union because it doubted both the Union's majority and the appropriateness of the bargaining unit.

As in many Board cases, the conclusions reached depend in considerable part upon whether the Examiner credits the witnesses called by the General Counsel or those called by Respondent. Having observed the demeanor of the witnesses and having considered the testimony in the light of all of the circumstances, I have concluded that some of the witnesses for each party testified truthfully in some respects and untruthfully in others. Although the general impression seems to be that a witness is either completely truthful or completely untruthful, "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *N.L.R.B.*

v. Universal Camera Corp., 179 F.2d 749, 754 (C.A. 2). As a result, "It is no reason for refusing to accept everything a witness says, because you do not believe all . . . ." that he says. *(Ibid.)*

In each case, the degree of the interest of the witness in the outcome of the proceeding has been considered in determining his credibility. Some of the witnesses for both sides had a financial interest in the outcome of the proceeding while the interest of others was more subjective, such as an interest in seeing the General Counsel and, indirectly, the Union win or lose. As the Supreme Court said in *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404, 408:

For the demeanor of a witness

> ". . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, *who has a motive to deny*, may be uttered with such hesitation, discomfort, arrogance, or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer* v. *McDougall*, 201 F.2d 265, 269. (Emphasis supplied.)

Similarly, the court observed in *N.L.R.B.* v. *Warrenburg Board & Paper Corporation*, 340 F.2d 920, 923 (C.A. 2), that "The testimony of those who attempted to buttress the Respondent's position was of questionable value since two of the witnesses were closely identified with the Company's management and the others, although originally Union members, were not shown to have retained their membership." And the court pointed out in *N.L.R.B.* v. *Radcliffe*, 211 F.2d 309, 315 (C.A. 9), certiorari denied, 348 U.S. 833, that the Board "rightfully may decline to credit the testimony of interested witnesses, even though such testimony is uncontradicted."

As will appear, I have credited the testimony of most of the witnesses called by counsel for the General Counsel and have discredited much of the testimony of the witnesses called by Respondent. However, I have not credited the testimony of Herbert Mount, Jr., a witness for the

General Counsel, except in those cases in which it is corroborated by similar testimony given by credited witnesses or other record evidence.[1] In other words, the conclusionary findings and the recommended order set forth *infra* would be the same even had Mount not been a witness. My inability to accept Mount's uncorroborated testimony is based in part upon his evasive manner while testifying and in part upon the conflicts in his testimony at the hearing. On the other hand, when it has been found that a management representative made a statement to a creditable witness, I see no reason to doubt that the same representative made a similar statement to Mount or in his presence. Moreover, it is clear from the testimony of one of Respondent's witnesses that Mount was testifying truthfully in part, *i.e.*, when he asserted that he saw Terry Lewis, the son of one of the Company's vice presidents, at a hotel before a Union meeting and heard Lewis make a telephone call to his aunt, Company Secretary-Treasurer Alfreda Closterman, at the plant. (See *infra*).

The presence of Lewis at the hotel has played an important part in my failure to credit most of the testimony of Company Vice President Karl Gissel, who is referred to in the record and herein as Charles Gissel. Although Gissel's testimony is frequently indirect (see *infra*), he sought to create the impression that he did not make the statements attributed to him by witnesses for the General Counsel. In support of his statements, Gissel repeatedly asserted that the Company had learned, as a result of a prior election and unfair labor practice proceeding, what it could and could not do in connection with a Union campaign. However, the admitted presence of Lewis at the hotel is wholly inconsistent with Gissel's claim that the Company was determined not to commit any unfair labor practice during the 1965 Union campaign. No doubt, the Company was given good advice and made good resolutions about how it would conduct itself. Unfortunately, it is often difficult to heed good advice and keep good resolutions when faced with the very situation to which

[1] In addition, I have credited little of the testimony of General Counsel's witness Maynard other than that which could have been and was not refuted by available records. (See *infra*.)

the advice and resolutions were intended to apply.[2] As stated by the court in *Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F.2d 150, 153-154 (C.A. 5):

> When, as done here, an employer sets out to campaign against a union, one of the risks is that out of zeal, ignorance, or otherwise, foremen, supervisors, and similar representatives in championing the anti-union cause will overstep the mark.

Finally, I have taken into consideration the Company's failure to adduce documentary evidence, such as employee statements, which were admittedly in existence, and which could have been produced to corroborate critical portions of Charles Gissel's testimony which were contrary to claims made by witnesses for the General Counsel. *N.L.R.B.* v. *Collins & Aikman Corporation*, 146 F.2d 454, 458 (C.A. 4). There had been ample time to obtain records for there was a 10 day adjournment prior to the day on which Gissel testified and some documentary evidence was offered by Respondent and received into evidence that day. Therefore, I can only assume that the cards were not offered because they would not have supported Gissel's statements. *Interstate Circuit* v. *U.S.*, 306 U.S. 208, 225-226; *N.L.R.B.* v. *Geuder Bros. Mfg. Co.*, 187 F.2d 329, 332 (C.A. 7); *N.L.R.B.* v. *A.P.W. Products Co.*, 316 F.2d 899, 902 (C.A. 2); *N.L.R.B.* v. *Wallick*, 198 F.2d 477, 485 (C.A. 3).

B. *Background*

In late 1960 or early 1961, the same Union claimed to represent a majority of Gissel's employees and filed a representation petition with the Board. A hearing was held and the Board issued a Decision and Direction of Election on January 27, 1961 (Case No. 9-RC-3966), in

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[2] When Charles Gissel was asked, "What is a 'Gissel fit'?" he answered, "You ask them boys (indicating); they will tell you. It is no more than a man getting mad and cussing and raising hell." Although Gissel said that he had been warned that the Union employees would try to make him mad, he did not quote even one provocative statement made by an employee. Vice President Richard Gissel also admitted that he gets mad and that "yelling and cussing" is not uncommon around the plant.

which it found the following unit appropriate for the purpose of collective bargaining:

> All production and maintenance employees of the Employer a its Huntington, West Virginia, plant including truck drivers, truck driver salesmen and the janitor, but excluding office clerical employees, salesmen, professional employees, guards, officers of the Employer, the salesmen foreman, the truck salesmen foreman, the working foremen of the processing and packaging department, the slaughter house, the freight and delivery department, and the maintenance department, and all other supervisors as defined by the Act.[3]

An election was subsequently held and the Union lost. The Union filed unfair labor practice charges against Gissel, apparently in 1960, a hearing was held in May, 1960, and on July 21, 1960, a Trial Examiner issued an Intermediate Report, to which no exceptions were filed, in which it was found that Respondent's president, Paula Gissel (Mrs. R. E. Gissel) informed the employees in a speech that the Company would not recognize the Union even if the employees desired representation, that she would close the plant or greatly curtail its operations rather than accept the Union; and "clearly implied" that the employees would be given the benefit of group insurance if they rejected the Union.[4] It was also found that her son, Vice President Herbert Gissel, told a group of employees that the Company would not accept the Union, that there would be discrimination against employees who joined the Union, and that management might close the

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[3] This is the unit set forth in the complaint as appropriate for bargaining. An issue was raised in the 1961 proceeding concerning the truck driver salesmen and the Board found that they "like the truck drivers, have sufficient interest in common with the production and maintenance employees" to warrant including them in the unit. As set forth *infra*, the Company contended in the instant case that the unit for which the Union sought to bargain was inappropriate because the truck driver salesmen were included.

[4] This Intermediate Report was received and has been considered only as the Union's explanation of why it did not file a representation petition during the 1965 Union campaign.

plant or run it on a smaller basis if the Union came in. In addition, it was found that another son, Vice President Edward Gissel, told a group of employees that Mrs. Gissel would close the plant before she would let a union represent them. The foregoing conduct was found to violate Section 8(a)(1) of the Act. Allegations that the Company engaged in other conduct violative of Section 8(a)(1) were found unsupported by the record. *Gissel Packing Company*, Case No. 9-CA-2068.

C. *The refusal to bargain*

(1) The request and refusal

The Union began its second campaign among Respondent's employees about the middle of January, 1965. As set forth *infra*, there are, at most, 47 employees in the unit alleged by the complaint to be appropriate for collective bargaining and 31 of them signed authorization cards between January 13 and January 22, 1965.

On January 22, Union Representative Sherwood Spencer made a telephone call to Company Vice President Charles Gissel. He asked Gissel if the latter remembered him and Gissel said that he believed he did.[5] Spencer then told Gissel that the Union represented a majority of the employees and requested recognition and bargaining. Gissel replied that Spencer would have to talk to the Company's attorneys and gave Spencer the name of at least one of them. (According to Gissel, when Spencer said he "wanted to talk about the Union, I refused to answer him, I refused to answer his questions".)

That same day, Spencer wrote Charles Gissel:

> This letter will confirm our telephone conversation earlier today in which I requested recognition and bargaining for the eligible employees in your plant. Our Union represents a majority of your eligible employees and we are prepared to deliver to you our signed application cards for the purpose of checking

[5] Spencer was apparently involved in the 1960-1961 campaign and hearing.

them against your payroll so that there will be no possible doubt as to our majority status. We stand ready and willing at any time to deliver these to you or to your representative for the purpose of ascertaining our majority status.

P.S. Eligible employees of your plant includes [sic] truckdrivers.

By letter dated January 26, Vice President Charles Gissel told Spencer:

> We acknowledge your letter of January 22 and your telephone conversation of the same date at which time you advised us you would contact us further about your Union's interest in representing employees of our Company.
>
> We refuse to recognize your Union as the representative of our employees because you do not represent a majority of them. At an earlier election conducted by the National Labor Relations Board you contended that you represented a majority of our employees, but when the election was held an overwhelming majority of the employees rejected your Union and we do not believe that there has been any change in circumstance or opinion of our employees since that time.
>
> We are advised that it is the current organizing technique of your Union to obtain signatures on so called application cards by a variety of means and representations which are not compatible with a free exercise of an employee's choice. We are advised of instances of direct misrepresentation in obtaining employees' signatures by your Union under such circumstances. Employees' signatures are not a free expression of employees' sentiments with respect to Union representation as provided for under the National Labor Relations Act.
>
> Your letter of January 22 suggests that you desire to represent certain employees of our plant including truck drivers and we do not know who "eligible employees" are as used in your letter and we further do not think that the truck drivers are a part of any appropriate bargaining unit.

If you really represent in your opinion a majority of the employees of our plant, we think that you would have heretofore petitioned the National Labor Relations Board to hold a fair and honest election, giving our employees the right to express their opinion as provided for under Section 7 of the Act, and their choice could be made in an appropriate bargaining unit in a fairly conducted election.

On February 10, Union Representative Spencer wrote Charles Gissel:

This letter will acknowledge your reply to our letter of January 22, showing date of January 26, 1965. We note that you are refusing to recognize our union as a representative of the employees because you claim we do not represent a majority. You further advise us that it is your understanding that it is our current organizing technique to obtain authorization cards from the employees in order tha we may claim representation. You go on further to say that we previously indicated that we represented a *majority of the employees* and when an election was held the Union was overwhelming defeated. All of this is true.

1. We are certain that the employees of your plant understand well what representation by our Union means to them and when they sign one of our authorization cards they are giving us the right to bargain for them.

2. There is nothing illegal in our requesting representation and bargaining without an election of the employees.

3. The coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election by the employers is most difficult for us to combat. The N.L.R.B. and the courts have recognized that an election is no longer necessary when we actually represent a majority of the employees.

> We are again offering to deliver to you or to your representative copies of our signed authorization cards which have been signed by a wide majority of your employees. There can be no doubt as to our position with regard to representation if you accept our offer and check these signed authorization cards against payroll records in your office.
>
> We are certain that your claim that the employees do not know what they are doing with respect to signing these cards is in error. We hold a much greater regard for the intelligence of your employees. Therefore, we find we have no choice except to file charges against the company for failure to recognize our Union and failure to bargain with us as representative of the employees because you can no longer express any good faith doubt as to our representation.

In his letter in reply, dated February 12, Vice President Charles Gissel stated that there was nothing "illegal" about the Company's refusal to bargain because it "honestly" doubted the Union's majority. He repeated that an election should be conducted by the Board and further declared that the Union's reference to "coercion", "intimidation", "illegal interrogation", and "threats" by employers did not apply to Gissel. The Union's "approach", the letter went on, "bolsters our opinion that you do not really honestly represent a majority of the employees." In addition, Gissel charged that the Union was using "These pressures and scare tactics in order to get around [the] expression of the true wishes of our employees . . . ." Finally, the Company said that although it regretted the possibility of unfair labor practice charges, it still doubted the Union's majority and therefore saw no alternative except to allow the matter to be "determined according to the law." *

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* Although all of the Company's letters to the Union are signed Karl (or Charles) Gissel, on or about February 12, the following notice was posted at the plant:

[Footnote continued on page 260]

In its reply of February 16, the Union reiterated its offer to submit the signed cards to the Company and its belief that the employees knew what they were doing when they signed the cards.

Neither the Union nor the Company filed a representation petition as provided for by Section 9 of the Act.

Vice President Charles Gissel testified that upon receipt of the Union's request for recognition

> We talked it over among ourselves and decided maybe they might not have a majority because the other time [the Union did not have a majority]. They lost the election.

As for its contention that the unit for which the Union was seeking to bargain was inappropriate, Gissel testified that the Company regarded the "peddle drivers" as salesmen who should not be in the unit.[7] When asked on cross-examination whether Union Representative Spencer said "anything about selling," Gissel answered, "I don't know, I would have to study the letter and see. I didn't read it that far."[8]

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[6] [Continued]

February 12, 1965

"NOTICE"

ALL EMPLOYEES ARE NOTIFIED THAT NO ONE IS AUTHORIZED TO REPRESENT THE VIEWS OF THE COMPANY [ON] ANY LABOR OR UNION MATTERS, EXCEPT ALFREDA CLOSTERMAN. IF ANYONE ATTEMPTS TO DO SO, YOU ARE TO REPORT IT AT ONCE TO ALFREDA CLOSTERMAN IN WRITING.

GISSEL PACKING CO., INC.
Karl Gissel

[7] Some of Respondent's regular rank-and-file employees occasionally drive trucks locally and it apparently does not object to their inclusion in the unit. Peddle drivers, who are at times referred to as truck driver salesmen, do not work the fixed schedule of the other employees. In addition, they are paid a salary plus commission whereas the production and maintenance employees are paid by the hour. Of course, the peddlers spend most of their time away from the plant.

[8] Respondent introduced evidence concerning alleged misconduct which, presumably, was offered to justify its refusal to bargain.

(2) The unit and the authorization cards

As set forth *supra*, the unit established by the Board in 1961 included truck drivers and "truck driver salesmen" (or peddlers) but excluded, *inter alia*, office clerical employees, salesmen, officers of the Employer, the foremen of various named departments, and "all other supervisors as defined by the Act."

Respondent is a family business of which Mrs. R. E. (Paula) Gissel is president. Her sons and daughters, including Charles (K. H.) Gissel, Herbert Gissel, E. W. Gissel, and Edith Gissel Lewis are vice presidents of the Company. Alfreda Closterman is the secretary-treasurer. Charles Gissel is also supervisor of the shipping department and admittedly hires and fires employees in that department; Herbert Gissel is the supervisor of the sausage department and also hires and fires employees in that department; Leoris Gissel also has authority to hire and fire employees in her department; W. R. Mollohan is foreman of the boning department; R. B. Simon is a supervisor in the shipping department; and Clifford Car-

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Employee Rush Moore was asked about "incidents" which began "in January" and told about a stolen coat which was soiled in a vulgar manner. The owner of the coat was not a witness nor was any evidence offered indicating who had committed the act. Moore also listed the appearance of a newspaper clipping about the Union campaign. Both Moore and employee Daniel Ellis testified that several trucks blew up and that when they "felt" the oil it "felt" as if there was sand in it. Both Moore and Ellis testified that samples of the oil, which was purchased from the Pure Oil Company, were sent to that company for analysis but that no report had yet been received, *i.e.* in August. I do not believe that a company like Pure Oil would *delay 6 months* in analyzing the oil and reporting the results, a request which cast doubt on the purity of its product. No doubt employees Moore and Ellis believed that no report had been received, but I am convinced that Pure Oil sent a report and that it was not introduced into evidence because it did not substantiate the Company's claim. See cases cited *supra*. I note, also, that Ellis recommended that the Company buy its oil from another company, that this was done, and that there had been no trouble since. Ellis could not say definitely that the oil purchased from Pure Oil was new oil although he said that it "shouldn't" have been used oil. In the light of the above facts, I cannot find that there was sand in the oil.

ley is sales supervisor.[9] These 10 persons are therefore "officers of the Employer" and/or supervisors and, as such, are excluded from the unit. There are also two office employees (Martin and Curtis) and two salesmen (Jordan and Springle.)

When these 14 names are subtracted from the 61 on the January 22, 1965 payroll, it follows that there are, at most, 47 employees in the bargaining unit. There are also three assistant foremen or supervisors: Alfreda Hutchison, L. R. Hutchison, and Roman Edward "Eddie" Lewis.[10] If these persons are excluded from the unit as "supervisors as defined by the Act", there would be only 44 employees in the unit established by the Board in 1961.[11]

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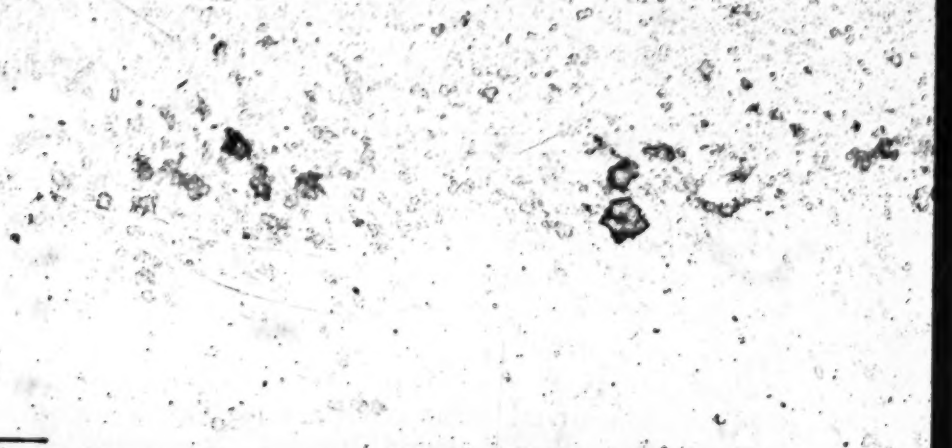
[9] In its 1961 Decision and Direction of Election, the Board did not pass upon the question of Mollohan's supervisory status and ruled that he could vote in the election subject to challenge. At the instant hearing, Charles Gissel identified Mollohan as "foreman of the boning department."

[10] In its 1961 Decision, the Board included L. R. Hutchison in the unit because nothing in the record indicated that he enjoyed a "special status" because he is the son-in-law of one of the vice presidents. However, at the instant hearing, Charles Gissel described Hutchison as an assistant foreman in the sausage room and said that he "takes over" when Vice President Herbert Gissel is absent. He added, however, that Herbert Gissel is not absent very often. In its 1961 Decision, the Board held that the record was insufficient to enable it to determine whether Alfreda Hutchison and R. E. Lewis should be excluded from the unit and allowed them to vote subject to challenge. Charles Gissel testified at the instant hearing that Alfreda Hutchison is a "supervisor" in her mother's absence, and expressed the opinion that, during such periods, she "would probably have about the same authority as her mother." When asked if Alfreda Hutchison could "hire and fire and so forth" in her mother's absence, Gissel answered, "I think so, yes." (Alfreda Hutchison's mother is one of Mrs. Gissel's children.) R. E. "Eddie" Lewis is the son of Vice President Edith Lewis and Charles Gissel described him at the instant hearing as "a sort of assistant foreman" and said that he has the right to discipline employees who do not obey orders. R. E. Lewis was only 21 or 22 at the time of the hearing in August, 1965, and had only worked full time for 2 or 2½ years. This means that he was ony 17 or 18 years old and a part-time employee in 1961 and it seems unlikely that he had any supervisory authority at that time.

[11] It has been assumed, for the purpose of determining the question of the Union's majority, that persons whose names appear

The record contains 31 cards. On each is the handwritten name of an employee who was in fact on the payroll on January 22 and a date, also handwritten. Only a few of the cards were identified by an official Union representative who testified that he saw the employee (whose handwritten name is on the card) sign the card on the date appearing on it.[12] The testimony of none of the Union representatives was disputed at the hearing and I find that the employees signed the cards on the dates which appear thereon. The persons on the January 22 payroll, their status, and the dates on which 31 of them signed cards are set forth in Appendix A, *infra*.

The cards, each of which bears a date no earlier than January 13 and no later than January 22, 1965, read as follows:



on the payroll and who are not identified in the record are employees. Of course, they are not in fact in the unit if they come within any of the classifications excluded by the Board.

[12] One card was identified by a fellow employee. The card of R. H. Hysell is marked with an "X" and is witnessed by Union Organizer Spitzer. Although Respondent presented evidence, which I credit, that Hysell can and does print his name, there is no evidence that he can write it. I also note that he was still employed by Respondent at the time of the hearing but was not called to deny Spitzer's testimony. Accordingly, I credit Spitzer's testimony and find that Hysell placed his "X" on the card as described by Spitzer. Kenneth Adkin's card is clearly dated January 19, 1965. Hysell's "signature" was the only one challenged by Respondent.

APPLICATION

Food Store Employees Union, Local # 347

P.O. Box 2751 Charleston, W. Va.

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions.

Employer's Name	Your Name
Employer's Address	Your Street Address
	City and State
Date ..... [13]	Your Telephone Number

Although Respondent asserted in its January 26th letter to the Union that it had been "advised of instances of direct misrepresentation in obtaining employee's signatures" on the cards, it introduced not a scintilla of evidence at the hearing in support of its assertion. And Respondent's witness, employee Rush Moore who did not sign a card, testified, "Of course, I knowed, you know, that all the guys, you know the biggest majority of them was for it." Moore is not a supervisor and his knowledge is not attributable to the Company. However, his testimony clearly reveals that he was aware of no conduct by the Union which caused him to believe that the employees who signed cards did so because of misrepresentations or pressures or for any other reason than the one stated on the card, *i.e.* that they wanted the Union to represent them in collective bargaining.

Furthermore, there is no evidence that, with one possible exception, any of the employees who signed cards

[13] In some cases, the date appears in the right-hand column and the line for the employee's telephone number is omitted.

changed his mind later. On the contrary, there is evidence that a substantial number of them, perhaps all but three, attended a Union meeting in April. (See *infra.*)

D. *Respondent's questioning of and statements to the employees*

As noted *supra*, there was an unsuccessful Union campaign among Respondent's employees in 1960-1961.

In September, 1964, employee Jerry Lee Frye was in the office on business and Vice President Charles Gissel told him to shut the door and then asked if anyone had talked to Frye about the Union. Frye said "No" and Gissel told him, "Well, if you do or if I think you're talking to a stranger, that is a Union man, . . . I will fire you right now." [14] During the same period, Charles Gissel saw employee Herbert Mount, Jr. talking to a loan company representative at the plant and asked Mount if the man was a Union representative, stated that he did not believe that the man was from a loan company, and told Mount that employees "caught talking" to a union representative would be "fired." [15] Frye and Mount signed

[14] Frye impressed me as a forthright and reliable witness and I have credited his testimony generally. Gissel finally denied having made any such statement after asking, "Why should I . . . there was no union campaign going on back then." Gissel's testimony indicates, however, that he was aware of a campaign by the same Union in the summer of 1964 at the plant of another, Huntington packing company, S. S. Logan Packing Co. A hearing was held in the summer of 1964 in a case involving that Company arising out of a charge filed by the same Union. *S. S. Logan Packing Co.*, 152 NLRB No. 40. A hearing was also held in Huntington on September 8 and 9, 1964 as the result of an unfair labor practice charge filed against a third local packing company by the same Union. *Sehon Stevenson & Co., Inc.*, 150 NLRB No. 64. In short, it is probable that Gissel knew that Union representatives were in town in the summer and fall of 1964. Gissel's testimony discloses that he talked to one of the Logans about the Union sometime in 1965. And a joint union meeting of Gissel, Logan, and Sehon Stevenson employees was held in April, 1965.

[15] It often required a number of questions before Gissel denied having asked the questions or made the statements attributed to him by witnesses called by the General Counsel. See, for example, the following:

[Footnote continued on page 266]

Union cards in January, 1965, attended a Union meeting on April 17, and were discharged on April 22. (See infra).

As set forth supra, 31 employees signed cards between January 18 and 22, 1965 and on the latter date, the Union told Charles Gissel that it represented a majority of the employees and requested bargaining.

In the early part of February, employee Frye heard Charles Gissel ask employee Rush Moore, who does a "little bit of everything" and works all over the plant, if he knew or had heard anything about the Union, if any Union men had been around to sign him up. Moore answered "No" and Gissel then asked Frye if he knew anything about employee Don Kidd and asked Moore if he knew whether or not employee Don Kidd was the "leader of the Union." Moore again answered, "No," whereupon Gissel said that he would fire Kidd "right there" if he found out "for sure" that Kidd was the "leader." [16]

[illegible] [Continued]

Q. (By Mr. Jenkins) Back in September of 1964, Frye testified that in the office you asked him about the Union and made the statement to the effect that you would fire him if he had anything to do with the Union.

Did you make any such statement to Frye back in September of 1964.

THE WITNESS: Why should I, Your Honor, there was no Union campaign going on back then.

TRIAL EXAMINER: Answer the question.

Q. (By Mr. Jenkins) Would you answer my question?

A. Well, like I said, there was no union campaign going on back then.

Q. Then you did not have any conversation with him like that?

A. No.

Having found that Gissel made the above statements in September, 1964, I find that Gissel told Mount in 1965, *i.e.* shortly after he was told that the shop was non-union and employees "caught" talking to a Union representative would be discharged. Of course, this statement has been considered only as background. See *N.L.R.B.* v. *Cumberland Electric Cooperative*, 337 F.2d 874, 874-875 (C.A. 6).

[16] I do not credit Mount's testimony that, during the same period, he heard Gissel tell one of the Company's suppliers that "maybe the Union was doing them a favor, that they could cut the slaughter

Althought I doubt Mount's reliability in some respects, after serious consideration, I have credited his testimony that, during the same period, he heard Charles Gissel ask Moore "to find out all he could about the Union, who had signed cards, to report back to him." My decision to credit Mount's testimony in this respect and to discredit that of Gissel and Moore is based in considerable part upon Gissel's answer when questioned about the statement attributed to him by Mount.[17] I have also considered Moore's testimony which discloses that the employees were reluctant to talk in his presence. In Moore's words, "Whenever, I walk around the plant if anybody is talking they all shut up and walk away from me." Finally, the

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house out . . . and have their meat shipped in." Although employee Kenneth Adkins testified that he heard Gissel say that it would be cheaper to have the meat shipped in and "get rid of most of the men in the back," Adkins stated that Gissel did not mention the Union during his conversation with the supplier. Gissel testified that the suggestion that the Company buy dressed hogs had been under consideration for 4 or 5 years. It is possible, of course, that the idea originated at the time of the 1960-1961 Union campaign. However, I do not find that Gissel indicated in his conversation with the supplier that the Company might close part of its operations because of the Union. In this case, Gissel's testimony was definite and clear. In a number of cases, Gissel was asked only if he "remembered" or "recalled" having made the statements attributed to him.

[17] When asked the following question by Company counsel, Gissel gave the following answer:

> Q. Now . . . the testimony of Mr. Mounts was that you asked Rush Moore to find out about the Union and report back to you.
> Did you ever make that statement to Mr. Moore?
> A. Let me put it this way.
> During the time we had this Union trouble or however you want to put it, a Government man who handled the election . . . cautioned us not to comment, not to mention the Union at all.
> He said when any of the employees mentioned [the] Union, not to say anything.
> When any employee did mention the Union, I walked away.

There are too many such answers for me to believe that they were unintentional. (See *infra*.)

admitted presence of a member of the Gissel family at a hotel just before a Union meeting in April (see *infra*) convinces me that the Company set out to learn the identity of the pro-union employees.

The afternoon after the Gissel-Moore-Frye conversation, Gissel asked Frye if he knew anything about the Union and Frye answered, untruthfully, that he did not. Gissel then wanted to know, "What did they offer you?" When Frye said that "they" did not offer him anything, Gissel told him, "I can offer you more than . . . they can." [18]

Tommy Lee Burchell, who was employed by the Company at the time he testified, heard about the Union from another employee shortly after he was hired. About a week after he began working, he talked to employee

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[18] Frye testified that he was interviewed at the plant by Respondent's attorney who said "something about he was from Cincinnati—had something to do with the Labor Board" or "was working [on] something about the Labor Board." Although I am convinced that Frye so understood Jenkins' statements, I credit the latter's denial that he identified himself as connected with the Board. However, Jenkins did not testify about what he said exactly and I do not doubt that he mentioned the Labor Board and Cincinnati, where the Board's Regional Office is located. Jenkins testified that he introduced himself and a court reporter but could "not recall" whether or not he told Frye that he was the attorney for the Company. Nor could Jenkins "remember" whether he told Frye that he was "working for Gissel Packing Company or not," adding, "It is my recollection that I did but I am not sure that I did." He stated that the reporter "reduced to writing" every word that was said, including his "introduction", and admittedly had a copy of the transcript. However, he refused the Union representative's request that he produce it. Under these circumstances, I am convinced that Jenkins did not make it clear that he was an attorney for the Company. There were other cases of "mistaken identity" such as employee Adkins' belief that a Board representative was a Union representative. Nor am I impressed by Frye's inability to recall the name of the Union, *i.e.* Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. I have also considered Frye's inability to find the notes he made. No one had instructed him to keep the notes and they were in a little book which, unlike the checkstubs in the the same box, could be used for some other purpose and disappear without intent to destroy the notes. If Frye wanted to conceal the notes, he had only to deny having made them.

Mount on break-time.[19] When Burchell went back to work, Charles Gissel took him to the second floor and asked him where he met Mount. Burchell said that he had met Mount through the latter's wife. Gissel also asked if Mount said anything to Burchell about "a Union." Burchell answered in the negative and Gissel told him that Mount would be "bad" for him and that Burchell should stay away from Mount. In crediting Burchell's testimony I have considered Charles Gissel's testimony that Company Counsel Jenkins and Mr. Logan of the Logan Packing Company advised him "to watch the men coming in because the Union usually put men in to make trouble."

In April, Burchell stopped to talk to employee Lawrence Hysell who owned him some money. Burchell made a note of the amount and a few minutes later, Charles Gissel stopped Burchell and asked if Hysell was trying to get Burchell to go to a Union meeting or to sign a card. Burchell answered in the negative.

Employee Elmer Maynard was still employed by Respondent at the time of the hearing. He signed a Union card in January and Gissel asked him on one occasion if he was going "to walk out" if the others did.[20] (The

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[19] Burchell testified (in August) that he had been working for the Company "about seven months or a little longer." At another point, Burchell testified that he began working in February and that the above conversation was in February. However, Respondent's records indicate that Burchell was not hired until the first week in March. His inability to recall exactly when he was hired does not cause me to discredit his testimony. I also note that Burchell waited until May to sign a Union card which suggests that he was not sufficiently pro-union to risk his job by testifying falsely against his employer.

[20] Maynard's pre-hearing affidavit dated February 24, 1965 does not state that Charles Gissel asked him if he had been "brainwashed" and I do not credit his testimony in this respect. Although Maynard testified that Gissel asked him about "brainwashing" on several occasions, and the questions may have asked after he gave the affidavit, I am unwilling to so find. Maynard also testified that when Mount was discharged in February, Gissel told Mount that he did not "give a damn about the Union, he could stick it — ——— ———." However, I think Maynard was mistaken about the date and that Gissel made the statement when he discharged Mount and Frye in April. (See *infra*)

Board's 1961 Decision and Direction of Election indicates that there had been an economic strike sometime earlier.)

Elisha Watts, who disclosed that he was strongly pro-union, had been hired and fired a number of times over a period of 8 years. In February, he heard Charles Gissel tell a group of employees, "The hell with the Union . . . I'm going to leave [the plant] and turn it over to them." On a later occasion, Watts heard Vice President Herbert Gissel say in the presence of several employees, "I don't want to hear anymore about this Union stuff. If you can't do your work, ket out." [21]

Kenneth Adkins, who was employed by the Company at the time of the hearing, signed a Union card in January. During that month, he heard Charles Gissel say that "If the Union got in, he'd just take his money and let the Union run the place the way they wanted to." Also in February, Adkins heard Vice President Herbert Gissel "bawling out" Watts and tell him that the Union was not going to "get in", that it would have to "fight him first." [22]

The notice posted by the Company in February stating that no one except Secretary-Treasurer Closterman was authorized to express the Company's views on Union matters has been considered in determining whether the two Gissel vice presidents engaged in the conduct attributed to them. The notice suggests that Vice President Charles Gissel, whose name is signed to the notice, was seeking "to have his cake and eat it too," *i.e.* to make illegal statements and to avoid responsibility for them by posting a self-serving notice. It would surely require more than a notice of this type to convince employees that the actions

[21] Watts was discharged about May 1, 1965. He admitted on direct examination that he did not hear Vice President Herbert Gissel say that he knew that Watts was "head" of the Union. This is not the testimony of a witness who was willing to testify falsely in order to establish a case against his employer.

[22] Herbert Gissel admitted that he gets "mad" and that both the Gissels and the employees engage in "yelling and cursing." Having considered his demeanor and his testimony as a whole, I cannot credit his testimony that he "never talked about the Union in the plant," testimony which he himself refuted later.

of two vice presidents did not reflect Company policy. It would also be a naive employee who would submit written reports to Secretary-Treasurer Closterman concerning the things being said by Vice President Charles Gissel and Vice President Herbert Gissel.[23]

E. *The Company's conduct in connection with a Union meeting on April 17*

A Union meeting was scheduled for Saturday afternoon, April 17, at a local hotel, for employees of three Huntington packing companies, *i.e.* Gissel, Logan, and Sehon Stevenson. On Thursday before the meeting, employee Frye heard Charles Hutchison, a member of the Gissel family, tell Charles Gissel that there was going to be a Union meeting on Saturday and ask Gissel if he knew about it. Gissel said that he did and that "there would be somebody there watching to see who all went in." Mount and Frye worked in the shipping department under Charles Gissel's supervision and Mount also heard the Gissel-Hutchison conversation.[24]

The meeting was held as scheduled and it is undisputed that Terry Lewis, the grandson of President Gissel, the son of Vice President Edith Gissel Lewis, and a nephew of Vice Presidents Charles Gissel and Herbert Gissel, was at the hotel as the employees were arriving for the meeting and was heard making a telephone call to his aunt, Secretary-Treasurer Alfreda Closterman, at the plant.

Lewis is a high school student who works only part-time. He testified that he saw a notice at the plant about the meeting and that it stated that there would be a meeting of "all employees" of Gissel, Logan Packing Company, and Sehon Stevenson, at 2 p.m., Saturday at a Huntington hotel. He did not claim that no member of management knew that he was going to the hotel and asserted that he decided to go to the meeting but "changed his mind" because he was "afraid of the employees; so

[23] All references herein to an individual Gissel are to Charles Gissel unless stated otherwise.

[24] In discrediting contrary testimony, I have considered, *inter alia*, that Terry Lewis was at the hotel before the meeting. See *infra*.

—I figured they would say something about it." He was asked the following questions by Respondent's counsel and gave the following answers:

> Q. What made you worry when you got down there?
>
> A. I figured I didn't have a right to be there really because—
>
> Q. Well, did anybody say anything or do anything that [led] you to that conclusion; *did they give you any funny looks or anything*?
>
> * * * *
>
> A. Elisha Watts made a smart remark, he asked me what I was doing down there and gave me a dirty look.[25] (Emphasis supplied.)

Lewis admitted that, after calling his girl friend, he called his aunt, Secretary-Treasurer Alfreda Closterman, at the plant, told her where he was, and that she told him "to come on back." (It was Saturday afternoon and Lewis did not explain why Mrs. Closterman told him to come to the plant.) He also testified that he really called Mrs. Closterman to find out whether his mother, Edith Gissel Lewis, was at the plant but he "was so scared" that he did not ask Mrs. Closterman about his mother. At another point, Lewis said, "I didn't want to go down there in the first place" but he later claimed that he wanted to go "at first" but changed his mind when he saw the employees. He said he was scared because employee Watts "made this face" and invited him to a "beer joint" with a bad reputation.[26] He later admitted that he was in the phone booth when Watts made the "face."

Although Mrs. Closterman was a witness for Respondent, she was not asked about Lewis' telephone call, *i.e.* what he said and what she said. Charles Gissel asserted

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[25] Lewis was asked, "What is a dirty look?" and answered, "He made a face . . . . Just an ordinary face."

[26] Much later, Lewis said that Watts accused him of stealing a coat and stated that he would get a warrant. Vice President Herbert Gissel admitted that he did not know what was meant by a "dirty" look.

that neither he nor any other Company representative "sent" Lewis to the meeting but no other member of the Company denied having sent Lewis to the hotel. And no Company representative, including Charles Gissel, denied knowledge that Lewis was going to the hotel.

Lewis was a very uncomfortable witness who frequently had difficulty in recalling what had gone on. When asked if he gave a report on the employees who attended the meeting, Lewis answered, "I don't remember what I said to her [Alfreda Closterman], I just told her I was up there and she told me to come on back."[27] On cross-examination, he repeatedly answered question with such statements as, "I don't remember."[28]

Having considered the entire record, I am convinced and find that, as Lewis testified at one point, he did not want to go "down there," that he did not go on his own initiative, and that he did not go without prior Company knowledge. If no member of the Gissel family sent him to the hotel and none knew that he was going, they would surely have so testified but none did except Vice President Charles Gissel who stated only that no one "sent" Lewis to the hotel. Similarly, no management representative claimed that Lewis did not report the names of the employees he saw at the hotel.

On the basis of the foregoing facts, I find that Lewis was sent to the hotel for the purpose of learning the identity and number of employees who attended the meeting and did report which employees he saw there.

As stated *supra*, Lewis' presence at the hotel is a major reason why I have discredited the testimony of Charles Gissel and others that the Company did not engage in any

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[27] Lewis did say that he did not report on what went on at the meeting but there is no claim that he attended the meeting.

[28] The record discloses that employees, other than the two whose discharge is an issue in this proceeding, were discharged. When Lewis was asked on cross-examination if he had told an employee that the Company was "getting rid of the people one by one," he answered "What, I mean, not as far as I can remember, no." Upon being pressed on the point, Lewis gave answers such as, "I don't remember, sir", "I say, it is not as I can remember", and "I don't remember saying it."

conduct violative of the Act. As noted above, Charles Gissel repeatedly sought to "prove" his testimony by asserting that the Company had learned its lesson during the 1961 election and the previous unfair labor practice proceeding. However, the presence of Lewis corroborates and lends credence to the testimony of the witnesses for the General Counsel, especially that which indicates that Respondent sought, by questions and other means, to find out which employees were involved in the Union campaign.

According to employee Elisha Watts, all "but three" Gissel employees attended the meeting.

Lowell W. Bailey, who signed a card in the presence of Union Representative Spitzer, was a witness for Respondent. He did not deny having signed the card nor did he claim that he did so as the result of any kind of pressure or misrepresentation. Bailey was clearly unhappy because management had learned that he had signed a Union card, pointing out that the "two guys" who signed him up said that the Company would not know who signed cards. He said also that "they made it sound easy" and that he "would make more money." He went on to say that the Company knew he had signed a card but did not say how it learned that fact. Bailey also failed to explain the circumstances under which he told Vice President Herbert Gissel that he attended the meeting but he conceded that he also told Gissel that he was not having anything to do with the Union "now." However, Bailey refused to say that he was in fact "against the Union."

As a witness for Respondent, he was asked by Company counsel, "The question, Mr. Bailey, is what did [the speaker at the Union meeting] say down there on the subject of what you all were to do at the various companies; what was said?" Bailey answered, "He was talking about breaking glass in a parking lot and nails or something in a parking lot, sir." However, Bailey admitted that he did not know whether the broken glass and tacks happened "in Charleston or Parkersburg or where it was." According to Bailey, sometime after the meeting, he "figured" that the Union wanted Gissel employees to commit similar acts at the plant. Bailey added that the speaker said something about men working during a strike and that the Union "was going in and get them."

Bailey's demeanor convinced me that he was a witness under pressure to give answers consistent with the questions and I do not believe that his "interpretation" of the remarks at the meeting originated with him. Under these circumstances, I cannot find that the speaker made any statements which could reasonably be interpreted as a suggestion that the employees present break glass or scatter tacks at the plants where they worked.

F. *The allegedly discriminatory discharges*

Herbert Mount, Jr., began working for the Company in April, 1963 and Jerry Lee Frye was hired in June, 1963. Both worked in the shipping department which is supervised by Charles Gissel. Each signed a Union card and each was questioned by Gissel who also told them that employees engaging in Union activity would be discharged. Both attended the Union meeting on April 17 where they were seen by Terry Lewis.

Mount and Frye normally worked from 6 a.m. to 5 p.m. or later. On Monday, April 19, they left the plant at 11:30 a.m., the beginning of the lunch period. As they passed Charles Gissel's car, he was sitting in it listening to the livestock market report and he asked them to wait a few minutes. After a short wait, Gissel asked Mount if he went to the Union meeting, Mount answered in the negative, but Gissel said he knew Mount was at the meeting, adding that he had been seen there, that "Someone told me you were there." Mount then admitted that he was at the meeting and Gissel told the two men that there were going to be "different arrangements made around here" and that Mount and Frye were to work from 5:30 a.m. to 11:30 a.m. "until further notice."

As per instructions, Mount and Frye did not work Monday afternoon and did not work Tuesday afternoon. Apparently, they helped Mount's father-in-law on a sewer job on Monday afternoon for Eddie Lewis, the assistant foreman of the department and Charles Gissel's nephew, said he thought that Mount said Tuesday morning that he had worked for his father-in-law the previous afternoon and had made "some money, twenty dollars. I would say, I am pretty sure." There is no claim that the men violated

any rule by working elsewhere Monday and/or Tuesday afternoon.

On Wednesday afternoon, Mount and Frye did not return to work after the lunch break and they in fact did some work for Mount's father-in-law. Vice President Charles Gissel sent Lewis, Supervisor Carley and employees Daniel Ellis and Rush Moore to obtain "evidence" that Mount and Frye were working elsewhere.[29]

When Mount and Frye got to work at 5:30 a.m. on Thursday, April 22, their timecards were not in the rack and they went to the office and asked Charles Gissel about their cards. Gissel told them that their cards had been "pulled" because they had "walked off the job" the day before. Frye denied that he and Mount had walked off saying that Gissel had not told them to work Wednesday afternoon. Gissel said that they should have known that they were supposed to work Wednesday afternoon but Frye told him, "No, we shouldn't have knowed . . . . You told us Monday that we would work from 5:30 till 11:30 'til further notice. . . . You didn't tell us no different." Gissel only repeated that the men "should have knowed" to work Wednesday afternoon. (Mount's and Frye's testimoney concerning this conversation is undenied.) Gissel then told the men to get out, that he was going to "call the law." (Gissel claimed that he threatened to call the law after the men "got to raising hell." However, he did not quote what the men said." As they were leaving, Gissel told them, "You all take that Union and stick it — — —."

Respondent contended at the hearing that Mount and Frye were not discharged but "quit," *i.e.* left Wednesday afternoon to go to work on another job. But it is not alleged that Mount and Frye had "quit" by working on the sewer job Monday and/or Tuesday afternoon and I do not find that they "quit" by failing to work Wednesday afternoon. They were only following instructions and, as they

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[29] It seems unlikely that Gissel could have talked to Mount's father-in-law on the telephone, as he claimed, because the father-in-law was digging a sewer. But even assuming that Gissel talked to the father-in-law, I find that the latter said nothing which caused Gissel to believe that the two men had gone to work for him permanently.

had done on Monday and Tuesday afternoon, they spent some of the time helping Mount's father-in-law. (For some reason, Respondent seemed to consider it necessary to estabilsh that it took no action against the men and, in effect, denied that they were discharged "for cause" on Thursday morning.)

One of the basic questions to be decided in connection with the discharges is one of credibility, *i.e.* whether Mount and Frye were told to work mornings "until further notice," as they claim, or whether they were told to work Monday and Tuesday mornings and all day on Wednesday, as claimed by Charles Gissel. As set forth previously, I have credited the testimony of Frye which is corroborated by Mount.

In addition to the reasons noted previously for doubting Mount's uncorroboated testimony, I would also hesitate to credit his testimony concerning his instructions about his work schedule for the week beginning Monday, April 19, because of his work record. Thus, he was admittedly late for work a number of times although the record does not reveal how many times.[80] In January or February, 1965, Mount probably caused additional damage to a truck by driving it after it developed engine trouble. He also failed to put some hams in a pan although he claimed, perhaps truthfully, that he had not been told to do so. Furthermore, he was 2 days late returning to work after a vacation in February, probably in part because he had a temporary job elsewhere at which he could earn more than the

[80] Gissel asserted that Mount was on time "only five or six times" between November, 1963 and April 22, 1965, *i.e.* in a period of at least 5 months. He also claimed that Mount was always late "from five minutes to forty-five minutes to an hour." Assistant Foreman Eddie Lewis testified only that Mount and Frye were late "pretty often." Although he first said they were late "a half an hour, or an hour, or a couple of hours," he admitted that he could not say "exactly two hours." However, their timecards were not introduced into evidence. Moreover, in a letter to Mount on February 19, 1965, Secretary-Treasurer Closterman stated only that ". . . you have been regularly late on a number of occasions," a statement which surely does not indicate that he was virtually never on time, as claimed by Gissel. I am convinced, therefore, that Gissel's testimony in this respect is greatly exaggerated and this conclusion is another reason why I do not credit his unsubstantiated testimony.

$1.25 an hour he was paid by Respondent. On another occasion, he did not "shake hides" when requested, or perhaps ordered, to do so. (Shaking hides is a dirty job and the employees hired for the purpose had quit. Moreover, Mount had already worked 8 or 10 hours that day.) In short, I could believe that Mount might have used his "lay off" on Monday and Tuesday afternoon as an excuse for not working Wednesday afternoon if he could have earned more money that afternoon by working elsewhere.[21] In fact, Mount was discharged in February but was recalled because, according to Charles Gissel, he believed that otherwise an unfair labor practice charge would be filed. Gissel also asserted that Mount would have been discharged on another occasion but for the probability of an unfair labor practice charge.

Frye, however, had no such record. He had never been discharged and there is no claim that the Company had ever even considered ischarging him. Although Gissel gave a summary statement concerning complaints against Frye, he did not give details or specify times, and his claims are not substantiated by the record generally as they are in the case of Mount.[22] This is not to say that Frye had never done anything for which he could have been criticized but there is nothing in the record which indicates that he was the type of emplovee who would have failed to work Wednesday afternoon if he had been told to do so. As a matter of fact, Gissel said that he was "surprised" when he learned that Mount and Frye were ab-

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[21] As noted *supra*, Lewis was unsure of the amount Mount claimed to have earned Monday afternoon.

[22] One of Gissel's claims was that Frye rode with Mount and was, therefore, late virtually every morning. However, Frye's timecards were not introduced into evidence. Gissel also said that Frye "could read a bill as well as I could and he would come to the office there for me to read the bill for him. He would not pack the meat good in the boxes and he would not put the paper in them and sometimes he would stack them on the flat truck and leave them on the trucks, then the load would spoil." It was also claimed that Frye, like Mount, refused to "shake hides." However, it is not clear that Frye actually refused an order to shake hides. (See the testimony of Eddie Lewis who gave the orders. Gissel admittedly was not present.)

sent, "Because they had never pulled a trick like that before."

An additional reason for crediting the employees' testimony is provided by the fact that Respondent's testimony concerning Mount's and Frye's work schedule and instructions is neither clear nor consistent. According to Charles Gissel, work had been slow for some time and he decided to have some men work Monday and Tuesday (and perhaps Friday) mornings and others work afternoons on those days, to even up the work because "some were getting more time than others."[33] All of the employees were to work all day Wednesday and Thursday, Gissel said, these being the busy days.

Gissel stated that he had been working on the "new" schedule for two weeks and although it had not been set up "completely at that time," some men had worked half days the week before. At another point, Gissel was asked by Company counsel, "In fact, there was—*In fact* [*Mount's and Frye's*] *work schedule was not changed, was it?*" and he answered, "*No.*" (Emphasis supplied.) However, no records in support of these statements were introduced.

On the other hand, Eddie Lewis, the assistant foreman of the department and the nephew of Charles Gissel, apparently knew nothing about a decision to set up a split schedule and clearly refuted Charles Gissel's testimony that the split schedule was in effect, at least to some extent, the week before. Thus, when questioned by Company counsel about the work schedule, he answered:

> They were *working full weeks* but at that time the business, I think, had slacked off and they were *sent home a half day early* the day [Mount] had made the twenty dollars . . . . [i.e. Monday, April 19] (Emphasis supplied.)[34]

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[33] Gissel did not explain why he decided to split the work day instead of having all of the employees come in and work the same number of hours with everyone leaving when the day's work was done. This appears to have been the custom in the past. There is no evidence that any employee benefited by the change.

[34] At another point, Lewis said that the men had been "let off" at 11:30 a.m. on previous occasions but he would not even estimate

The schedule, Gissel further asserted, applied to three men besides Mount and Frye, *i.e.*, Assistant Foreman Eddie Lewis, supervisor Simon, and employee Maynard. But if Lewis worked half days either the week of April 19 or the week before, he did not say so at the hearing. In fact, it is clear from Lewis' testimony that he had heard nothing about a change in his schedule.[35] Simon, who worked in the same department, was also a witness and said nothing about a "new" schedule for himself or anyone else.

Maynard who, like Mount and Frye, attended the Union meeting on April 17, claimed that he was told to and in fact did work afternoons the week of April 19 until after Mount and Frye were discharged, *i.e.* through Wednesday. Although Maynard was not sure of the dates, Respondent was well aware that the General Counsel was claiming that Maynard did not work Wednesday morning and that Maynard's testimony was offered to support Mount's and Frye's assertion that their instructions to work half days likewise applied to Wednesday as well as to Monday and Tuesday.

Charles Gissel also recognized that the Company's case, *i.e.* that he told Mount and Frye to work all day Wednesday would be strengthened if it could be established that Maynard understood that his instructions to work afternoons did not apply to Wednesday. Accordingly, he stated emphatically that Maynard was wrong, that he worked all

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when that had happened. As Lewis put it, "I could not say to that, just that he had, in the weeks before *maybe*, just laid them off a half a day." (Emphasis supplied.)

[35] When Lewis was asked on cross-examination, "At the same time [Mount and Frye] were told to come in at 5:30 and work until 11:30, there were others . . . who were told to come in at 12:00 and work until some time in the afternoon, were there not?", he answered, "I don't know about that. I know about they were told to come in at 5:30 and work until I don't know when." Lewis also said, "I don't think they were told to work from 5:30 to 11:00. I think they were told to go ahead, the way it is usually done, they tell them when to come in and then if the work is slacked up, they are told then to leave." After a leading question on redirect examination, ("There were two others, were there not?"), Lewis said that the schedule "worked out" for Mount and Frye also applied to Maynard.

day Wednesday and that his timecard would prove it. However, Maynard's timecard was *not* introduced into evidence even though there had been ample time to obtain it, due to a 10 day adjournment, and Respondent in fact introduced other records into evidence the same day that Gissel testified. Cf. *N.L.R.B.* v. *Collins & Aikman Corporation*, 146 F.2d 454, 456, (C.A. 4). And Assistant Foreman "Eddie" Lewis could not and did not say that Maynard worked all day Wednesday.

I am convinced that Maynard's card was not introduced becaus it would have established that, as I find, he worked Wednesday afternoon only, a fact which adds support to the General Counsel's claim that Mount's and Frye's instructions to work mornings also applied to Wednesday. Cf. *Interstate Circuit* v. *U. S.*, 306 U.S. 208, 225-226; *N.L.R.B.* v. *Condon Bros. Mfg. Co.*, 187 F.2d 329, 332 (C.A. 7); *N.L.R.B.* v. *A.P.W. Products Co.*, 316 F.2d 899, 903 (C.A. 2); *N.L.R.B.* v. *Wallick*, 198 F.2d 474, 483 (C.A. 3).

In addition, Gissel's testimony concerning his instructions to Mount and Frye is far from precise. Thus, his testimony on direct examination was as follows:

> Q. Now, had Mounts and Frye been told or had they not been told as to their hours of work on Wednesday and Thursday?
> A. Right.
> Q. They had been told?
> A. Right.

Nor did Gissel say on direct examination when or where or under what circumstances he told Mount and Frye about their new hours. He was asked on cross-examination when he told Mount and Frye about their new schedule and first said "on Monday morning", which would have been after they attended the Union meeting and had been seen by Terry Lewis. The question was immediately repeated and Gissel answered, "Every Friday, we were laying off at noon on Friday and I would send them home on Tuesday and sometimes on Monday; but never on Wednesday or Thursday."

Finally, Gissel did not deny the testimony of Mount and Frye that when they insisted on Thursday morning that

he had not told them to work all day on Wednesday, Gissel replied only that they should have known they were supposed to do so. In other words, Gissel did not claim that he told the two men on Thursday that he had given them explicit instructions to work all day Wednesday and Thursday.

Gissel, an intelligent and experienced business man, revealed that he expected that a unfair labor practice charge would be filed. Under these circumstances, he should have been able to give a detailed account, in his own words, about what he told Mount and Frye. However, he gave few answers on direct examination in which he independently described what actually happened. Instead, much of his testimony consisted of affirmative or negative answers to what amounted to statements by Company counsel.[36] Moreover, Gissel's assistant and nephew, "Eddie" Lewis, should have been able to corroborate Gissel's testimony concerning the new schedule which, allegedly, also

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[36] Questions of this type include the following: "Then you did not have any conversation with [Frye]" as described by Frye; "In fact [Mount's and Frye's] work schedule was not changed, was it?"; "I will ask you whether or not I told you . . . that it was a method of this Union . . . to put people in the plant to make statements and misquote you; did I not warn you against this eventuality?"; "Now, had you been working on this schedule for some time or not?"; "You asked me how long you had to put up with [Mount's work habits] did you not?"; "Now, had you been working on this schedule for some time before that, or what?"; "You asked me how long you had to put up with this, did you not?"; "Was [Union Representative] Spencer or was he not insisting that these peddle drivers . . . be in the unit?"; "This was not your first trouble with Mounts, was it?". Other witnesses were asked similar questions, among them: "There were two others [affected by the schedule change] were there not?"; "Now about [January or February] . . . did you have any problems with any vehicles that were operated by Herbert Mounts . . . ." When the Examiner asked one witness about a date, counsel answered, "I said in January . . . ."; "If an employee had wanted to put sand [in the oil] would it have been possible; was it open in such a way that they could have gotten in there?" ". . . did they give you any funny looks or anything?"; "What did the [Union Representative at the April 17 meeting] say with respect to things that you were supposed to do at the various companies?"; "Did he make any threats to you, did he threaten to beat up on you, did he do anything like that or make any statements that you would object to?"

applied to Lewis himself. Instead, it is clear that Lewis knew nothing about the schedule changes which are basic to Respondent's case and which Respondent sought to establish by Gissel's testimony. If the schedules for the week of April 19 and the previous week were those alleged by Gissel, Respondent should have been able to produce records which would have proved that the schedules were those described by Gissel. However, no records were introduced.

In short, my conclusion that Mount and Frye were told to work mornings "until further notice" is based in considerable part upon the failure of the testimony of Respondent's witnesses to withstand scrutiny and the absence of documentary evidence which was available and which, I am convinced, would have been produced if it would have supported Gissel's claims, including his assertion that Maynard worked all day Wednesday.[87]

G. *Analysis and conclusions*

1. Respondent's conduct which violated Section 8(a)(1) of the Act

In this case, it was chiefly Vice President Charles Gissel, not a minor supervisor, who questioned the employees in an effort to learn the identity of the Union adherents and frequently, in the same conversations, threatened the immediate discharge of employees who were found to be involved with the Union. In addition, Gissel's remarks were clar and unequivocal and were followed by action consistent therewith. For example, he announced that a Union meeting would be kept under surveillance and Terry

[87] Even had I found that Gissel did not use the words "until further notice," having considered, *inter alia*, Mount's and Frye's undenied testimony concerning Gissel's statements on Thursday morning and the generalized nature of Gissel's testimony about what he told them originally, I would have found: (1) Gissel did not tell them to work all day Wednesday but assumed that they understood that the half-day schedule did not apply to Wednesday because they knew that it was a busy day; and (2) that Mount and Frye honestly believed that Gissel's instructions to work mornings meant that they were to do so until notified otherwise.

Lewis was in fact at the hotel and placed a telephone call to Secretary-Treasurer Closterman at the plant. Moreover, Gissel's conduct was not limited to one or two remarks but continued off and on from early September, 1964 into the third week in April, 1965 and coincided closely with the periods of known or suspected Union activity.

Having considered Respondent's questions, statements, comments, and actions "in connection with the position of the parties, with the background and circumstances in which they were made and with the general conduct of the parties," I find that the acts set forth below were "part of a general pattern or course of conduct" which interfered with, restrained, and coerced the employees in violation of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Kropp Forge Co.*, 178 F.2d 822, 829 (C.A. 7), certiorari denied, 340 U.S. 810.

1. Vice President Charles Gissel's questioning of employee Jerry Frye in September, 1964 about whether anyone had talked to him about the Union and his statement in the same conversation ". . . If I think you're talking to a stranger, that is a Union man . . . I'll fire you right now." And Gissel's similar questioning of and statement to employee Mount, also in September, 1964.

2. Charles Gissel's order to employee Rush Moore in February, 1965 "to find out all he could about the Union, who had signed cards, [and] to report back to him."

3. Charles Gissel's interrogation of employee Moore, in the presence of employee Frye, concerning what he knew or had heard about the Union, about whether a Union representative had tried to sign Moore up, his asking if employee Frye knew anything about employee Don Kidd, his questioning of Moore about whether Kidd was the "leader of the Union," and Gissel's statement, in the same conversation, that he would fire Kidd promptly if he found out "for sure" that Kidd was the Union leader.

4. Vice President Charles Gissel's questioning of Frye in February as to whether he knew anything about the Union, a question which Frye answered untruthfully, his asking Frye what the Union had offered him and Gissel's statement, "I can give you more than they can." Cf.

N.L.R.B. v. *Camco, Incorporated*, 340 F.2d 803, 804 (C.A. 5).

5. Vice President and Charles Gissel's asking of employee Burchell, shortly after the latter was hired, *i.e.* in late February or early March, 1965, about where he met Frye and Gissel's warning, in the same conversation, to stay away from Mount, that Mount would be "bad" for Burchell.

6. Vice President Charles Gissel's statement in February, "The hell with the Union . . . I'm going to leave [the plant] and turn it over to them" and his statement that if the Union "got in", he would take his money and let the Union ran the plant the way they wanted to.

7. Vice President Herbert Gissel's statements during the same period, *i.e.* that he did not want to hear anymore about "this Union stuff," if the employee could not do his work, to "get out," and that he was not going to have the Union "get in," that it would have to "fight him first." Although these statements might not constitute interference, restraint and coercion if they stood alone, their effect must be considered in the light of what had gone before and what came after. See *Daniel Construction Company* v. *N.L.R.B.*, 341 F.2d 805, 811 (C.A. 4), in which the court pointed out that words which would be lawful if considered separately, can "unite in such a fashion as to yield an improper end product." And the court said in *Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F.2d 100, 103-104 (C.A. 5), that in cases in which the Company "makes no bones" about its opposition to the Union, the Board may, "with ample justification . . . regard" statements of "anti-union attitude" as "background" against which "to measure statements, conduct, and the like made by other management spokesmen, especially in terms of the interpretation which the employees reasonably could put on such actions. More specifically, this would bear on the question whether, from the listeners' point of view, these statements by subordinate management constituted forbidden coercion, threats, or intimidation."

8. Charles Gissel's statement that he would have someone at the Union meeting on April 17 to report on who was there and his statement that Mount had been seen at

the meeting. *N.L.R.B.* v. *Community Motor Bus Co.*, 335 F.2d 120, 122 (C.A. 4); *Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F.2d 100, 104, n. 7 (C.A. 5); *N.L.R.B.* v. *Prince Macaroni Mfg. Co.*, 329 F.2d 803, 805-806 (C.A. 1).

9. The presence of Terry Lewis, a member of the Gissel family, at the hotel on April 17, as the employees were arriving for a Union meeting, and his call to Secretary-Treasurer Closterman at the plant. In *N.L.R.B.* v. *Collins & Aikman Corporation*, 146 F.2d 454, 455 (C.A. 4), the court said that "Any real surveillance by the employer over the Union activities of employees, whether frankly open or carefully concealed, falls under the prohibitions of the Act." In view of all of the circumstances, the employees could not fail to believe that Lewis was sent to the hotel to see who came to the meeting and could not fail to believe that he would and did report the names of the employees he saw there. Cf. *N.L.R.B.* v. *Champa Linen Service Company*, 324 F.2d 28, 30 (C.A. 10). That he in fact did so is established by Gissel's statement to Mount on Monday, when the latter denied having attended the meeting, that Gissel had been told that Mount was at the meeting.

10. Gissel's interrogation of Mount on April 19 about whether he attended the Union meeting, his telling that he was not telling the truth when he answered in the negative, and Gissel's statement to Mount and Frye, in the same conversation, that there would be changes in their working hours.

11. Gissel's statement to Mount and Frye when they were discharged on April 22, about what they could do with the Union. Cf. *Hendrix Mfg. Co., supra.*

2. Respondent's refusal to bargain in violation of Section 8(a)(5) of the Act

As set forth *supra*, the Union filed a representation petition in late 1960 or early 1961, a hearing was held, and the Board issued a Decision and Direction of Election in January, 1961 in which it established the unit appropriate for collective bargaining. It included, over Respondent's objection, the truck driver salesmen or peddlers. There being no claim and no evidence that there had been any change in the status of the peddlers between 1961

and 1965, I regard myself as bound by the Board's 1961 unit determination.[28]

Furthermore, as also set forth *supra*, 31 of the 47 (or even fewer) employees in the unit signed cards in mid-January, 1965 which state unequivocally that the "undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions."

Thus, when Union Representative Spencer notified the Company on January 22 that the Union represented a majority of "eligible" employees, it did in fact represent a substantial majority of the employees in the unit found appropriate by the Board.[29] It is admitted, of course, that Respondent refused to bargain with the Union.

At the hearing, the only basis asserted for the Company's doubt of the Union's claim that it represented a majority was Charles Gissel's statement that "We talked it over among ourselves and decided that maybe they might not have a majority" because the Union had lost an election 4 years earlier after having claimed to represent a majority. However, employees are entitled to and at times do change their minds and a similar argument was rejected by the court in *Overnite Transportation Company* v. *N.L.R.B.*, 308 F.2d 279, 283 (C.A. 4). The court also commented in *Overnite* that the employer "unmistakably demonstrated" that it gave some credit to the Union's claim by embarking upon a course of "illegal" conduct, in-

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[28] As the court said in *Florence Printing Co.* v. *N.L.R.B.*, 333 F.2d 289, 291 (C.A. 4), "Even if the company entertained doubt [about the appropriateness of the unit], is it no defense to a refusal-to-bargain charge where the unit is proper."

[29] Although Vice President Charles Gissel stated in his first letter to the Union that the Company did not know who the "eligible" employees were, he did not mention the unit question in his later letters. Moreover, at the hearing, Gissel disclosed that the only question concerning the unit was that raised by the inclusion of the peddlers. He also made it clear that he recognized that the Union's reference to "truck drivers" in its letter referred to peddlers rather than to its regular employees, some of whom occasionally drive trucks locally. In other words, Gissel understood that the Union was requesting the Company to bargain for the employees in the unit established by the Board in 1961.

cluding interrogation and speeches. Such conduct, according to the court, constituted an "absolute refutation" of the Company's good faith claim.

Further proof that Respondent was willing to assert unfounded claims to justify its refusal to bargain is provided by its statement in its letter of January 26 that it had been "advised of instances of direct misrepresentations" used by the Union to obtain signatures on the cards. At the hearing, however, Respondent introduced not a scintilla of evidence that the Union had made misrepresentations to the employees or had obtained the signatures by any other method which might create a doubt about whether the employees signed the cards for any reason other than that they desired Union representation.

It is also significant that Respondent did not file its own representation petition with the Board as it is empowered to do by the Act. It would surely have been quick to do so if it had good reason to believe that the Union could not establish its majority in a Board-conducted election. Cf. *Florence Printing Co.* v. *N.L.R.B.*, 333 F.2d 289, 292 (C.A. 4); *Overnite Transportation Company* v. *N.L.R.B.*, 308 F.2d 279, 283 (C.A. 4). (The first unfair labor practice charge was not filed until February 11, *i.e.* nearly 3 weeks after the Union's bargaining request.)

At the same time, Respondent ignored the Union's offer to submit, for examination and comparison with payroll signatures, the signed cards upon which the Union was relying. Nor did it question at the hearing the signature on any card except the one signed with an "X" by Ralph Hysell. (As noted *supra*, Hysell was not called as a witness, Respondent's evidence consisting of testimony that Hysell could print his name.) Thus, as the court said of the employer in *N.L.R.B.* v. *Inter-City Advertising Co.*, 190 F.2d 420, 421-422 (C.A. 4), Respondent made no attempt to determine whether the Union's claim was justified but instead engaged in unfair labor practices "in an attempt to get rid of it as a bargaining representative." See also *N.L.R.B.* v. *Philamon Laboratories, Inc.*, 298 F.2d 176, 180 (C.A. 2).

Having considered Respondent's failure to file its own representation petition, its failure to make any reply to

the Union's offer to submit the cards on which it was relying, its wholly unsupported charge that it had been advised of instances of misrepresentation by the Union, and its efforts to destroy the Union's majority by coercive conduct such as interrogation, threats, and surveillance, I find that its refusal to bargain was not due to a good faith doubt of the Union's majority "but to a positive rejection by the company of the principle of collective bargaining." *N.L.R.B.* v. *Inter-City Advertising Co.*, 190 F.2d 420, 422 (C.A. 4). That this was Respondent's attitude was revealed by Vice President Charles Gissel, who answered the Union's letters, when he gave the following reply to a question about one aspect of the Union's first letter, "I don't know. I would have to study it and see. I didn't read it that far." It follows, therefore, and I find that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain, upon request, with the majority representative of its employees in an appropriate bargaining unit.

Finally, there is no evidence that any of the employees who signed cards, with one possible exception, thereafter changed his mind. On the contrary, there is evidence indicating that all but three of the employees attended the Union meeting on April 17. In short, this is not a case in which the Union subsequently lost its majority and in which it must be inferred that its loss was attributable to the Company's unfair labor practices.

Apparently, Respondent's position is that a Union can never establish its majority on the basis of cards but can do so only in a Board-conducted election. But the courts have repeatedly affirmed the Board's holding that an employer does not have a "vested right" to an election, especially in situations in which the employer's unfair labor practices have made a fair election impossible.[40] As the Supreme Court pointed out in *United Mine Workers of America* v. *Arkansas Oak Flooring Company*, 351 U.S. 62, 74-75, the Act "says nothing as to how the employees' rep-

[40] See, for example: *N.L.R.B.* v. *Philamon Laboratories, Inc.*, 298 F.2d 176, 179 (C.A. 2); *N.L.R.B.* v. *Wheeling Pipe Line, Inc.*, 229 F.2d 891, 893 (C.A. 8); *N.L.R.B.* v. *Trimfit of California, Inc.*, 211 F.2d 207, 209 (C.A. 9).

resentative shall be chosen . . ." and "It does not make it a condition that the representative . . . shall be certified by the Board . . . ." In other words, the Act "leaves open the manner of choosing such representatives" and in cases in which a clear majority of the employees have, by means of cards, designated the Union to represent them, the employer is obligated to recognize that Union. In the words of the court, "A Board conducted election is not the only method by which an employer may satisfy itself as to the Union's majority status." 351 U.S. 73, 8, n. 8.

Two of the alternative methods open to the employer in a situation such as this one were mentioned by the court in *Overnite Transportation Company* v. *N.L.R.B.*, 308 F.2d 279, 283 (C.A. 4), where it stated:

> If the company . . . sincerely doubted the Union's majority status it could have challenged the Union to substantiate its claims *by checking the union cards against the payroll or by requesting the Labor Board to hold a representation election* as is its right under Section 9(C)(1)(B) of the Act. (Emphasis supplied.)

Another method was approved by the court in *Florence Printing Co.* v. *N.L.R.B.*, 333 F.2d 289, 282 (C.A. 4), in which the court noted that the Company could have agreed to the private election suggested by the Union. An employer who not only fails to take any steps to check the Union's claims but also attempts "to defeat the Union by means of conduct violative of Section 8(a)(1) and (3)" of the Act may not later claim that it has a right to such an election. "Such a rule," the court said, "would encourage employers to commit unfair labor practices rather than promote the freedom of employees to decide for or against a union in an atmosphere free from restraint and coercion. . . ." *Overnite*, 308 F.2d at 283.

Respondent may also argue that each employee who signed a card should have been called and personally authenticated his card. But in a case such as this in which there is not the slightest evidence that the employees whose handwritten names (or in one case an "X") appear on the cards did not in fact sign them on the date appearing

thereon, the undisputed testimony of the persons in whose presence the cards were signed is sufficient. Cf. *The Colson Corporation* v. *N.L.R.B.*, 347 F.2d 128, 134 (C.A. 8), in which the court recognized that

> The law permits alternative methods of authentication. Thus the court have approved the authentication of such cards by a witness to their execution. *N.L.R.B.* v. *Economy Food Center*, 7 Cir., 1964, 333 F.2d 468, 471, or by comparison with a known specimen of the person's handwriting. *N.L.R.B.* v. *Philamon Laboratories*, 2 Cir., 1962, 298 F.2d 176, 179-180, certiorari denied, 370 U.S. 919 . . .

In other words, when a Union has obtained signed cards from a majority of the employees, the employer is under a duty to bargain unless he "has a good-faith doubt as to the reliability of the authorization cards." (*Ibid.*).[41]

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[41] Although it has been found that Respondent's refusal to bargain was not motivated by a good faith doubt of the Union's majority, there is language in *International Ladies' Garment Workers Union* v. *N.L.R.B.*, 366 U.S. 731, 738-740, which suggests that a good faith doubt concerning the Union's majority is no defense to a refusal to bargain if the Union in fact represented a majority. There, the Court affirmed the Board's holding that the Company violated the Act by bargaining with a Union which it believed in good faith, though mistakenly, represented a majority of the employees. After noting that the employer's action "invaded" the employees' rights, the Court went on to say, "More need not be shown. . . . It follows that prohibited conduct cannot be excused by a showing of good faith." If the Union in fact represents a majority, it would seem that the employees are similarly denied their rights under the Act if the employer refuses to bargain even if he acts in good faith. This appeared to be the Court's view for it stated:

> Assuming that an employer *in good faith* accepts or *rejects a union claim of majority status*, the validity of his decision may be tested in an unfair labor practice proceeding. *If he is found to have erred in* extending or *withholding recognition, he is subject only to a remedial order* requiring him to conform his conduct to the norms set out in the Act . . . .

Cf. the court's statement in *Florence Printing Co.* v. *N.L.R.B.*, 333 F.2d 289, 291 (C.A. 4), that "Even if the company entertained doubt [as to the appropriateness of the unit], it is no defense to a refusal-to-bargain charge where the unit is proper."

3. Respondent's discriminatory discharge of employees Mount and Frye

As set forth *supra*, Herbert Mount, Jr. began working for the Company in April, 1963 and was told shortly thereafter that the plant was "non-union" and that employees "caught" talking to a Union representative would be discharged. Mount worked in the shipping department under the supervision of Vice President Charles Gissel as did Jerry Lee Frye who was hired in April, 1963. Both men signed Union cards in January 1965, both were questioned and threatened by Gissel who clearly suspected that they were involved in the Union campaign. In April, they attended the Union meeting kept under surveillance by the Company. The next working day, Gissel told Mount that he had been seen at the meeting, and told Mount and Frye that they were to work mornings "until further notice." Then, on April 22, their timecards were "pulled" and they were accused of walking off the job because that did not work Wednesday afternoon and, instead, helped Mount's father-in-law for an undisclosed period. In addition, Gissel made a vulgar suggestion about what the men could do with the Union and threatened to call the police.[42]

Needless to say, if an employer first directs employees to work from 5:30 a.m. to 11:30 a.m. "until further notice" and then discharges them for not working in the afternoon, his motive must be something other than the employees' failure to work or their disregard of orders.

Furthermore, the discharge of Mount and Frye cannot be considered in a vacuum but must be considered in the light of all that had gone before. "While union membership in itself is no bar to the discharge of employees, it sometimes discloses the real motive actuating an anti-union employer in discharging such employees, notwithstanding other asserted reasons." *N.L.R.B.* v. *Nabors*,

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[42] As noted previously, Respondent's basic contention at the hearing was that it had taken no action against Mount and Frye, *i.e.* that they had quit. For some reason, Respondent refused to contend that the two men were discharged for cause and seemed to feel that it must establish that it was in no way responsible for the fact that they did not work for the Company after 11:30 a.m. on April 21.

196 F.2d 272, 275 (C.A. 5), certiorari denied, 344 U.S. 865. And the same court stated in *N.L.R.B.* v. *Houston & North Texas Motor Freight Lines*, 193 F.2d 394, 398 (C.A. 5), that in cases in which the Company's opposition to the Union is clear, ". . . every equivocal act that was done may be properly viewed in the light of [the Company's] animus toward the efforts to organize its men."

Similarly, the courts, as well as the Board, hold that discharges which "coincide" with the intensification of organizational activity, in this case the Union meeting, must be examined with special care. Cf. *N.L.R.B.* v. *Jones Sausage Company*, 257 F.2. 878, 882 (C.A. 4); *Angwell Curtain Company, Inc.* v. *N.L.R.B.*, 192 F.2d 899, 903 (C.A. 7); *Sardis Luggage Co.* v. *N.L.R.B.*, 234 F.2d 190, 196-197 (C.A. 5).

The series of events which ended with the discharge of Mount and Frye have been set forth previously. They began in September, 1964 at about the time a Board hearing was being held in Huntington as the result of an unfair labor practice charge filed by the same Union against another local packing company. At that time, Vice President Charles Gissel warned that employees "caught" talking to a stranger, who was a Union representative, would be discharged promptly. However, there was no Union activity among Gissel employees at that time and Charles Gissel had nothing more to say about the Union until the following January or February, *i.e.* until after the Union claimed to represent a majority of the employees and requested bargaining.

The Company's response and attitude toward the Union's claims and request have been discussed *supra*, including its failure to file its own representation petition or to examine the cards which the Union offered to submit. Even more significant is the Company's wholly unsupported assertion in justification of its refusal to bargain that it had been advised of "instances" in which the Union had obtained the signatures on the cards by misrepresentations. For if Respondent would assert a reason for its refusal to bargain which had no basis in fact, it might also be willing to assert (or create) an equally unsupported reason to justify its discharge of Union adherents.

After the Company's refusal to bargain, Charles Gissel repeatedly questioned employees about the Union and threatened reprisals against the employee leaders of the Union campaign. Among other things, Gissel asked employee Rush Moore what he knew about the Union, asked if employee Kidd was the "leader" of the Union movement, and said that he would fire Kidd immediately if he found out "for sure" that Kidd was the Union leader. Gissel also directed Moore to find out all he could about the Union, about who had signed cards, and to report what he found out. Gissel also asked Frye what he knew about the Union, what it had offered him, and told Frye that the Company could offer him more than the Union could. In addition, Gissel asked employee Burchell where he met Mount, whether Mount had said anything to him about the Union, and warned Burchell to stay away from Mount.

There is no evidence of any Union activity between January, when the cards were signed, and April, when the Union meeting was held. Similarly, Respondent had little if anything to say about the Union between January-February and April. Then when the Union meeting was announced, Gissel let it be known that he knew about the meeting and that some one would be there to report on who attended it. And Terry Lewis was at the hotel on Saturday, April 17, and called his aunt, Secretary-Treasurer Closterman, at the plant. It was also in April that Gissel asked employee Burchell if employee Hysell had tried to get Burchell to go to a meeting or to sign a card.

The admitted presence of Lewis at the hotel is one of the most significant facts in the record both generally and in connection with the discharge of Mount and Frye. As noted *supra*, it disproves the Company's repeated assertion that it was determined not to commit any unfair labor practice during the Union's 1965 campaign. It also discloses that Respondent was determined to learn the identity of the pro-union employees, a subject in which it could have had no legitimate interest. *N.L.R.B.* v. *Martin Sprocket & Gear Co.*, 329 F.2d 417, 420 (C.A. 5).

Perhaps most important of all, by keeping the Saturday meeting under surveillance, Respondent learned that Mount, Frye, Maynard and probably most of the employ-

ees who had signed cards in January were still pro-union. This information revealed that the Company's refusal to bargain, its interrogation and threats, and its announced plan to keep the meeting under surveillance had not been effective, *i.e.* its prior conduct had not caused the employees to defect from the Union and to abandon their efforts to obtain Union representation.

On Monday, Gissel made a change in working hours which affected only employees who attended the Union meeting, i.e. Mount, Frye, and Maynard. Although the alleged purpose of the change was to spread the work more evenly, there is no evidence that any employee benefited by the change, only that the hours of Mount, Frye, and Maynard were reduced. Then, when Mount and Frye did not work Wednesday afternoon, after having been told to work from 5:30 a.m. to 11:30 a.m. "until further notice," they were discharged, threatened with the police, and advised what they could do with the Union.

The relationship in time between Mount's and Frye's presence at the hotel, the change in their work schedule and their discharge a few days later is a fact which does not depend upon the credibility of any witness. Presumably, Respondent will argue that these events were wholly unrelated, *i.e.* were merely coincidental. Coincidences do happen but a finding of "coincidence" in view of the parallel series of events summarized above would be warranted only if Respondent's testimony was clear and precise and was corroborated by available documentary evidence. However, as noted *supra*, Charles Gissel was either unable or unwilling to state in detail and in his own words what he told the men when he notified them about their new schedule. No timecards were introduced although they were clearly available. Finally, Gissel's nephew and assistant, "Eddie" Lewis, refuted rather than corroborated Gissel's testimony about the schedule changes which, allegedly, applied to Lewis as well as to Mount, Frye, and Maynard. The failure of Respondent's testimony to stand up under scrutiny provides further evidence that something more was involved than the straightforward discharge of two employees for good cause and adds support to and strengthens the inference that they were discharged be-

cause of their Union activity. *N.L.R.B.* v. *Griggs Equipment, Inc.*, 307 F.2d 275, 278 (C.A. 5).

Having considered the record as a whole, including Gissel's instructions to Mount and Frye to work from 5:30 a.m. to 11:30 a.m. "until further notice," the Company's refusal to bargain, and its unsupported explanation for its refusal, its efforts to learn the identity of the Union adherents, its threats of reprisal against the employee leaders of the Union campaign, its surveillance of the Union meeting, the timing in relation thereto of the change in the schedule of the two men and their discharge, Gissel's statements at the time of the discharges, and the failure of Respondent's explanation of its action to stand up under scrutiny, I conclude that a preponderance of the evidence establishes that Respondent discharged Mount and Frye because of their Union activity, both generally and their presence at the meeting on April 17 in particular. It follows, therefore, and I find that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

Furthermore, the conclusionary finding set forth above would not be different had it been found that there was a genuine misunderstanding about Mount's and Frye's hours on Wednesday, *i.e.* that Gissel believed that they understood that they were to work all day Wednesday and they misunderstood Gissel's instructions. If the men were expected to work, their absence no doubt caused some inconvenience. However, there is no claim that their absence meant that the day's work was not completed and there is no evidence that their absence caused the other employees to work later than usual to get the work done. And the fact remains that four men could be spared in the middle of the afternoon to go looking for Mount and Frye and to obtain "evidence" upon which Respondent could take action against them.

Moreover, there is no claim and no evidence that the Company has a firm and well-known rule that men absent on Wednesday, without good cause, are automatically terminated. Nor does it claim that it always checks on the activity of an absent employee. Perhaps, Respondent will argue that it set about obtaining "evidence" about what Mount and Frye were doing because it had reason to be-

lieve that they had "quit" and gone to work for some one else. This argument, however, would ignore the fact that Gissel knew that the men had done similar work on Monday and/or Tuesday afternoon only because they had been laid off at 11:30 a.m. on those days. Under these circumstances, Gissel might at least have considered the possibility that they were working elsewhere Wednesday afternoon for the same reason, *i.e.* because they believed that they were not supposed to work at the plant Wednesday afternoon. (Respondent did not claim that it did not expect the men to report to work Thursday morning.)

Instead, Gissel clearly decided to discharge Mount and Frye without waiting to hear their explanation and he refused to give any weight to Frye's insistence on Thursday morning that he did not understand that he was supposed to work the afternoon before. Although Gissel might justifiably have doubted Mount's word, he had no reason to believe that Frye was not telling the truth when he asserted that, at most, he misunderstood Gissel's instructions. (As noted *supra*, Gissel did not testify that he told Mount and Frye Thursday morning that he had given them explicit orders to work all day Wednesday. On the contrary, Frye testified without denial that Gissel said only that he and Mount should have *known* they were supposed to work all day Wednesday.) And, as Gissel admitted, the two men had never "pulled" such a "trick" before.

When to these facts are added Gissel's anger, his threat to call the police, and his vulgar suggestion about what the two men could do with the Union, it is apparent that Gissel's actions and reactions were not prompted primarily by their absence the previous afternoon even assuming, *arguendo*, that they had misunderstood Gissel's instructions. Moreover, even if the Company had grounds for which it could have discharged Mount and Frye validly, it does not follow automatically that they were discharged for this reason alone or for this reason primarily. On the contrary, as the court stated in *Nachman Corporation* v. *N.L.R.B.*, 337 F.2d 421, 422 (C.A. 7),

> It is well settled that the presence of valid grounds for an employee's discharge does not legalize it where

"other circumstances indicate that the union activity weighed more heavily in the decision to fire him than did dissatisfaction with his performance." (Case citations omitted.)[45]

Applying the above test to the instant case, I would conclude, in the light of the entire record, that Mount and Frye would not have been discharged but for their Union activity even had it been found that Gissel believed that Mount and Frye understood that his instructions did not apply to Wednesday and that they, in turn mistakenly believed that they did. Even under these circumstances, I would find that Gissel seized upon their absence as a pretext not only to rid the plant of two active Union adherents but to indicate what could happen to other employees who continued to disregard Respondent's warning that Union acvitiy would not be tolerated. Cf. *N.L.R.B.* v. *Link-Belt Co.*, 311 U.S. 584, 602, in which the Court recognized that an employer's purpose may be to make an "example" of employees whose conduct *vis-a-vis* the Union has displeased him.

Conclusions of Law

1. Gissel Packing Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of Respondent employed at its Huntington, West Virginia, plant including truck drivers, truck driver salesmen and the janitor, but excluding office clerical employees, salesmen, professional employees, guards, officers of Respondent, the salesmen foreman, the truck salesmen foreman, the working foremen of the processing and packaging department,

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[45] See also: *Wonder State Mfg. Co.* v. *N.L.R.B.*, 328 F.2d 835, 837 (C.A. 6); *N.L.R.B.* v. *Jamestown Sterling Corp.*, 211 F.2d 725, 726 (C.A. 2); *N.L.R.B.* v. *WTVJ, Inc.*, 268 F.2d 346, 347-348 (C.A. 5) and cases cited therein.

the slaughter house, the freight and delivery department and the maintenance department, and all other supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. On and after January 22, 1965, the date on which the Union requested recognition and bargaining, the Union represented in fact and in law a substantial majority of the employees in the bargaining unit set forth in paragraph 3 above.

5. Respondent's admitted refusal to bargain with the Union, on request, with respect to the wages, hours, and working conditions of the employees in a unit found appropriate for bargaining by the Board was not motivated by a good faith doubt about the Union's majority and, therefore, violated Section 8(a)(5) and (1) of the Act.

6. By interrogating employees concerning their Union activity and the Union activity of other employees, by threatening employees with reprisals for engaging in Union activity, by directing an employee to find out who had signed cards and to report the information to Vice President Charles Gissel, by asking an employee what the Union had offered him and by telling him that the Company could offer him more than the Union could, by announcing its intention to have someone at a Union meeting to report on who attended it, by keeping a Union meeting under surveillance, by making disparaging and vulgar remarks about the Union, the latter in a context of interrogation, threats, and surveillance, the Company engaged in conduct which constituted interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

7. By discharging employees Herbert Mount, Jr. and Jerry Lee Fye because of their Union membership and activity, Respondent violated Section 8(a)(3) and (1) of the Act.

8. Respondent did not violate the Act except by engaging in the conduct summarized in paragraphs 5, 6, and 7 above.

The remedy

Having found that Respondent engaged in the unfair labor practices set forth above, the recommended order will direct Respondent to cease and desist therefrom and to take the affirmative action normally required in such cases. Any backpay found to be due to Herbert Mount, Jr., and Jerry Lee Frye shall be computed in accordance with the formula set forth in *F. W. Woolworth*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716. Since the Union has at all times material herein represented a majority of the employees, in law and in fact, in an appropriate bargaining unit, the recommended order will require that it bargain with the Union on request.

In view of the broad range of Respondent's illegal conduct, including its discriminatory discharge of Mount and Frye, action which goes to the very heart of the Act (*N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4)), I am convinced that Respondent would interfere with the employees' statutory rights under similar circumstances in the future. As a result, the recommended order will direct Respondent to cease and desist from engaging in conduct which in any manner denies its employees the rights guaranteed them by the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended order:

RECOMMENDED ORDER

Gissel Packing Company, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in the Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or in any other labor organization, by discharging employees or by discriminating against them in any other manner because of their Union membership and activity.

(b) Refusing to bargain, on request, with the above-named Union, the majority representative of its employees in the following appropriate bargaining unit:

> All production and maintenance employees of the Employer at its Huntington, West Virginia, plant including truck drivers, truck driver salesmen, and the janitor, but excluding office clerical employees, salesmen, professional employees, guards, officers of the Employer, the salesmen foreman, the truck driver salesmen foreman, the working foremen of the processing and packaging department, the slaughter house, the freight and delivery department, and the maintenance department, and all other supervisors as defined by the Act.

(c) Coercively interrogating its employees concerning their own and the Union activity of other employees, threatening reprisals for engaging in Union activity, directing employees to find out which employees have signed cards and report the information to management, stating that the Company could offer more than the Union could, announcing that it will have some one at a Union meeting to report on who attended it, keeping a Union meeting under surveillance, and making disparaging and vulgar remarks about the Union in a context of interrogation, threats, and surveillance.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to form, join, or assist Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other labor organization, to bargain collectively through a representative of their own choosing, or to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activity.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Herbert Mount, Jr. and Jerry Lee Frye immediate and full reinstatment to their former or substan-

tially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any losses they may have suffered by reason of the discrimination against them in the manner set forth in the section entitled, "The remedy." Notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(b) Bargain collectively, upon request, with Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, the statutory representative of its employees in the above-described appropriate bargaining unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records and reports, and all other reports necessary to analyze the amount of backpay due under these recommendations.

(d) Post at its plant copies of the notice attached hereto marked Appendix B.[44] Copies of said notice to be furnished by the Regional Director of the Ninth Region shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall

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[44] In the event that this Recommended Order be adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a United States Court of Appeals, the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words, "A DECISION AND ORDER."

be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Ninth Region, in writing, within 20 days from the date of the receipt of this Decision what steps the Respondent has taken to comply herewith.[45]

It is further recommended that the complaint be dismissed in all other respects.

Dated at Washington, D. C. December 14, 1965.

/s/ Rosanna A. Blake
Trial Examiner

[45] In the event that this Recommended Order be adopted by the Board this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply therewith."

APPENDIX A

Payroll January 22, 1965 [1]

Name	Status	Card Date
Mrs. R. E. Gissel	President	
E. W. Gissel	V. Pres. (Son of Mrs. R. E. Gissel)	
H. L. (Herbert) Gissel	V. Pres. (Son of Mrs. R. E. Gissel) right to hire/fire	
K. H. (Charles) Gissel	V. Pres. (Son of Mrs. R. E. Gissel) right to hire/fire	
A. L. Closterman	Sec.-Treas.; right to hire/fire	
H. B. Martin	Bookkeeper	
Harriett Curtis	Clerk in office	
Edith Lewis	V. Pres. (Daughter of Mrs. R. E. Gissel)	
Marie Snead	[assumed to be an employee]	
Leoris Gissel	(Daughter-in-law of Mrs. R. E. Gissel) right to hire/fire	
Siddy Caldwell	employee	1/16/65
Nell Charles	employee	1/18/65
Evelyn Collins	employee	
Emogene Ellis	employee	1/19/65
Alfreda Hutchison	(Niece of V. Pres. Charles Gissel; part-time supervisor)	
C. P. Adkins	employee	1/18/65
K. R. Adkins	employee	1/19/65
L. W. Bailey	employee	1/14/65
D. F. Billups	[assumed to be an employee]	1/20/65
J. J. Bonham	employee	1/21/65

[1] The persons assumed to be employees are those as to whom there is no evidence in the record. The assumption is for the purpose of determining the maximum number of employees in the unit and does not constitute a finding that they are in fact in the unit if they come within any of the classifications excluded by the Board in its Decision and Direction of Election.

Name	Status	Card Date
I. H. Caldwell	employee	
George Collins	employee	1/15/65
R. L. Curry	[asumed to be an employee]	1/18/65
D. W. Ellis	employee	1/19/65
Earl Fortner, Jr.	employee	
Francis Fortune	employee	1/14/65
L. R. Hutchison	grandson-in-law of Mrs. R. E. Gissel; part-time foreman	
L. R. Hysell	employee	1/14/65
R. H. Hysell	employee	1/16/65
J. K. Johnson	employee	1/19/65
D. C. Kidd	employee	
H. C. Lewis (Terry)	(Son of V. Pres. Edith Lewis) part-time employee	
C. F. McComas, Jr.	employee	1/18/65
E. B. Maynard, Jr.	employee	1/21/65
Donald Meadows	employee	1/19/65
J. T. Mollohan	employee	1/13/65
W. R. Mollohan	foreman boning dept.	
R. D. Moore	employee	
W. D. Moore	employee	1/19/65
Dewey Parsley, Jr.	employee	1/22/65
Curtis Queen	employee	
P. D. Rowe	employee	1/18/65
J. M. Vance	employee	1/16/65
Elisha Watts	employee	1/16/65
R. B. Simon	supervisor	
J. L. Ellis	truck driver	1/18/65
J. L. Frye	employee	1/19/65
R. E. Lewis (Eddie)	(Son of V. Pres. Edith Lewis) assistant sup; right to discipline	
H. E. Mounts, Jr.	employee	1/19/65
J. P. Robinson	employee	1/20/65

Name	Status	Card Date
S. H. Rowe	employee	1/21/65
J. B. Scott	employee	1/18/65
Clifford Carley	sales supervisor (route salesman)	
W. W. Bowyer	truck salesman-peddler	
N. A. Gibson	peddler	
J. B. Harless	peddler	
T. L. Jordan	car salesman; lives in Logan, W. Va.	
C. R. Kitchen	peddler	
E. M. Osborne	peddler	
C. F. Springle	car salesman, lives in Charleston, W. Va.	
L. E. Turpin	peddler	1/20/65

APPENDIX

NOTICE
PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT discourage membership in FOOD STORE EMPLOYEES UNION, LOCAL # 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or any other Union, by discharging or by discriminating in any other manner against employees because of their Union membership and activity.

WE WILL NOT coercively question employees concerning their own Union activity or the Union activity of other employees; we will not threaten to discharge employees or to punish them in any other way because they join, work for, attend meetings of, or otherwise help FOOD STORE EMPLOYEES UNION, LOCAL # 347, or any other labor organization; direct employees to find out and report on which employees have signed Union cards; tell employees that we can offer more than the Union can; say that we will have someone at a Union meeting to report on who attended it; send anyone to a Union meeting or to a place where a Union meeting is going to be held; make remarks about the Union which will make employees believe that we will take action against them because of their Union activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in their right to join, work for, attend meetings of, or otherwise help FOOD STORE EMPLOYEES, LOCAL # 347, or any other labor organization.

WE WILL OFFER Herbert Mount, Jr., and Jerry Lee Frye immediate and full reinstatement to their

former or substantially equivalent positions, without loss of seniority or other rights and privileges, and we will pay each of them the amount of money necessary to compensate them for any loss he has suffered because of his discriminatory discharge.

WE WILL bargain, on request, with FOOD STORE EMPLOYEES, LOCAL UNION, # 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as the representative of the employees in the unit set forth below, concerning wages, hours, and other terms and conditions of employment and, if agreement is reached, we will put the agreement in writing and will sign it:

> All production and maintenance employees employed at our Huntington, West Virginia, plant, including truck drivers, truck driver salesmen and the janitor, but excluding office clerical employees, salesmen, professional employees, guards, officers of the Company, the salesmen foreman, the truck salesmen foreman, the working foremen of the processing and packaging department, the slaughter house, the freight and delivery department, and the maintenance department, and all other supervisors as defined by the Act.

All of our employees are free to become, remain, or to refrain from becoming or remaining members of FOOD STORE EMPLOYEES UNION, LOCAL # 347, or any other labor organization, except to the extent that such right may be affected by an agreement in conformity with Section 8(a)(3) of the National Labor Relations Act.

GISSEL PACKING COMPANY, INC.
(Employer)

Dated .....

By .....
(Representative) (Title)

NOTE: We will notify either of the above named employees presently serving in the Armed Forces of the United States of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2023 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684-3627).

EXCEPTIONS OF GISSEL PACKING COMPANY, INC. TO TRIAL EXAMINER'S DECISION

Gissel Packing Company, Inc. excepts to the Trial Examiner's Decision as follows:

1. The Examiner refused to grant Respondent's Motion to Dismiss Section 5(a) i, ii. (Transcript, page 9)
2. The Examiner refused to grant Respondent's Motion to Dismiss Section 5(a) iii of the Complaint. (Transcript, pages 9-10)
3. The Examiner refused to grant Respondent's Motion to Dismiss Paragraphs 5(a) vi, vii, ix, and Paragraph 5(b) of the Complaint. (Transcript page 10)
4. The Examiner refused to grant the Respondent's Motion to dismiss Sections 5 (b), (c), (f), in Case No. 9-CA-3583, of the Complaint. (Transcript, page 11)

5. The Examiner overruled the Respondent's objections to an answer of a witness designating "eligible employees" and comments of Counsel for the General Counsel as set out more fully in the record on the grounds stated therein. (Transcript, pages 22-23-24)

6. The Examiner refused to sustain the Respondent's objection to General Counsel's Exhibit No. 8 on the grounds set forth in the record. (Transcript pages 25-26)

7. The Examiner admitted testimony with the respect of other union activities involving other employers over the objection of the Respondent. (Record pages 37-38)

8. The Examiner overruled the Respondent's objection to permitting the General Counsel to call Charles Gissel as an adverse witness as set out in the record. (Transcript page 88)

9. The Examiner admitted General Counsel's Exhibit Nos. 10A through F over objections duly stated in the record. (Transcript pages 70-71)

10. The Examiner admitted General Counsel's Exhibits Nos. 10G through M over objection. (Transcript page 79)

11. The Examiner accepted hearsay evidence of witness Jesse C. Spitzer over objection. (Transcript, page 82)

12. The Examiner accepted over Respondent's objection General Counsel Exhibits 10-M through Z. (Transcript, page 88)

13. The Examiner accepted immaterial evidence on incidents occurring at times not in question in the proceeding over objection of the Respondent. (Transcript pages 104-105)

14. The Examiner accepted General Counsel's Exhibits 10AA and 10BB over objection of the Respondent. (Transcript page 122)

15. The Examiner admitted General Counsel's Exhibit No. 11 over objection. (Transcript, pages 157-158)

16. The Examiner permitted witness Jerry Lee Frye to testify with respect to state of mind evidence over objection of Respondent. (Transcript, 162)

17. The Examiner accepted irrelevant evidence from witness Jerry Lee Frye over objections stated in the record. (Transcript, pages 172-173)

18. The Examiner accepted General Counsel's Exhibit No. 10CC over objection. (Transcript page 176)

19. The Examiner exhibited a hostile attitude toward the Respondent by refusing to permit the Respondent to ask even routine questions with respect to witnesses offered by the General Counsel. (Transcript, page 177-178)

20. The Examiner refused to permit the Respondent to make an offer of proof by an avowel of the record. (Transcript, pages 187-188)

21. The Examiner refused to grant the Respondent's Motion to strike the entire testimony of witness Frye on the grounds stated in the record. (Transcript, page 196-197)

22. The Examiner accepted into evidence General Counsel's Exhibit No. 10-GG over Respondent's objection. (Transcript page 204)

23. The Examiner admitted irrelevant evidence over objection of the Respondent. (Transcript pages 210-211)

24. The Examiner permitted witness Burchell to give evidence pertaining to his state of mind over objection of the Respondent. (Transcript pages 211-212)

25. The Examiner admitted Respondent's Exhibit No. 10-HH over objection of Respondent. (Transcript pages 215-216)

26. The Examiner permitted the introduction of evidence not relevant to matters in the Complaint and permitted General Counsel to cross-examine his own witness. (Transcript 218-219)

27. Over the Respondent's repeated objections, the Examiner permitted witness Maynard to read statements, permitted the General Counsel to cross-examine his own witness. (Transcript pages 221-224)

28. The Examiner made remarks indicating a prejudice few toward the evidence offered by the Respondent and implying that she would not give fair consideration to certain evidence. (Transcript 251)

29. The Respondent permitted improper redirect examination. (Transcript page 259)

30. The Examiner admitted into evidence General Counsel's Exhibit 10-FF over objection. (Transcript page 269)

31. The Examiner admitted General Counsel's Exhibit No. 10-EE over objection. (Transcript page 283)

32. The Examiner made comments with respect to the weight of the evidence adverse to the Respondent indicating the prejudice few toward the Respondent's evidence. (Transcript pages 404-411)

33. The Examiner permitted a witness to testify whether he was for or against the union over objection of the Respondent. (Transcript page 433, and motions in connection therewith.)

34. The Examiner refused to grant Respondent's Motion to strike certain testimony of witness Rush D. Moore. (Transcript 441-443)

35. The Examiner permitted certain evidence to be introduced which was irrelevant and immaterial over the objection of the Respondent. (Transcript page 408)

36. The Trial Examiner improperly took over the conduct of the General Counsel's case and had certain irrelevant evidence introduced over objection of Respondent. (Transcript pages 450-453)

37. The Examiner permitted colloquy of Counsel for the General Counsel to stand in the record over objection. (Transcript page 496)

38. The Examiner permitted certain evidence which was objected to by the Respondent. (Transcript pages 496-497)

39. The Examiner permitted the General Counsel to introduce evidence which was not proper cross-examination. (Transcript page 532). (Transcript 533-534)

40. The Examiner overruled the Respondent's objection to certain witnesses being in the hearing room. (Transcript page 537)

41. The Examiner permitted witness Simon to testify with respect to whether or not a certain person was for or against the union over objection. (Transcript page 539)

42. The Examiner, over objection of the Respondent, permitted Counsel for the General Counsel to argue at length with his own witnesses. (Transcript page 561)

43. Over the objection of the Respondent, the Examiner permitted witnesses for the General Counsel to testify

with respect to their state of mind. (Transcript pages 562-563)

44. The Employer accepts to the Trial Examiner's findings and conclusion in their findings as follows:

(a) The Examiner rejected a large portion of the testimony of Carl Gissel because of a certain unrelated incident pertaining to Lewis, (Page 3) there was no connection between the veracity of Carl Gissel in the incident involving Lewis which would lead to such a conclusion.

(b) The failure of the company to interview time cards has been seised upon by the Trial Examiner as important in her conclusions when there was no obligation or showing as to what the time cards purported and her inference therefrom is not supported by the evidence or any reasonable conclusion. (Page 4)

(c) The Examiner relied upon previous hearings conducted by the National Labor Relations Board which were not pertinent to the issues involved in the present hearing. (Pages 4-5)

(d) The Examiner accepted the evidence of application cards which she admitted were not properly identified. (Page 9)

(e) The Examiner arbitrarily credited the testimony of Union witness Frye. (Page 10)

(f) The Examiner uses tortuous and improper reasoning in connection with the testimony of witness Lewis and the conclusion is drawn therefrom. (Page 15)

(g) The Examiner arbitrarily credited certain testimony and reached improper conclusions based on inadmissible evidence with respect to the alleged discriminatory discharges. (Pages 16-21)

(h) The Examiner reached improper conclusions based on inadmissible evidence arbitrarily crediting some witnesses and disregarding the testimony of others in finding the Respondent guilty of refusing to bargain. (Page 23-26)

(i) The Examiner incorrectly credited certain testimony and rejected certain other testimony in con-

cluding that the discharge of Mount and Frye were discriminatory. (Page 26-30)

(j) The Respondent accepts to the conclusions of law. (Transcript pages 30-31)

(k) The Examiner finds that the Employer did not have a good faith doubt as to the union majority status. There was no agreement as to what constituted a valid and appropriate unit. The remedy recommended by the Examiner would deny the employees of the Respondent the right to determine a union of their choice provided by Section 7 of the National Labor Relations Act. Accordingly, the Employer says that the proposed remedy and recommended order are improper, inappropriate, and unlawful.

/s/ John E. Jenkins
Of Counsel for Gissel
Packing Company, Inc.

JENKINS & JENKINS
Attorneys for
Gissel Packing Company, Inc.
500 Kelly-Hatfield Building
Huntington, West Virginia

[Certificate of Service]

DECISION AND ORDER

On December 14, 1965, Trial Examiner Rosanna A. Blake issued her Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the ruling of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions,[1] and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modification noted below.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Gissel Packing Company, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., March 25, 1966.

/s/ John H. Fanning, Member
/s/ Gerald A. Brown, Member
/s/ Sam Zagoria, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

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[1] The Respondent excepted to the credibility findings made by the Trial Examiner. It is the Board's established practice, however, not to overrule a Trial Examiner's resolutions with respect to credibility unless, as is not the case here, the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd, 188 F.2d 362 (C.A. 3).

[2] In adopting the Trial Examiner's conclusion that the Respondent violated Section 8(a)(5) of the Act, we need not rely upon her interpretation of the Supreme Court's opinion in *International Ladies' Garment Workers Union (Bernhard-Altmann Texas Corp.) v. N.L.R.B.*, 366 U.S. 731, as set forth in footnote 41 of the Trial Examiner's Decision.

The following inadvertences contained in the Trial Examiner's Decision are hereby corrected: "September 1965" is changed to "September 1964" (p. 11, line 39); "November 1963" is changed to "November 1964" (p. 17, line 55); "April 1963 is changed to "June 1963" (p. 26, line 22).

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,228.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

GISSEL PACKING COMPANY, INC., RESPONDENT

FOOD STORE EMPLOYEES UNION, LOCAL # 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, INTERVENOR

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Argued January 11, 1968. Decided June 28, 1968.)

Before HAYNSWORTH, Chief Judge, and BOREMAN and WINTER, Circuit Judges.

PER CURIAM:

The National Labor Relations Board petitions for enforcement of its order [1] directing respondent, Gissel Packing Company, Inc. to take certain steps to remedy violations of the National Labor Relations Act [2] found by the Board to have occurred. We decline enforcement of that portion of the order directing respondent to bargain with the union upon request.

[1] 157 NLRB No. 94.

[2] 29 U.S.C.A. § 151 *et eq.*

Respondent is a West Virginia corporation engaged in the slaughtering, processing, and wholesaling of beef and pork products. Amalgamated Meat Cutters and Butcher Workmen of North America, the union, attempted to organize certain of respondent's employees in 1960 and 1961. The Board directed that an election be held, but the union was defeated. About the middle of January, 1965, the union began a second campaign to organize respondent's employees, and it is out of this campaign that this controversy arises.

The Board concluded that during the 1965 campaign respondent violated Section 8(a)(1) of the Act by coercing its employees in the exercise of their rights under the Act and Section 8(a)(3) by discharging two employees because of their union membership and activity. Substantial evidence on the whole record, though not uncontradicted, exists to support these findings, and we enforce that portion of the Board's order requiring respondent to remedy these violations.

We are unable, however, to accept the Board's determination that respondent violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the union upon request, for the evidence is insufficient to support a finding that respondent did not have a good faith doubt as to the union's majority status when confronted with the demand for recognition. On January 22, 1965, union representative Spencer informed respondent that the union represented a majority of the employees in a certain unit and requested recognition, basing his claim upon possession by the union of signed authorization cards from 31 of the 47 unit employees. Respondent replied through its agents that it doubted the union's claim, and invited Spencer to file for a Board election. The bases of its doubts were buttressed by the fact that a few years earlier the union lost a valid secret election after a similar claim of majority status.

In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justi-

fied in withholding recognition pending the result of a certification election.[3]. The reasoning elaborated in those decisions applies with equal force here, and we decline enforcement of that portion of the Board's order requiring respondent to bargain with the union.

Enforcement granted in part and denied in part.

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[3] Crawford Mfg. Co. v. NLRB, 4 Cir., 386 F.2d 367, cert. denied 36 LW 3403, ___ U.S. ___; NLRB v. S.S. Logan Packing Co., 4 Cir., 386 F.2d 562; NLRB v. Sehon Stevenson Co., Inc., 4 Cir., 386 F.2d 551; NLRB v. Heck's, Inc., 4 Cir., ___ F.2d ___, (decided this day).

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,228.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

GISSEL PACKING COMPANY, INC., RESPONDENT

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, INTERVENOR

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Gissel Packing Company, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns on the 25th day of March, 1966, in a proceeding before the said Board known upon its records as Case Nos. 9-CA-3472 and 9-CA-3583; upon the answer of the said Respondent, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the said order of the National Labor Relations Board be, and it is hereby, enforced as to that portion dealing with the violations of §§ 8(a)(1) and (3) of the National Labor Relations Act, and that enforcement with regard to that portion of the order requiring respondent to bargain with the union is denied; and that the said Respondent, Gissel Packing Company, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said

order as so enforced contained, in accordance with the opinion of the Court filed herein.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

A True Copy, Teste:

Samuel W. Phillips, Clerk
By Margaret L. Davis
Deputy Clerk

[SEAL]

Filed, June 28, 1968, Samuel W. Phillips, Clerk

SUPREME COURT OF THE UNITED STATES

No. 573, October Term, 1968

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC., ET AL.

ORDER ALLOWING CERTIORARI—Filed December 16, 1968

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is consolidated with No. 691 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

No. 691, October Term, 1968

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

GISSEL PACKING CO., INC.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

GISSEL PACKING CO., INC., *et al*

and

No. 691

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

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—v.—

GISSEL PACKING CO., INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
NINTH REGION

Case No. 9-CA-3356
Case No. 9-CA-3477

In the Matter of:
HECK'S, INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

Room 5404,
Federal Building
500 Quarrier Street,
Charleston, West Virginia
Monday, June 28, 1965.

The above-entitled matter came on for hearing, pursuant to notice, at 1:30 o'clock p.m., EDST,
BEFORE:

THOMAS F. MAHER, ESQ., Trial Examiner

* * * *

[fol. 4] PROCEEDINGS

TRIAL EXAMINER MAHER: The hearing will be in order. This is a formal hearing before the National Labor Relations Board in the matter of Heck's, Incorporated, and Chauffeurs, Teamsters and Helpers, Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Case Nos. 9-CA-3356 and 9-CA-3477. The Trial Examiner conducting this hearing is Thomas F. Maher.

Will Counsel please state their appearances for the record?

MR. MITTENDORF: Counsel for the General Counsel, William C. Mittendorf, National Labor Relations Board, Ninth Region, Federal Office Building, 550 Main Street, Cincinnati, Ohio.

MR. BOWLES: I am Martin C. Bowles, representing Teamsters 175. My office is 407 Kanawha Banking and Trust Building, Charleston, West Virginia.

MR. HOLROYD: Appearing on behalf of the Respondent, Heck's, Inc., is Frederick F. Holroyd of the law firm of Gardner, Gandal and Holroyd, 521 Central Avenue, Charleston, West Virginia.

* * * *

[fol. 9] ROBERT D. JACKSON

was called as a witness by and on behalf of the National Labor Relations Board and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: Robert D. Jackson, 1211 Lyndale Drive, Charleston, West Virginia.

* * * *

[fol. 13] DIRECT EXAMINATION

* * * *

BY MR. MITTENDORF:

Q By whom are you employed? A Chauffeurs, Teamsters and Helpers, Local No. 175, affiliated with the International Brotherhood of Teamsters, Chauffeurs and Helpers of America.

[fol. 14] Q They are located in Charleston? A Yes.

Q What is your capacity with that organization, sir? A A business agent.

Q How long have you been a business agent? A I have been a business agent approximately five years with the local union.

Q Were you with the Teamsters prior to that time? A Yes. I was employed by the Teamsters Joint Council No. 84 for about five years.

Q In your capacity as a business representative for Local 175 have you ever had occasion to deal with the employees of Heck's? A Yes.

Q When did that association with those employees begin, Mr. Jackson? A The first occasion was early May, approximatey May 7, I would guess.

Q Was there a subsequent occasion? A Yes.

Q About October 5, 1964, it would be, would it not? A Yes. October 5, 1964.

Q With whom was your initial contact? A James Goins.

* * * *

[fol. 15] Q What was your initial contact with Mr. Goins? A Mr. Goins called me on the telephone making inquiry as to how the employees of Heck's could get into the union.

Q What was done at the time, if anything; that is, at the time you talked with Mr. Goins? A Briefly I explained to him the procedures, the fact that they would have to sign application cards, pay initiation fees, and at the conclusion of the telephone conversation I arranged to meet with him at noon the following day.

Q You did meet with him? A I did.

Q What took place at that meeting? A I met with him at the corner, I believe, of 19th Street and first Avenue in Nitro, which is across the tracks from the employer's warehouse in Nitro. He was en route with a truck driver to Ashland, Kentucky, and he was unable [fol. 16] to talk to me, but I gave him application cards and told him to get them signed, and the initiation fee was $6. He said he would call me later.

Q Do you recall any reference to the number of cards being made? A Not at that time. He was in a hurry, having to meet the truck driver and proceed on.

Q Did you later meet with Mr. Goins again? A Yes. However, I talked with him by phone prior to this. On the following evening he called me and made inquiry as to how many applications would be necessary to have. I told him he would have to have a majority, and explained the initation fee to him, how you go about get-

ting elections with the National Labor Relations Board and just general information of the rule.

Then the following evening he called me again.

Q As nearly as you can recall, what date was this? A That was probably about the sixth or seventh. Just a few days after the initial phone conversation.

Q Proceed. A Probably the seventh.

The following evening he called and asked if the warehouse employees in the Charleston and St. Albans Stores could join the union, and I informed him they could. The same application and initiation fee would prevail for them. [fol. 17] In this conversation we arranged to meet at noon on Friday the ninth.

Q Did you meet on the ninth? A We did.

Q Whom did you meet with on that occasion? A James Goins, Ivan Vickers and Searls.

Q What took place at that meeting? A I collected thirteen application cards and the initation fees for all thirteen.

* * * * *

Q Mr. Jackson, I show you what has been identified as General Counsel's Exhibits 2 (a) through 2(m) and ask you if you can identify these? A These are the applications that I received from the three employees.

Q How many? A Thirteen.

Q At the time you received those three cards from Mr. Goins, Mr. Vickers, and Mr. Searls, did you have this discussion with them at that time, Mr. Jackson? A Yes. [fol. 18] We discussed the question of the number of employees employed by the employer at the Nitro Warehouse and the warehouse at the Charleston store and the warehouse at the St. Albans store, primarily those employees employed in the warehouse and truck drivers' group.

It was pretty well substantiated that we had the majority, so in the course of the conversation I told the three employees that I may go to the chief executive officer, whom they informed me was Mr. Fred Haddad, and request recognition that we would negotiate a contract and see if the matter could be handled that way rather than through the procedures of a Board Election.

Q Is there anything else? A A question of the initiation fees and dues was discussed again and I wrote out receipts for the money I received for the applications.

* * * *

[fol. 19] Q Do you recall anything further in that discussion? A In the conversation I informed the three that upon requesting recognition of Mr. Haddad that it may be necessary for me to show the cards to them to verify the majority status of the union and inquired if this was all right with them, in an attempt to keep faith with those employees, and they informed me to take whatever procedures I felt to be necessary under the circumstances.

Q What did you do after that? A I ate lunch and then about 1:15 or 1:30 that afternoon I went to the company's offices in Nitro, West Virginia.

Q Who did you request to see? A I requested the receptionist to see Mr. Haddad. I announced who I was and that I wished to see Mr. Haddad. There was a short wait and I was called into Mr. Haddad's office.

TRIAL EXAMINER: What was the date of this?

THE WITNESS: This was October 9.

Q Who was present when you talked with Mr. Haddad? A Just Mr. Haddad and myself.

Q Will you describe for the Trial Examiner the conversation that took place at that time? A I informed Mr. Haddad that—

TRIAL EXAMINER: Hold the phone. On this question of request for bargaining, is Counsel disposed to concede that the request was made?

MR. HOLROYD: I would like to hear the testimony about it.

[fol. 20] TRIAL EXAMINER: Go ahead.

THE WITNESS: I informed Mr. Haddad that a majority of the employees had signed up with the Teamsters Union and I was requesting recognition of the union for the truck drivers and warehousemen for those employees employed at the warehouse in Nitro, West Virginia, the warehouse in the store at Charleston and the warehousemen in the store at St. Albans.

He inquired as to how he knew that I represented the majority, and I told him that I had signed cards. He requested to see them and I gave them to him.

Q You say you gave them to him. Are you referring to what has been identified as General Counsel's Exhibits 2 (a) through 2 (m)? A That is correct.

Q Will you describe what happened when Mr. Haddad went through the cards? A Mr. Haddad went through the cards, two or three times, with such comments as he couldn't believe it, or "I have known this one all my life. He couldn't have done this", and such comments as this.

After he had gone through them he stated that he didn't know all of them and where they worked and requested if he could call someone else into his office. I told him it was quite all right with me.

[fol. 21] Q Did he call someone else in? A He called Mr. Ray Darnell in.

Q Can you identify Mr. Darnell? A Mr. Darnell is sitting at the table with Mr. Holroyd.

Q When Mr. Darnell came in what was done or said at that time? A Mr. Haddad handed the thirteen cards to Mr. Darnell, inquiring as to where they worked and who some of them were, and the two of them went through the cards at their leisure and pleasure.

Q Do you recall any further conversation? A Mr. Haddad suggested that he and I and Mr. Darnell go through the warehouse and talk to the warehouse employees and see if they really did want a union.

I reminded him that I was also requesting recognition for the warehouse employees of Charleston and St. Albans. He informed me that we would go through those warehouses also.

I informed Mr. Haddad that this was a little bit irregular and I never ran into a situation like this, but I felt I would be quite willing to do this if he would agree to recognize the union and sit down and negotiate a contract if the majority of the employees stated that they did want a union. He refused to do this.

* * * *

[fol. 22] Q What was said? A Mr. Haddad was quite insistent upon identifying something, apparently, and

asked if it would be all right if he called an employee in and questioned him about signing the card. I informed Mr. Haddad that if he did he was subjecting himself possibly to an unfair labor practice, and he informed me that he knew all about unfair labor practices because he just got out of a trial regarding his Ashland Store in Ashland, Kentucky. He knew all about his rights under the law.

Thereupon, he called Ivan Vickers to his office. Mr. Vickers came into the office. Haddad asked Vickers if he had signed that card. Mr. Vickers stated he had. Mr. Vickers was then excused to return to his work place.

Q How long was Mr. Vickers present? A Just long enough to ask the question and suggest he go back to work. It was no longer than that.

Q After Mr. Vickers left was there any other conversation between you and Mr. Haddad? A I asked for recognition again and I asked that we sit down and negotiate for a contract. In each one of my comments or statements Mr. Haddad would merely say, "No comment", or "No further comment".

[fol. 23] Q Do you recall any other conversation? A No. I am sorry. I don't.

Q Do you recall any reference to any other stores? A When the recognition was made Mr. Haddad commented that he had stores in Huntington and Ashland.

TRIAL EXAMINER: When the recognition was what?

THE WITNESS: When I requested recognition for the warehouse at Nitro and for the warehouses in Charleston and St. Albans he informed me that he also had stores in Huntington, Ashland, Kentucky, and Parkersburg, West Virginia, each of them having warehouses.

I informed him that there was no request being made for the warehouse employees at the three stores because they were out of the marketing area of Charleston and would not be considered an appropriate unit, I didn't believe.

I informed him emphatically that the request was being made for truck drivers and warehousemen for the employees at the Nitro Warehouse, the warehouse in the

Charleston store and the warehouse in the St. Albans store; those and those only.

There was some discussion of the clerks and all and I informed him that there was no request for recognition of the clerks, that we did not historically negotiate for clerks.

TRIAL EXAMINER: Let us repeat that again. You were asking recognition for what?

THE WITNESS: Truck drivers and warehouse em-
[fol. 24] ployees employed at Charleston, St. Albans, and Nitro, West Virginia.

MR. MITTENDORF: In connection with this exhibit I would like to state to Mr. Holroyd that this is a list of the warehouse employees that was provided us by Mr. Hermansdorfer, an attorney formerly representing the employer.

MR. HOLROYD: I have no objection to the introduction of that into evidence as being the document furnished by former Counsel.

MR. MITTENDORF: In that connection, Mr. Holroyd, I would like to ask, does this list accurately reflect the names of the employees at the various locations as of that date?

MR. HOLROYD: As far I can tell from my brief purview it does.

TRIAL EXAMINER: Without objection General Counsel's Exhibit No. 3 will be admitted into evidence.

You said warehouse employees when you were requesting the introduction, and I notice on here that there are individuals who are listed as drivers. I also notice that in your Paragraph 8, where you allege as the appropriate bargaining unit, drivers as well as warehousemen.
[fol. 25] Do I understand that the unit that you allege to be appropriate is a unit that includes all of the employees listed on this document, which is headed "Warehouse Employees", and that the positions of drivers that are listed on here are part of that unit?

MR. MITTENDORF: That is correct, sir.

TRIAL EXAMINER: This is an entire unit?

MR. MITTENDORF: That is correct.

MR. HOLROYD: We would stipulate that the General Counsel's Exhibit 3 constitutes all of the employees in the appropriate unit.

TRIAL EXAMINER: The alleged appropriate unit.

MR. HOLROYD: We would just—that all these employees listed on General Counsel's Exhibit 3 constitutes an appropriate unit.

MR. MITTENDORF: No. I would not so stipulate, Mr. Examiner. It is the contention of the General Counsel that the approporiate unit; that is, that the names of all the employees in an appropriate unit appear thereon, identified as either warehousemen or drivers, and further we specifically exclude the employees designated as being employed at Parkersburg, Huntington and Ashland.

In short, the unit being sought here is a unit of drivers and warehousemen at Nitro, West Virginia, St. Albans, West Virginia, and Charleston.

* * * *

[fol. 29] Q Did you at anytime make a subsequent demand on Mr. Haddad? A I did.

Q When was that? A The early part of the following week, probably about the twelfth or thirteenth of October.

MR. HOLROYD: I didn't hear that question. I am sorry.

TRIAL EXAMINER: Read it back, please.

(Whereupon, the preceding two questions and answers were read by the Reporter as requested.)

Q What were the circumstances preceding the second demand, Mr. Jackson? A Mr. Goins had been fired and I called Mr. Haddad to inquire about it, to seek his rein-
[fol. 30] statement, and in the course of the conversation I suggested that he recognize the union and that we commence negotiations for a contract.

Q Did you actually get in touch with Mr. Haddad on that date? A I talked to Mr. Haddad at that time. Yes. That was to whom I was speaking. He informed me that he had no comment on the request for recognition and negotiation.

However, he did say that he would get in touch with

Mr. Darnell to find out about Mr. Goins' discharge and call me back.

Q Did he ever do so? A No. I attempted to reach him the sixteenth, the Friday of that week, exactly one week after I had made my demand. Mr. Haddad was not in. I left word for him to call me, but he has not yet.

Q General Counsel's Exhibit 3 shows locations of the employer at Charleston, Nitro, St. Albans, Huntington, Parkersburg, and Ashland, Kentucky. At this time I would like for you to give us a physical description of the layout of those stores, using Charleston as a center. How far is it from Charleston to Nitro? A Approximately eleven miles.

Q In what direction would that be? A That would probably be in a northwesterly direction.

* * * *

[fol. 31] Q From the Charleston store to the Nitro Store? A About eleven miles, I would guess.

* * * *

[fol. 32] Q From the Charleston store to the St. Albans store? A Probably seven or eight.

Q In what direction? A In a westerly direction.

Q How far is it from Nitro to St. Albans? A The store and the warehouse would probably be three or four miles.

* * * *

[fol. 33] Q Mr. Jackson, subsequent to October 9 did you receive additional cards? A I did.

MR. MITTENDORF: I would like to have marked for identification as General Counsel's Exhibit 5 (a) and 5 (b) these two documents.

(The documents above-referred to were marked General Counsel's Exhibits Nos. 5 (a) and 5 (b) for identification.)

[fol. 34] Q I show you what has been identified as General Counsel's Exhibits 5 (a) and 5 (b) and ask you if you can identify those, Mr. Jackson? A These are applications that were received in my office.

* * * *

[fol. 35] FURTHER DIRECT EXAMINATION

* * * *

BY MR. BOWLES:

Q Tell the Trial Examiner what Mr. Haddad said about the appropriate unit in reference to the various stores. A Mr. Haddad said that he had warehouses in all his stores and as a result questioned the unit. However, I told him that I was amenable to negotiate either on behalf of the Nitro Warehouse or separate contracts for the warehouses in the store. I would be happy to listen to anything he had in mind in that respect.

* * * *

[fol. 48] JAMES E. GOINS

was called as a witness by and on behalf of the National Labor Relations Board and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: James Edward Goins, 1654 McClung Street, Charleston, West Virginia.

DIRECT EXAMINATION

BY MR. MITTENDORF:

Q Were you ever employed by Heck's, Mr. Goins? A Yes.

Q Do you recall when you started there? A It was on or about August 1, 1964.

Q What was your job? In what capacity were you hired? A Warehouseman.

[fol. 49] Q What was your rate of pay? A $1.25 an hour.

Q Were you familiar with the union campaign at Heck's? A Well, I was talking to them about the last week or the first week of October.

Q You say you talked to them. Who are you referring to? A Ivan Vickers.

Q You talked to Ivan Vickers. Did you talk to anyone else. A James May and U. R. Searls.

Q Will you describe what happened after your conversation with these men? A I called Mr. Robert D. Jackson, business representative of the union, Local 175.

Q Do you recall when that was? A Fifth.

Q Of what? A October, 1964. At his home.

Q What happened after that? A We arranged a meeting for October 6 at 19th Street and First Avenue. That is the Bank of Nitro Parking Lot. It is right on the corner of 19th Street and First Avenue.

Q Did you meet there with Mr. Jackson? A Yes, sir. I met with him at noon.

Q What was the discussion you had with him at that time? A I was in a rush and we didn't get to talk too much. I obtained application blanks for the union.

[fol. 50] Q Did he give you any instructions?

MR. HOLROYD: I object to the materiality of this.

TRIAL EXAMINER: Overruled.

Q Go ahead. A I picked the applications up, for I was on my way in to Huntington and Ashland that day. He told me to get in touch wth him as soon as we had them signed, then get in touch with him.

Q What did you do with the cards that he gave you? A I took them back. I carried them around one day with me. Then on October 6 I give some to Vickers and I kept them. We talked to the ones in the warehouse.

Q Did you give cards to anyone besides Mr. Vickers? A I passed them out to the ones I passed out between the guys to be filled out and to be given back to me.

Q What happened to those cards? A When Mr. Vickers—the ones I give him, he had passed out between the men.

MR. HOLROYD: I object to this testimony about what Mr. Vickers did unless he can establish that he saw it.

Q What eventually happened to the cards? A They was give back to me.

Q They were returned to you? A Returned to me.

[fol. 51] Q How many of these cards did you personally have signed, Mr. Goins? A About six or seven.

* * * *

Q Would you have any way of recalling whether other cards were signed in your presence? A I signed the back of them where the witness is supposed to sign.

* * * *

[fol. 53] Q Mr. Goins, there is your card. I ask you if that bears your signature? A Yes, sir.

Q Here is the card of Mr. Vickers. I ask you if that bears your signature? A Yes, sir. It does.

Q Did Mr. Vickers sign that in your presence? A Yes.

Q There is the card of Mr. Curry. I ask you if that bears your signature? A Yes.

[fol. 54] Q Did Mr. Curry sign that card in your presence? A Yes.

Q Here is the card of Mr. Woodall. I ask you if that bears your signature? A Yes.

Q Did Mr. Woodall sign the card in your presence? A Yes.

Q Here is the card of Samuel Douglas Nelson. I ask you if that bears your signature? A Yes. It does.

Q Did Mr. Nelson sign it in your presence? A Yes.

Q Here is the card of Mr. Hughart. Did Mr. Hughart sign this in your presence? A No.

Q This does not bear your signature. A I am not sure.

Q Here is the card of Mr. Johnson. I ask you if that bears your signature? A Yes.

Q Did Mr. Johnson sign in your presence? A Yes.

* * * *

[fol. 61] DIRECT EXAMINATION RESUMED

BY MR. MITTENDORF:

Q After these cards were returned to you, Mr. Goins, what did you do with them? A I called Mr. Jackson.

[fol. 62] Q Do you recall the date that you called him? A October 8.

Q What did you tell Mr. Jackson? A I told Mr. Jackson that I had the majority of applications signed. We arranged to meet at 19th Street and First Avenue, the Bank of Nitro Parking Lot, at noon.

Q Did you meet? A Yes. We did.

Q Who met with you, if anyone? A Mr. Vickers and U. R. Searls.

Q What did you do? A Turned the applications in to Mr. Jackson and give him the money, the initiation fee.

Q Do you recall anything further? A We asked what procedure would follow. Mr. Jackson said he would probably go talk to Mr. Fred Haddad.

Q Who is Mr. Haddad? A He is President of Heck's.

Q All right. A And try to negotiate a contract, try to represent us. He asked us if this was all right and we told him to do the best, the best that he could do.

Q Was that all there was to that meeting? A He wrote out receipts for us and I handed him the money.

[fol. 63] Q With respect to the union campaign what was the next thing that happened? A We went back after lunch on October 9. We went back to work at one o'clock, and met Mr. Vickers in the aisle. It was about—

MR. HOLROYD: I can't understand him with his hand over his mouth.

THE WITNESS: I met Mr. Vickers around two o'clock. He told me that he had been called into Mr. Haddad's office.

MR. HOLROYD: I object to this hearsay testimony.

TRIAL EXAMINER: Overruled.

THE WITNESS: About two o'clock Mr. Ray Foy called a meeting.

BY MR. MITTENDORF:

Q Who is Mr. Ray Foy? A He was the warehouse manager.

Q All right. A He called a meeting in his office, all the warehousemen. After we assembled, Mr. Fred Haddad, Mr. Ray Darnell, Mr. Bill Ellis—

Q Will you identify these people as their names come up for the first time? Who is Mr. Ellis? A Mr. Ellis—

MR. HOLROYD: These are stipulated to and admitted in the complaint.

BY MR. MITTENDORF:

Q Anyone else? A Mr. Graley, Bernard Graley.
[fol. 64] Q Will you tell the Trial Examiner what took place at that meeting? A Mr. Haddad came in. He wanted to know why we wanted a union, what did the union offer us that he couldn't offer us, that he could work us the way he desired. He didn't have to guarantee us forty hours a week, he could work us a split shift or however he desired. He mentioned that he was flabbergasted at us wanting a union.

Q Do you recall anything further of Mr. Haddad's speech at that time, Mr. Goins? A He asked Mr. Charles Lewis if he signed an application, and he told him, no, he did not.

Q Did he ask anyone besides Mr. Lewis?

MR. HOLROYD: I object to the leading nature of the question.

TRIAL EXAMINER: Overruled.

THE WITNESS: Not that I can recall right now.

BY MR. MITTENDORF:

Q What was Mr. Lewis' capacity at the warehouse? A He worked in the cosmetics department part-time.

Q Part-time? A Yes, sir.

Q What did he do with the other part of his time, if [fol. 65] you know? A He was going to school.

Q Do you know where? A I believe it was West Virginia State.

Q Do you recall anything else that Mr. Haddad said while he was talking to the employees? A No. I don't.

Q You do not recall anything further? Was there any reference to withdrawal?

MR. HOLROYD: I object to the leading nature of the question.

TRIAL EXAMINER: Overruled.

BY MR. MITTENDORF:

Q You may answer. A Mr. Haddad told us in the meeting if any of us wanted to withdraw from the union that he wouldn't fire nobody, and that he would fire nobody for joining the union.

* * * *

[fol. 69] BY MR. MITTENDORF:

Q Mr. Goins, on what date did you leave Heck's? A I worked the ninth. I come out to work the tenth of October, 1964, and went to work at the regular time. I worked—they put three of us on the outside washing down the driveway in the parking lot.

Q What day of the week would this have been, if you [fol. 70] can recall? A Saturday.

Q All right, sir. A We was outside, three of us, Nelson—

Q Since we have two Nelsons, tell us which one. A Opie Nelson and U. R. Searls and myself outside washing down the driveway in the parking lot.

Q What did you use? A About ten o'clock Ray Foy called a meeting in his office and told us—he called everybody but the cosmetics department, and told us—

Q Just a moment. Forget the meeting. What happened after the—

MR. HOLROYD: I am going to object. If the witness is getting half an answer out here and then we come up and say forget it—

TRIAL EXAMINER: You can cross examine.

MR. MITTENDORF: The meeting in this particular case does not go to the allegation of the complaint. It was something that happened that morning and that was the extent of it.

MR. HOLROYD: In the light of that explanation I will withdraw my objection.

THE WITNESS: At eleven o'clock we went back out, finished up our work outside, and at eleven o'clock that day we finished washing down the driveway in the parking lot with a fire hose. I was wet from shoulders down, sopping wet, and after we finished I went up to Bernard [fol. 71] Graley and asked him to go home.

He said, "Well".

I went over to Ray Foy's office. He was in his office. I opened the door and told him I was going home. He nodded his head okay. I punched out at eleven o'clock and went home.

BY MR. MITTENDORF:

Q You said two other men were working outside with you. Were they wet? A They wasn't as wet as I was.

Q Is there a reason? A I had hold of the nozzle, a leaky nozzle, on a high pressure fire hose.

Q You punched your card out at approximately eleven o'clock? A Yes.

Q Had you ever done this before? Had you ever left early before? A No.

Q Did you report to work the following Monday? A Yes. I did.

TRIAL EXAMINER: What day was this that he punched out?

THE WITNESS: October 10, Saturday.

I reported for work October 12. I went in to the time clock. I had no card. Right offhand I can't call their names, but there was some from the cosmetics department, and they didn't have no timecard. Well, we stayed [fol. 72] around—

MR. HOLROYD: I object to the testimony about these others as being immaterial.

TRIAL EXAMINER: Sustained.

THE WITNESS: I went up front when Ray Foy and Bernard Graley come in for work and asked them for a timecard. He told me he would fix it out. He asked everybody else to leave his office and he told me my work, and he said—he told me that I left on Saturday and didn't tell nobody.

He said, "You was hired on ninety days probation period", and right now I still know nothing about the ninety day probation period, "That your work was unsatisfactory, and we are going to have to let you go".

There was nobody in the room but Ray Foy and I. While he was talking to me he was sitting at his desk. He had a drawer out and he had some writing on a piece of paper. It looked like to me that he was reading off of it.

BY MR. MITTENDORF:

Q Had there been any complaints about your work prior to this time, Mr. Goins?

TRIAL EXAMINER: He just testified his work was satisfactory.

MR. HOLROYD: I object to this line of questioning, anyway. That is anticipating the defense.

TRIAL EXAMINER: Overruled.

BY MR. MITTENDORF:

Q How many hours a day had you been working pre-
[fol. 73] ceding October 12, Mr. Goins? A I averaged, now, just average, for it is hard to say, but I averaged anywhere from ten to twelve hours a day, eight to twelve hours a day.

Q How long had that been going on? A Since I started there, about the third of August.

Q Had you ever, since you left there on October 12, applied for re-employment? A No.

TRIAL EXAMINER: You say you started on the first of August?

THE WITNESS: About the first of August.

* * * * *

[fol. 102] Room 5404,
Federal Building,
500 Quarrier Street,
Charleston, West Virginia
Tuesday, June 29, 1965

* * * *

[fol. 104] JAMES E. GOINS

was recalled as a witness and, after having been previously duly sworn, was examined and testified further as follows:

* * * *

[fol. 105] CROSS EXAMINATION

BY MR. HOLROYD:

* * * *

[fol. 118] Q Let me go back to Saturday. Why didn't you go up to Vickers and ask him if you could leave? A To me Vickers wasn't a foreman at that time.

Q You earlier testified that he told you what to do.

MR. MITTENDORF: I am going to object to that, Mr. Trial Examiner.

TRIAL EXAMINER: Overruled.

THE WITNESS: That is when we first opened up the warehouse. There wasn't nobody there then. The only person we would see once in a while was Mr. Ray Darnell, Mr. Ellis, and Mr. Haddad.

BY MR. HOLROYD:

Q But you didn't consider Vickers as the boss? A Not at that time. No.

Q Had his authority diminished? Are you saying when you first went there and opened the warehouse, he was a boss, but at the time you were discharged he was not a boss? A To me he wasn't actually a foreman then. But maybe Mr. Haddad come up and told him to tell something. I don't know if Mr. Haddad told him to have me go on the night shift or not.

Q You testified in your affidavit that he told you what to do. Is that correct? A He told us what to do right then.

[fol. 119] Q My question is, did he stop telling you what to do after they first opened the warehouse, from that time until the time you were discharged? A He didn't tell us—the only way that I can recall right now that he would tell somebody to do something is Mr. Foy or Bernard Graley would tell him to go get somebody to help his do this or that.

Q You were always around when they told that? A No.

Q How do you know they always told him to, then? A I was around quite a few times that he told him.

Q Were you around all the time they told him? A Not every time.

Q Isn't it a fact that Mr. Vickers is one of your fellow employees and you would like to keep him in this case not as a supervisor?

* * * *

[fol. 124] REDIRECT EXAMINATION

BY MR. MITTENDORF:

Q Mr. Goins, do you know if there is a difference between the way Heck's pays supervisors and the way they pay their regular warehouse help? A Their supervisors are all on salary.

Q To your knowledge was Mr. Vickers ever on a salary? A No.

Q During the time that you first started at the ware-[fol. 125] house you said that Mr. Vickers told you certain things to do. Did Mr. Vickers work right with you doing those things? A Yes, sir.

Q Did he handle as much merchandise as you did? A Yes, sir.

Q He loaded and unloaded trucks? A Yes, sir.

* * * *

[fol. 127] TRIAL EXAMINER: I thought you said he was alone in the office.

THE WITNESS: He was. But where his office is there is three or four big windows all across. He can sit and look straight out on shipping and receiving.

BY MR. MITTENDORF:

Q Could you describe the office partitions?

TRIAL EXAMINER: He just did. He said there was glass all the way around.

THE WITNESS: No. Just on one side. Facing the shipping and receiving docks.

BY MR. MITTENDORD:

Q How far was Mr. Vickers from you and Mr. Foy? A Twenty to thirty feet.

Q The partitions are full height partitions? Do they go all the way to the ceiling? A The glass?

Q Yes. A No.

Q You said that you mentioned to Mr. Ellis that you had been told that you were drinking on the job, that you were told this by one of the other employees.

Q Do you drink, Mr. Goins? A I don't drink, definitely.

[fol. 128] TRIAL EXAMINER: You do not drink what?

THE WITNESS: I don't drink, definitely. I don't drink nothing but milk and water and pop and koolade.

TRIAL EXAMINER: Koolade?

THE WITNESS: Yes, sir.

* * * *

[fol. 131] SAMUEL DOUGLAS NELSON

was called as a witness by and on behalf of the National Labor Relations Board and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: Samuel Douglas Nelson, 84 Leftwich Avenue, Madison, West Virginia.

DIRECT EXAMINATION

BY MR. MITTENDORF:

Q Mr. Nelson, do you recall when you first started working for Heck's? A Yes. I started September 13, 1963.

Q Are you still employed at Heck's? A Yes. I am.

[fol. 132] Q In what capacity were you hired? A Warehouseman.

Q At what location? A St. Albans.

* * * *

[fol. 137] BY MR. MITTENDORF:

Q During the time of the union campaign, Mr. Nel-

[fol. 138] son, did you on any occasion ever discuss the union with any of the supervisors of Heck's A Yes, sir.

Q How many times? A Twice.

Q Directing your attention to the first time, when was that? A I believe it was October 10.

Q Do you recall what day of the week that was? A It was on a Saturday.

Q Who was the management representative involved? A Junior Turner, Department Head of Housewares at the Charleston store.

Q Where did this conversation take place? A It took place in his car on the parking lot.

Q On the parking lot where? A On the Heck's parking lot in the southwest corner.

Q Of what store? A St. Albans.

Q Mr. Turner had come from Charleston over to St. Albans? A He was there when I came back from eating lunch.

Q How often did Mr. Turner come to the St. Albans store? A Not very often. Sometimes he would come down there and pull stock from our warehouse and take it up to Charleston to the store.

[fol. 139] Q Would you describe for the Trial Examiner what happened preceding that conversation and during it? A Like I said I was coming back from lunch. I was walking through the warehouse and I saw him and my boss, which was Junior Ferrell, talking on the other end of the warehouse. As I came up to him he said, "The man said you would go with me".

I said, "All right".

So I accompanied him to his car. We got in his car and he drove over, like I said, to the sothwest corner of the parking lot. He told me that he had heard we had tried to join the union.

I said, "Yes. That is correct."

He said, "I understand that Larry Woodall has also".

I said, "Yes, sir".

He said, "I can get you out of this mess if you want me to", said, "I can get withdrawal cards and therefore you won't have to through with it".

I said, "No. I am not interested for myself, and I don't feel that anybody else is either".

He said, "Well, you know that they don't have to give you any raise or increase in salary or cut your hours or anything like that if you do get the union in".

I said, "Well, that may be true. I don't know, really".

He said, "You can also hurt yourself by not getting the [fol. 140] amount of hours which you have been. There-

fore, it would decrease your pay, of course, and it would hurt the people who work on the floor, and the company could, if they wished, discontinue the bonuses. Therefore, it would hurt everybody, of course."

* * * *

Q. How long did the conversation last? A I would say twenty, maybe thirty, minutes. I am not sure.

Q During the time that you had been there had you ever had a private conversation with Mr. Turner before? A No, sir.

Q Directing your attention to the second time you had a conversation with a management representative, Mr. Nelson, when was that? A I believe it was just about [fol. 141] a week after I talked to Mr. Turner, which would have been about the 17th of October, I think.

Q Who was the management representative involved that time? A Mr. Haddad himself.

Q Where did this conversation take place? A Well, I was at the St. Albans store in the warehouse and he came in and he told me, he says, "I want to see you over in my office at Nitro", and asked me if I could get over there. I told him, "Yes", I could.

He said, "I don't want you to tell anybody. I just want you to come right on over and not say anything to anybody else".

I said, "Well, I will have to go get my coat". As I was going back to get my coat I run into Larry Woodall in the warehouse and I told him, "Fred just asked me to come over to his office in Nitro." I said, "He told me not to tell anybody, but I am going to tell you. There is something up. I don't know what".

Q Did you go on over? A Yes, sir.

Q What time did you arrive? A I would say probably twenty after ten, something like that.

Q Did you see Mr. Haddad? A Yes, sir. After I waited until he got there. He wasn't there at the time. [fol. 142] I had to wait about ten minutes.

Q When you went into his office who was present? A Just me and Mr. Haddad.

Q Would you describe for the Trial Examiner the conversation that took place at that time? A Mr. Haddad

told me that the union representative had been there and showed him signed cards by employees of Heck's and that I was one of them and that when he saw my card he almost passed out.

He said, "In fact, I got so mad I went outside and bawled out my receptionist", who is my sister-in-law, Jackie Kitchen.

TRIAL EXAMINER: Whose sister-in-law is she? Yours or Mr. Haddad"s?

THE WITNESS: Mine.

BY MR. MITTENDORF:

Q Would you continue? A He asked me what I was making at the time when I was there. I told him. I said, "I am making $1.40 an hour at this time".

He said, "If I give you a salary job with $325 a month will you help me to break up the union in the St. Albans store? He said, "I only want one of two answers, a simple yes or no".

I said, "No. I cannot do it".

Then he asked me, said, "Well, do you believe that you [fol. 143] are due another raise?"

And I said, "No. I doubt it under the circumstances, since I am trying to get into the union".

He said, "Well, I will call Mr. Darnell in and we will see if you are".

I said, "All right".

And so he called Mr. Darnell in and Mr. Darnell brought a list with him and Mr. Haddad and Mr. Darnell looked over the list and they said, "No. You are not due".

I said, "Well, I didn't figure I was".

Then Mr. Darnell said to me, said, "I wish that you could be on our side".

I said, "Well, it is just one of those things. I am not on your side this time".

Q Do you recall anything further, Mr. Nelson? Do you recall any other statements of either Mr. Haddad or Mr. Darnell? A Mr. Haddad asked me what I expected to gain if we did get the union in. I told him better wages and, of course, less hours and more benefits.

He told me at that time, said, "Well, that is all I have to say right now. You can go back to work." So I went back to work.

Q How long did this conversation actually take? How long were you in the office? A Forty minutes to an [fol. 144] hour, somewhere along there. I am not sure.

* * * *

[fol. 145] IVAN LEWIS VICKERS

was called as a witness by and on behalf of the National Labor Relations Board and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: Ivan Lewis Vickers, Griffithsville, West Virginia.

DIRECT EXAMINATION

[fol. 146] BY MR. MITTENDORF:

Q Are you presently employed? A No, sir.

Q Were you ever employed at Heck's? A Yes, sir.

Q When were you employed at Heck's? A I started out at their warehouse at Lewis Street in Charleston. We later moved to Nitro.

Q Do you remember when you started for Heck's? A I think it was April 2 of '63.

Q What was your rate of pay at the time you started? A $1.15 an hour.

Q Do you recall when it was you left Lewis Street? A I think it was in August, I believe.

Q Of what year would that be? A '64.

Q That is when you went to Nitro? A Yes, sir.

Q How long did you remain at Nitro? A Until approximately the first week of December.

Q Also of 1964? A Yes, sir.

Q What happened the first week in December? A I quit to enlist in the Air Force.

Q At the time—

TRIAL EXAMINER: What date was that?

[fol. 147] THE WITNESS: When I enlisted?

TRIAL EXAMINER: When did you quit to enlist in the Air Force?

THE WITNESS: I think it was December 3, 1964.

BY MR. MITTENDORF:

Q At the time you quit to go in the service what was your rate of pay? A $350 per month.

Q How long did you remain in the service? A Approximately about three weeks.

Q About three weeks? A Yes.

Q What was the reason for your discharge? A Temporary medical discharge.

Q Mr. Vickers, when were you transferred from an hourly rate to the $350 a month salary? A I think the date was October 21 of '64.

Q What was your last previous hourly rate? A $1.50 per hour.

Q Were you familiar with the union campaign at Heck's? A Yes, sir.

Q When did you first learn about it? A It was about October 4, I believe. The first week of October of '64.

Q Who did you learn about it from? A From Mr. Goins.

[fol. 148] Q Were there any other individuals involved in it at that time? A Mr. Virgil Searls, and I believe that was about it at that time.

Q What was done after that? A I gave the business representative's card to Mr. Goins and he called and got in touch with him and arranged a meeting and got the application blanks from him. Then he gave me part of them and I passed them out to some of the employees and he gave them to the others.

Later on during that week we went around and collected and got the initiation fee. I gave them to Mr. Goins.

Q Did you personally have some cards signed? A Yes, sir.

Q Do you remember the names of the individuals who signed for you. A I was there when everyone one in the Nitro warehouse signed it.

Q Who would those people be? A Mr. Virgil Searls, and I was there when Mr. Goins signed, and myself and James May, Richard Johnson, Ted Lanham. That is all I recall right offhand.

* * * *

[fol. 150]

DIRECT EXAMINATION RESUMED

BY MR. MITTENDORF:

Q After you had all the cards signed what did you do with them? A We took them along with myself and Mr. Searls and Goins and arranged a meeting with Mr. Jackson at the parking lot of the Bank of Nitro at 19th Street and we met approximately at noon and handed the cards over to him, along with the initiation fees.

Q As a result of that meeting was there a determination made as to what to do with the cards? A Yes, sir. He had decided that he was going to go to Mr. Haddad, the President of the company, either the day or the following day, and show him the cards and see if he could organize a contract.

Q Did he, to your knowledge, go see Mr. Haddad?
[fol. 151] A Yes, sir. He went that same day.

Q How did you know that? A Because I was called up into the office while he was present.

Q Who called you in? A Mr. Bernard Graley, I believe it was.

Q When you went into the office who was present? A Mr Jackson and Mr. Haddad and Mr Ray Darnell, I believe.

Q Will you describe for the Trial Examiner what occurred when you went in there? A I walked in and Mr. Haddad had the applications in his hand looking at them. He asked me if I had signed the application to join the Teamsters Union and I told him "yes." That was all, and I left and went back to work.

Q How long were you actually in the office there, Mr. Vickers? A Approximately about twenty seconds.

Q With respect to the union did anything else happen later that same day? A Yes, sir. There was a meeting

called of all the warehouse employees in the office of Mr. Foy, who was the warehouse manager.

Q Who were the company representatives present at that meeting? A Mr. Haddad and Mr. Ray Darnell and [fol. 152] Mr. Bill Ellis and Mr. Ray Foy and Mr. Bernard Graley.

Q What employees were present? A The whole warehouse employees.

Q Who spoke at that meeting? A Mr. Haddad said that he didn't know what the union had promised us that he couldn't promise us, and he said he could prove that he couldn't afford to pay union scale. In fact, he said he couldn't afford to pay $1.15 an hour and that if the union came into effect that he could cut their hours as low as ten hours a week if they wanted to and work them split shifts, such as four hours in the morning and four hours at night.

Q Do you recall anything else that Mr. Haddad said at that time? A I think he asked Mr. Charles Lewis if he had signed a union card and he said "no." In fact, he had not signed one at all.

* * * *

[fol. 158] BY MR. MITTENDORF:

Q Do you recall anything further that was said at that time, and by whom? A Mr. Haddad asked me, as I was getting ready to leave, he wanted to know if I would take the raise and would try to break up the union. So I told him that I would try, and I left.

Q Did you in fact receive a raise subsequent to that time? A Yes, sir. I received a raise but it was not on the following check I received. The first raise I received was in the first week of November of '64.

Q Was there any other change in your duties when you received this raise? A No, sir. There was not.

Q Did you continue to punch a time clock? A Yes, sir.

Q Did you have any added authority? A No, sir.

Q Did you continue to work with the other employees? A Yes, sir.

Q Did you handle merchandise? A Yes, sir.
[fol. 159] Q Load and unload trucks? A Yes, sir.

* * * *

[fol. 163] CROSS EXAMINATION

* * * *

[fol. 167] BY MR. HOLROYD:

Q You actually received this bribe, did you not? A
[fol. 168] Yes, sir.

Q Did you do anything to justify receiving this money? A No, sir.

Q You told Mr. Haddad you would, though? A That I would try.

Q But you didn't? A No, sir.

Q Did you ever attend supervisory meetings? A Yes, sir. I have.

Q You were in fact a supervisor prior to your discharge, were you not? A At one time I was. When we moved to Nitro I say that I wasn't.

Q You were a supervisor in the Lewis Street warehouse? A Yes, sir. I was the manager of the warehouse.

Q Then you moved over to the Nitro warehouse. A Yes, sir.

Q Did you have a reduction in pay when you went over there? A No, sir.

Q What did you do at the warehouse? That is, the Lewis Street warehouse, that you didn't do in Nitro? A I wasn't in charge of the warehouse. They told me I was in charge of shipping.

Q You told the employees in shipping what to do, what [fol. 169] to load and what to unload. Is that correct? A Yes, sir.

Q That is after you went to Nitro? A Yes, sir.

Q You had that responsibility to direct them? A Yes, sir.

Q In fact, prior to going over to Nitro you hired some employees. Is that not correct? A Yes, sir. At Lewis Street.

Q You hired quite a few, didn't you? A I would say approximately six or eight.

[fol. 171] REDIRECT EXAMINATION

BY MR. MITTENDORF:

Q You stated you attended supervisory meetings. How often are these held? A Once per month, I believe it is.

Q How often did you attend them? A Every month.

Q Did you attend every month? A Yes, sir.

TRIAL EXAMINER: When was the last one you attended before you went in the service?

THE WITNESS: I don't remember the date. I would say it was in September, I believe.

BY MR. MITTENDORF:

Q In September was the last one? A I believe it was.

Q What about the October and November meetings? A I wasn't asked to go.

Q You were not asked to go? A No, sir.

Q When you were at Lewis Street were you on an hourly basis or a salaried basis? A Hourly.

[fol. 172] Q The first time you ever worked on a salaried basis was after your meeting with Mr. Darnell and Mr. Haddad. Is that correct? A Yes, sir.

Q You got your salary in the first of November? A Yes.

Q While you were at Nitro who was your supervisor? A Mr. Graley and at first Mr. Foy while he was there.

Q How were Mr. Graley and Mr. Foy paid, if you know? A I don't know. But monthly, I suppose.

Q You do not know? A No, sir.

Q You were talking about giving the men orders and filling orders that went to the stores. Were you told by Mr. Graley or Mr. Foy what orders to give?

MR. HOLROYD: I object to the leading nature of the question.

TRIAL EXAMINER: I will sustain that.

BY MR. MITTENDORF:

Q What type of orders did you receive from Mr. Foy or Mr. Graley? A They would give me the individual orders to go to separate stores, such as Ashland and so

forth. They would give them to me and I was to see that they were filled and loaded on the trucks.

[fol. 173] Q When they were loaded on the truck would you work with the men? A Yes, sir.

* * * *

BY MR. MITTENDORF:

Q How did your duties differ from the other warehouse employees? A The only thing that I know that I was just in charge to see that the orders were filled, and that was it.

Q During the time that you were at Nitro did you ever hire anybody over there? A No, sir.

Q Did you ever interview anybody for employment? A No, sir.

Q Did you report any infractions of rules to Mr. Foy or Mr. Graley. A No, sir.

* * * *

FURTHER REDIRECT EXAMINATION

BY MR. BOWLES:

Q When did Mr. Darnell come to the Nitro warehouse? A Mr. Darnell?

[fol. 174] Q Yes. A He moved when all the officers were brought down. I don't know the date.

Q Where had he been before? A Mr. Darnell had been at St. Albans.

Q When Mr. Darnell came to the Nitro warehouse were your duties changed any? A Mr. Darnell?

Q Yes, sir. A No, sir. He just told me I was in charge of the shipping.

Q How about Mr. Foy? When did he come there? A Mr. Foy came, I believe, from the Parkersburg store. That was while the construction men were still working—

Q What was his title or duty; that is, Mr. Foy? A He was the warehouse manager. He was in charge of everyone in the warehouse.

Q How did your duties comp are at the Nitro warehouse after Mr. Foy came there. A After Mr. Foy came?

Q Yes. As to what they were before. A I wasn't at the Nitro warehouse but two days before Mr. Foy came. Then I went back to Lewis Street and stayed there approximately two weeks, or a week or two. When I went back down there is when they told me I was in charge of shipping.

[fol. 175] Q At any time did you ever have the title as warehouse manager? A At Nitro?

Q At any place. A At Lewis Street. Yes, sir.

Q Did you have at Nitro? A No, sir.

Q Besides seeing the orders were filled, did you have any other supervisory duties? A No, sir. I don't believe.

Q If someone didn't fill the order properly, what happened then? A It came back to me. I was responsible for it.

Q Responsible in what way? A That if they weren't filled I had to either do it myself or see that they were filled better, taken care of.

Q If there was any disciplinary action taken who would do that? A Mr. Foy, or Mr. Graley, one.

Q At that time could you or did you recommend hiring and firing? A No, sir.

Q Whose duties were firing and hiring? A Mr. Foy.

* * * *

[fol. 190] BERNARD GRALEY

was called as a witness by and on behalf of the Respondent and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: Bernard Graley, Madison, West Virginia.

DIRECT EXAMINATION

BY MR. HOLROYD:

Q Are you the same Bernard Graley who is a supervisor in the Nitro warehouse of Heck's? A I am.

Q Are you familiar with an employee by the name of James E. Goins? A Yes, sir.

Q Did he work under your instructions? A Yes, sir.

Q Is that person presently working with Heck's? A No, sir.

Q When was he discharged, if you recall? A Along about the first of October.

Q Would you explain the events leading up to his discharge? A On this particular morning we sent him out to hose down the driveway, or the driveway around the building, and along in the morning when they came back in—

[fol. 191] Q Let me interrupt you a second. What kind of a hose were they using? A A fire hose.

Q Was it the same size as a garden hose or larger? A No. Two inch, I reckon.

Q All right. A He come up to me and said, "It's pretty chilly, pretty cold. My trousers is wet".

Q Did you notice his clothes? A They was a little bit wet up along in through here, the best I can remember. [Indicating]

Q You are speaking of about eighteen inches off the floor? A Something like that.

Q What else was said? A I don't remember just what else was said there, but I don't believe that I talked any more with him.

Q What did he do then, if you know? A I smelled alcohol on his breath. I don't know whether this—he was drinking that day, that morning, the night before.

Q Had you ever smelled alcohol on his breath before? A Yes.

Q What did he do after that? A Well, I went to the office to report it and Mr. Foy said, "Well, I will be back in a minute".

[fol. 192] Q You reported it to Mr. Foy? A Yes.

Q All right. A Mr. Foy said, "I will be back in a minute", and he went somewhere. I don't know where it was, because I didn't go with him. He come back and he asked me where Goins was at.

Q Where were you while he was gone? A I was in the office.

Q All right. A I said, "Well, he was back in the warehouse here a minute ago." We went to look for him and one of the boys, I don't know who it was, told us that he went home.

Q Did he ask you if he could go home? A No.

Q Did he ask Mr. Foy in your hearing if he could go home? A No, sir. I couldn't answer that.

* * * * *

[fol. 193] Q What was your duty back in October of 1964? A I had been assistant warehouse manager then.

Q Who was the warehouse manager? A Mr. Foy.

Q As assistant warehouse manager were you familiar with the duties of your employees under you? A Yes, sir.

Q Would you state whether or not the warehousemen were under your instructions? A Yes, sir.

Q How about the pricers? A They were.

Q Tell us the difference between the duties of the warehousemen and the pricers. A Actually there is no difference, because pricers, they pull merchandise, they receive merchandise. I mean they take it off the trucks, the same as everybody works as pricers or puller, or whatever you want to call them.

Q Let me give you a name or two. Virgil Searls. He is listed as a warehouseman. Is that correct? A Yes.

Q Tell us what Virgil's duties were. A His duties were to receive merchandise; that is, unload trucks, take the merchandise and put it in stock, price it—

Q What would he do to price it? A He would take a [fol. 194] pink copy, purchase order, and go down and find the item on it, and then mark the price on this carton.

Q He would mark the price on the carton? A Yes.

Q What does Shelia Hostein do? I have here listed here as a pricer. What does she do? A She prices, pulls merchandise, takes care of changing of prices, and shipping merchandise too.

Q Does she load or unload trucks? A No.

Q Other than loading and unloading trucks is there any difference in the duties of Shelia Hostein and Virgil Searles? A No.

Q Is there any difference in the pay? A That would be entirely upon the person himself in their pay.

Q How is that established? A Mostly on time that they have been there, according to how they work. You know, if they are a good worker they get more, you know, increase quicker than someone that does not work.

Q Who supervises the pricers? A I do.

Q Who supervises the warehousemen? A I do.

[fol. 195] Q Who supervised them back in October? A Ray Foy and myself.

MR. HOLROYD: That is all we have of this witness. Thank you very much, Bernard.

CROSS EXAMINATION

BY MR. MITTENDORF:

Q Mr. Graley, you stated that on the day Mr. Goins went home, did you say that you smelled alcohol on his breath? A Some type of alcohol.

Q Some type of alcohol: Was he drunk? A I couldn't say that.

Q How was he acting? A Well, now, I don't know. Normal, sort of normal.

Q What did he do?

MR. HOLROYD: We will stipulate that the man wasn't drunk on the date of his discharge.

BY MR. MITTENDORF:

Q I believe you stated that you had smelled alcohol on his breath before. Is that correct? A Yes, sir.

Q How many occasions? A One or two.

Q Was Mr. Goins known to be a drinking man? A I couldn't answer that.

Q Could you tell if this was beer or whisky that he had [fol. 196] been drinking? A No, sir.

Q You say this had happened on one or two occasions prior to this? A Yes, sir.

Q When was the last time that it happened? How long before this? A This is to the best of my opinion. When we opened the Civic Center for a sale.

Q How long ago was that, Mr. Graley? A Roughly thirty days or something like that.

Q About thirty days before this incident? A Yes.

Q What kind of condition was he in at that time? A Well, he had a little bit to drink.

Q Did he have a little too much? A No. Not enough, you know, to be staggering or anything like that.

Q Was he doing his work? A Well, partly.

Q Was he working as well as the other employees with him? A I better not answer, because I don't remember all of this.

TRIAL EXAMINER: Was he or wasn't he? If you don't know, say you don't know.

THE WITNESS: I say I don't remember.

[fol. 167] BY MR. MITTENDORG:

Q What did you say to him on that occasion? A I don't believe I said anything to him at that time.

Q You said this happened though on a couple of prior occasions. When was the time prior to that? A I don't remember.

Q Do you remember where it was? A We was at the warehouse.

Q At the Nitro warehouse? A I better not say no dates, because I don't remember about that.

Q Do you remember saying anything to him about his drinking at that time? A I don't remember whether I did or not.

Q Did you report it to anyone? A No.

Q What about the other time at the Civic Center? Did you report that to anyone? A Yes.

Q You reported that to whom? A I believe I reported that to Mr. Darnell. I believe it was Mr. Darnell.

Q Why wouldn't you have reported it to Mr. Foy? He was your immediate supervisor, wasn't he? A He wasn't there the next day.

[fol. 198] Q I believe you stated that you did not discharge Mr. Goins. A No, sir.

Q Who did discharge Him? A I don't know. I couldn't say for sure, because I wasn't with nobody when he was discharged.

Q After you reported it to Mr. Foy you don't know what happened? A No, sir.

Q Was it never discussed with you? A No, sir.

Q Did you recommend his discharge? No, sir. I just reported that he was drinking.

Q I beg your pardon? A I just reported that I smelled alcohol on his breath.

Q At the time you reported that you were aware of the fact that there was a union campaign going on, did you not? A No, sir.

Q You didn't know anything about the union campaign? A No, sir.

Q Did you know that Mr. Jackson had been in the Nitro plant to discuss the union with Mr. Haddad? A No, sir. I didn't.

Q You heard nothing about the union at all? A I heard maybe a year or so before that.

[fol. 199] Q But immediately preceding this you knew nothing at all about the union? A No, sir.

Q It wasn't discussed with you by Mr. Foy, Mr. Haddad, or Mr. Darnell? A No, sir.

Wait a minute now. Well, when we first went to Nitro there was some talk of union activity. But after that it quietened down.

Q When would that have been, Mr. Graley? A That would have been in the last part of July or September.

* * * *

Q You were talking about the distinction between pricers and warehousemen and you said that the warehousemen price merchandise. Is that correct? A Yes, sir.

[fol. 200] Q Isn't it a fact that when the warehousemen price merchandise they price the carton rather than the individual items in the carton? A Not necessarily.

Q Do they run the pricing machines? A Yes.

Q The warehousemen do or the pricers do? How much time do the warehousemen spend operating the pricing machine? A I would say fifteen per cent.

Q What percentage of the time do the pricers spend runing it. A Everybody prices.

Q The warehouse—

TRIAL EXAMINER: That is now the question. What percentage of the time do the pricers spend on the machines?

THE WITNESS: Maybe thirty per cent.

BY MR. MITTENDORF:

Q What do the pricers do the other seventy per cent of the time? A They are pulling merchandise or putting it in stock, unloading trucks, something of that type.

Q What about your two lady pricers at Nitro? I think Sheila Hostein and Mary Lou Adkins. A They do about everything but unload the trucks and load them.

[fol. 201] Q What percentage of their time is spent on the pricing machine? Not just on the machines, but actually making the tags and tagging the merchandise itself. A That would be kindly hard to determine.

Q Isn't that essentially their job, to price the individual merchandise? A Yes. But everybody does that, see. Maybe they are off pulling merchandise or maybe putting merchandise in stock.

Q Isn't it true, Mr. Graley, that the work of the pricers is confined to the cosmetics department? A No, sir.

Q Do they price all of the merchandise that comes in? A Yes.

Q What is their association with the cosmetics department specifically? A The cosmetics has their own—we have it set up in a separate group. Cosmetics naturally would have to be. But they have all their pricers, what they call pricers, and pullers. But the rest of the warehouse, the men, they take this merchandise in. They stock it and price it and so on, on the carton.

TRIAL EXAMINER: Price it how?

THE WITNESS: On the cartons.

TRIAL EXAMINER: Who does that?

THE WITNESS: The warehousemen.

[fol. 202] TRIAL EXAMINER: Do they price the individual items?

THE WITNESS: No. Well, now, there is occasions that we do.

TRIAL EXAMINER: Who is "we"?

THE WITNESS: The people in the warehouse. Like hardware, for instance. They have a shipment to come in to be broken down. We have to take all that out, break the cartons open, sort it out into different stores. Then we will mark on these cartons the prices, or the packages or whatever it might be.

BY MR. MITTENDORF:

Q Isn't there a separate area of the warehouse set aside for pricers? Don't they have their own section of the warehouse, a cosmetics section? A Cosmetics. Yes.

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FURTHER CROSS EXAMINATION

BY MR. BOWLES:

Q Mr. Graley, do you remember the tenth of October of '64? A Around about that time.

Q That was the day that Goins got wet when he was out on the parking lot hosing it down. A I suppose. Yes.

Q Do you remember the day before a meeting that was held with Heck's in which the employees were called in and [fol. 203] the supervisors were called in about the union? A Not the day before.

Q On October 9. A No, sir. I dont.

Q You were not at that meeting? A Wait a minute. I didn't say I was or wasn't, but I don't remember no meeting.

Q If you don't remember a meeting then you were not— A Yes. Yes. Yes. Yes. I do, too.

Q Tell us about it.

MR. HOLROYD: I object. This meeting is outside the scope of direct examination.

TRIAL EXAMINER: I will accept it for credibility purposes.

THE WITNESS: Wait a minute. I don't say that this is the right date.

Mr. Haddad—wait a minute. I better not comment on that, because I don't remember what—

BY MR. BOWLES:

Q I want you to comment on it and tell us what you remember about it. A That is why I don't comment. I don't remember.

Q Was there or was there not a meeting held on October 9, the day before Goins was fired? A I don't say as I don't remember whether it was the day before.

[fol. 204] Q You spoke of another meeting. Tell us about that.

MR. HOLROYD: I think the man is entitled to complete his answer.

MR. BOWLES: Yes. He is. If he isn't through, he may continue.

THE WITNESS: I don't remember when that was.

BY MR. BOWLES:

Q Tell us about the other meeting that you mentioned that you remembered. A That was about merchandising for the warehouse. We was having quite a bit of breakage, damage of merchandise.

Q You had those kinds of meetings all the time, did you not? A No, sir.

Q You didn't have supervisory meetings? A Only what the warehouse theirself had.

Q To call your attention, and I want to specifically refer to the meeting with the warehousemen, Mr. Haddad, Mr. Darnell, Mr. Foy and I want to know whether or not you were in that meeting? A I better not answer, because I may make a mistake here.

Q Don't you remember it? A I remember a meeting. But I don't remember what it was about.

Q Maybe I could refresh your recollection. This was about union activities of the employees at the warehouse. Does that refresh your memory? A No, sir.

[fol. 205] Q Are you saying there wasn't any such meeting or you don't remember? A I don't remember it being this type of meeting.

Yes. I do. But I don't remember what was said. But I do—let's see. I better not. You better strike that one, because I actually don't remember that, what that was, whether it was or not.

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HARRY TURNER, JR.

was called as a witness by and on behalf of the Respondent and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: Harry Turner, Jr.

DIRECT EXAMINATION

[fol. 206] BY MR. HOLROYD:

Q Mr. Turner, were you the Junior Turner, head of the warehouse department for Heck's? A Yes, sir.

* * * *

BY MR. HOLROYD:

Q Mr. Turner, do you know a fellow by the name of Sam Nelson? A Yes, sir.

Q Did you ever have a conversation with him with reference to the union? A Yes, sir.

Q Would you tell us when it was? A Around October 10.

Q Where was this? A St. Albans.

[fol. 207] Q What time of the day? A I imagine it was around four or five o'clock.

Q What was said? A You mean what I said to him?

Q What you said to him and what he said to you. A We got to talking about the union. I got to telling him the good points that we had at the store and what the company could do if they wanted to. They didn't have to give us a bonus and they didn't have to have these parties for us and stuff like that. I was explaining the good points to him about it.

Q What did he say about it, if anything? A Well, he told me he had made up his mind.

Q Did he tell you how he made up his mind, which way? A He said he was going to join.

Q Did you say anything to him that you recall? A Only about the good points of the company is all.

Q Did you make any threats or promises to him as to what would happen if he did or did not join the union? A I told him what could happen. The company could cut our raises off, cut it off short, and stuff like that. It was to your own advantages. And our vacations.

Q Let me understand what you are saying. Are you saying that you told him that the company could—

MR. BOWLES: Just a minute. We object to this.

[fol. 208] TRIAL EXAMINER: It is leading.

BY MR. HOLROYD:

Q Do you recall anything else that was said to him, Mr. Turner? A No. I don't

Q Can you recall anything else that was said? A No, sir.

* * * *

[fol. 209] BY MR. HOLROYD:

Q Did you tell Mr. Nelson that if the union was voted in that the company would discontinue granting bonuses or reduce the work hours of the employees? A No, I said they could.

Q Did you tell Mr. Nelson that you knew that he and another man, Mr. Woodall, had signed union cards for the union? A Read that again, I didn't understand it.

Q Did you tell Mr. Nelson that you knew that he and Woodall had signed union cards? A Yes, sir.

[fol. 210] Q You told him that? A Yes, sir.

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FRED HADDAD

was called as a witness by and on behalf of the Respondent and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: West 19th Street, Nitro, West Virginia. Fred Haddad.

DIRECT EXAMINATION

BY MR. HOLROYD:

Q Are you the President of Heck's? A Yes, sir.

Q Do you know an employee by the name of Ivan Vick-

[fol. 211] ers? A Yes, sir.

Q Directing your attention to a date sometime around the last of October, did you have occasion to discuss with Mr. Vickers his duties and responsibiities and rate of pay in your office? A Yes, sir.

Q Was the union discussed at that time? A No, sir.

Q Tell us what you said to Mr. Vickers. A I discussed with Mr. Vickers—he used to be head of our warehouse on Lewis Street and he was transferred down to Nito as head shipping clerk. Mr. Darnell and Mr. Ellis discussed him with me a couple of days before I called him in the office, that he was a good man and that we should give him a raise and put him on salary as head of the shipping department. That is what we discussed.

Q You testified that he was already head of the shipuing deparment? A Yes.

Q Directing your attention over to General Counsel's table here, do you recognize Mr. Jackson? A Yes, sir.

Q Has Mr. Jackson ever been in your office? A Yes, sir.

Q Can you tell us approximately when? A It was in [fol. 212] the fall. But the exact date—

Q Was he in there more than once? A Not in my office.

Q Tell us about the events that occurred while he was in your office. A He came in and introduced himself and he showed me some cards and he said he represented a majority of our employees.

Q He said what now? A That he represented a majority of our employees. He sat these cards on my desk and Ivan Vickers' was on top of the list of cards.

Q Before you get on, I want to show you some cards here and ask you if this stack, which constitutes all of General Counsel's union card exhibits, is that approximately what he showed you? A The amount I couldn't say. But the stack was just like that.

Q Was this the same type of general card, size and description and the like? A Yes.

Q You say Ivan Vickers name was on top? A Yes, sir.

Q What did you do, if anything, after that? A I

picked the cards up. Then I didn't look at the cards and I called Mr. Darnell in my office, Ray Darnell.

[fol. 213] Q You didn't look at them? A No, sir. I looked at the top card. I flipped the cards and handed them to Mr. Darnell.

Q What do you mean? A Flipped through them.

Q Did you look at them? A Just the corners of them.

Q Then what happened? A Mr. Darnell probably looked at the top card too and put them back on the desk.

Q Did anything happen after that? A Not that I can recall.

Q You say Ivan Vickers' name was on top? A Yes, sir.

Q Did you do anything with reference to Ivan Vickers? A No. I was surprised, him being a supervisor, that he had signed a card.

Q Was anybody else in the room there at that time or not, or later? A While Mr. Jackson was there?

Q Yes. A I don't recall. I don't think so. Mr. Ellis might have come in. I don't recall.

I think Mr. Vickers came in there while Mr. Jackson was there. I asked Mr. Jackson if I could call Mr. Vick-

[fol. 214] ers in and ask him if he signed a card. He said, "Yes."

I asked Mr. Vickers to come in. I asked him if he signed a card and he said "yes".

Q Why did you call Mr. Vickers in? A For him being a head of the shipping department and a supervisor I just couldn't feel like he would sign a card, because he was a good worker and being a supervisor.

* * * *

[fol. 217] BY MR. MITTENDORF:

Q You referred to Ivan Vickers on several occasions as being a supervisor. Isn't it correct that Mr. Vickers at that time was on an hourly basis, Mr. Haddad? A Truthfully I don't know. That is not in my department.

Q Isn't it a practice at Heck's to have its department heads and supervisors on a salaried basis? A Yes, sir.

Q Isn't it also true that Mr. Vickers worked along with the other employees? He loaded and unloaded trucks, moved merchandise, and that sort of thing? A Not to my knowledge. But he might have.

* * * *

[fol. 218]

FURTHER CROSS EXAMINATION

BY MR. BOWLES:

Q Mr. Haddad, when Mr. Jackson came into your office he came there for the purpose of getting you to recognize the Teamsters Union for the warehousemen at the St. Albans, Nitro, and Charleston warehouses. Is that correct? A He came there to be recognized. Yes, sir.

Q You refused to recognize him. A I think I gave him the words "No comment".

Q You didn't agree to recognize the union, did you? A I didn't come out and agree to it. No, sir.

Q There were no further meetings held between you and Mr. Jackson that day, were there? A No, sir.

Q You refused to recognize the union or made no comment without even counting the number of cards that he give you. Is that correct? A I know the number of [fol. 219] cards didn't represent half of my employees.

Q I thought that you had said, and maybe I misunderstood you, that you only looked at the top card. A Yes, sir.

Q So then you didn't count them? A No, sir.

Q So you don't know how many he had at that time? A I know I have got more employees than he brought in there.

Q But you don't know how many? You were not interested enough to count them? A No, sir.

* * * *

[fol. 224] RAY DARNELL

was called as a witness by and on behalf of the Respondent and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: Ray Darnell, 5102 Frederick Drive, Charleston, West Virginia.

DIRECT EXAMINATION

BY MR. HOLROYD:

Q Are you the Ray Darnell in charge of operations and personnel for Heck's, Inc.? A Yes, sir.

* * * *

[fol. 228] BY MR. HOLROYD:

Q Mr. Vickers, was he on salary when he was in charge of the Lewis Street warehouse? A No, sir. He was on an hourly rate.

Q How did his responsibilities differ from when he moved from the Lewis Street warehouse to Nitro? A He was in complete charge of the Lewis Street warehouse in both receiving and shipping. When he was brought to the Nitro warehouse his duties were in charge of shipping.

Q Why wasn't he in charge of the whole warehouse? A Because the warehouse was about three times larger in Nitro than it was at Lewis Street. We felt the need [fol. 229] for breaking down the responsibilities. We had one warehouse manager in charge of the complete warehouse and we broke it down into shipping and receiving under the warehouse manager.

Q Who was in charge of shipping? A Mr. Vickers.

Q How many employees did he have under him? A It varied. It depended on the business that we had, what the amount of merchandise we had to ship other places was. If the outgo was heavy then they would change boys from the receiving line over to the shipping line.

Q Normally approximately how many would he have under him? A Approximately five or six.

Q Who would he be responsible to as far as those five or six employees? A He would be responsible directly to the warehouse manager.

Q Did anyone else given them instructions, the five or

six employees? A Not unless they were transferred over into receiving. Then Mr. Graley was responsible.

Q Did you tell Mr. Vickers what his responsibilities were as shipping clerk? A Yes. They were explained to him.

Q What did you explain to him? A That his duties were, as the transfers were written up, to pull the merchandise and see that it was properly checked and properly shipped to our various stores.

[fol. 230] Q In reference to the employees, what was his instrucition, if any? A There was no definite instruction as to the employees. He was to be assigned employees by Mr. Foy.

Q Do you know whether Mr. Vickers ever recommended anybody to be hired or fired? A He hired men when he was at the Lewis Street warehouse.

Q I think the document in evidence shows that Mr. Graley was the receiving clerk. A Yes, sir.

Q Was Mr. Graley over Mr. Vickers? A No, sir. Not directly.

Q Who did Mr. Graley report to? A Mr. Foy.

Q Who did Mr. Vickers report to? A Mr. Foy.

Q Mr. Foy reported to who? A To myself.

Q Was there anyone between Mr. Vickers and the five or six employees that were under him? A No, sir.

Q Was there anyone between Mr. Vickers and Mr. Foy? A No, sir.

Q Did Mr. Foy actively instruct the employees under [fol. 231] Mr. Vickers as to their day-to-day duties? A Not to my knowledge. He should have passed it on through the chain of command to Mr. Vickers and he should have handed it down.

Q Did you participate in the meeting alluded to by Mr. Haddad in reference to placing Mr. Vickers on salary rather than on an hourly basis? A Yes, sir.

Q Was Mr. Vickers present at that time? A Not at the time it was discussed, he wasn't. It was discussed by Mr. Haddad, Mr. Ellis and myself.

Q Who suggested the increase or the change? A I suggested that he go on salary. Normally the procedure on a salaried person, I get the okay through Mr. Haddad

to put a person on salary. It was discussed at that time by Mr. Ellis and myself.

Q Why was he not placed on salary before this? A That is a good question. I have no answer to that. Actually when he was working at Lewis Street he had been there not too long. He had not been working on an hourly basis. We had given him an increase over the rest of the employees to take care of the warehouse. But there just had been no—we had just neglected to put him on salary.

* * * *

[fol. 232] Q Did he receive any benefits that the rest of the employees didn't receive? A The only benefits he would receive would be attending our supervisors' meeting.

Q You mean only supervisors attend supervisors' meetings? A No, sir.

Q Did the supervisors in the warehouse attend all of the supervisory meetings? A No, sir. Not at all times.

Q Why was that? A Once a month we have what we call a department head or supervisors' meeting to bring all the department heads or supervisors from each store into the main office and have a general meeting.

There are occasions when we don't bring the head of the cashiers from each store, or there are times when we feel like we have no need for the head of the warehouse or supervisors of the warehouse to be brought in. It is up to our own choosing.

Q Mr. Vickers here has testified earlier that he attended the supervisory meeting in September. He has testified he did not attend the supervisory meeting in October and November. Can you explain why he did not attend those meetings? A I would imagine it was because we were so busy in our stores and warehouses that we tried to bring in those fellows to; that is, we tried not to bring [fol. 233] them in. We were going through our busiest time of the year. So we tried to keep as many people in the store as we could. In fact, in December we didn't have a general meeting for anyone.

Q That is, I assume, because of the Christmas rush. A Yes.

* * * *

Q Tell us the difference between a pricer and a warehouseman or warehousewoman. A There actually isn't [fol. 234] too much difference as far as the general warehouseman and a person we consider as a pricer. The warehousemen, if we are busy in the area where we are pricing, fit right in and help with the pricing. Each one of them, uness they are female, will unload and help load the trucks. They will stock merchandise in the shelves and so forth. General warehouse work.

Q Why the difference in names? A We just set them up that way for our own records.

Q Why, for example, do you have a male employee that is called a pricer and another male employee that is called a warehouseman? A I suppose when we set that up that way in our warehouse, we do have our warehouse broken down, not into two categories, but we have our cosmetics department, which is set aside in one area of our warehouse, and our pricers as we classified them were working out of the cosmetics department. However, their duties were pricing merchandise, stocking merchandise in the shelves, loading and unloading mechandise.

In our cosmetics we have that a little different from the general warehouse. In fact, that is set up on a control. They are all control sheets. We have order forms that come directly from our stores. The merchandise is lined up in the order that the merchandise is on our floor in our warehouse so that the orders are easily pulled, which are the duties of the pricer working in that department.

[fol. 235] TRIAL EXAMINER: Are the cosmetics employees in your warehouse your employees or are they by any chance the employees of the concessionaire?

THE WITNESS: No, sir. We have no concessionaire.

MR. HOLROYD: I didn't hear the question.

TRIAL EXAMINER: I want to know whether they were employees of the company or whether there was a concessionaire in here.

BY MR. HOLROYD:

Q Is there any transfer of employees between pricers and warehousemen? A Yes. As I stated before, if they are busy pricing merchandise and they are not receiving

or shipping merchandise, then we send the regular crew over to help them price. Or vice versa. If there are people that are setup for pricing who are not busy we send them to help unload trucks. It is all very flexible.

Q Do you have a person as head of the department that does the cosmetics? A No, sir. That comes under the warehouse supervisor.

Q Are the items that go into the cosmetics department separated physically when they come in and go out from the other warehouse items? A They are separated physically from the other merchandise that comes into the warehouse. Yes.

[fol. 236] Q Do the warehousemen handle or do any work with them? A Yes. The warehousemen load and unload the trucks as they are distributed to the other stores.

Q This is in the warehouse. Is the situation any different in the warehouses in the St. Albans and Charleston stores as you described in the general warehouse? A No. They are the same. All the duties are basically the same thing, shipping, receiving and merchandising; that is, merchandise pricing.

Q Is there any difference in salary of the pricers and warehousemen? A No, sir.

Q Are there any benefits that one gets that the other one doesn't get? A No, sir.

* * * *

BY MR. HOLROYD:

Q Mr. Darnell, did you participate in any discussion [fol. 237] with Mr. Vickers in reference to a raise? A Yes, sir.

Q Approximately when did this occur? A Sometime in the latter part of October.

Q Who was there? A Mr. Haddad and Mr. Ellis and myself and Mr. Vickers.

Q What was said? A To my knowledge Mr. Haddad called him in and told him we were giving him an increase in pay—

MR. BOWLES: We object to his knowledge. He either heard it or he didn't hear it.

TRIAL EXAMINER: Did you hear it or didn't you?
THE WITNESS: Yes, sir. I heard it.

BY MR. HOLROYD:

Q Continue telling us what you heard. A That he was giving him an increase because Mr. Ellis and I had been talking to him about it and telling him that he was a good worker and that he deserved to be put on a salary.

Q Did his duties increase as a result of that? A No, sir. His duties remained the same.

Q Was anything said about the union, that you recall? A Not to my recollection. No, sir.

* * * *

[fol. 241] Q Mr. James Goins; did you participate in anyway in the discharge of him? A Yes, sir.

Q Tell the Court what your participation in that was. A Mr. Foy came to me on the Saturday morning in question, stating that Mr. Goins left the job without permission, without notifying anyone, and also that Mr. Graley had reported to him that he could smell alcohol on his breath and asked me what steps I thought should be taken.

I suggested that we release him. He was on probation at the time, so we felt that we couldn't afford to have anyone around in our organization unless they were going to work with us and work for us.

Q You say he was on probation. Do you have a probationary period? A Yes, sir.

Q What is that? A Ninety days.

Q Who made the determination to discharge Mr. Goins? A I did.

* * * *

[fol. 244] CROSS EXAMINATION

BY MR. MITTENDORF:

Q Mr. Darnell, is there any contention that Mr. Goins was a supervisor? A No, sir.

Q Mr. Vickers, up until the time of the change in November, was on an hourly rate, was he not? A That is correct.

Q Do you know what his hourly rate was? It has been testified that it was $1.50. A I believe it was $1.50 an hour. I am not positive. $1.50 or $1.55.

Q Is it true there were also other individuals in the warehouse department receiving rates of pay commensurate with that? A No, sir.

Q What was Mr. Nichols getting? A Mr. Nichols was working in the warehouse at St. Albans. I think he was making $1.40 or $1.45 an hour.

Q Are you sure it couldn't have been $1.55. A I wouldn't swear to it under oath. However, Mr. Nichols [fol. 245] had been with the company since the St. Albans store was opened, which would have had some bearing on what he was making at that time.

* * * *

[fol. 248] Q With respect, Mr. Darnell, to Mr. Vickers hiring people when he was at Lewis Street, did he hire these people independently of you? A Yes, sir. Let me clarify that just a little bit. I would suggest to him that he needed more employees to help him with his work there and ask him if he could hire someone to take care of that.

Q The point I am trying to make, the actual decision to hire someone else was yours and the selection was left [fol. 249] to Mr. Vickers. Is that correct? A That is true. However, that was true in the case of the Nitro warehouse with Mr. Foy or any other supervisor we had. The only person in our organization besides myself who can hire a person is the store manager.

* * * *

Q Were you present at the time Mr. Foy talked to him about his discharge? A No, sir.

Q Had you instructed Mr. Foy what to tell Mr. Goins? A No, sir. We discussed releasing, but we didn't discuss exactly what he would say to release him.

* * * *

[fol. 251]

REDIRECT EXAMINATION

BY MR. BOWLES:

Q You say, Mr. Darnell, that you have people who are supervisors working for you who are making less than employees who are not supervisors? A We do have in some cases. Yes, sir.

Q How does this come about? A We find someone that we promote as the department head faster than the ordinary person. Maybe we don't accompany with the pay.

[fol. 252] We have in our Ashland store, for instance, a girl who is head of the cosmetics department that is not making as much as, for instance, you might use Mr. Nichols as an example. She has not been with the company, however, as long.

It is rare, but we do have those cases.

Q Do you have a rule that supervisors must receive more than the employees? A No, sir.

* * * * *

[fol. 255] RAY DARNELL

was recalled as a witness by and on behalf of the Respondent and, after having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. HOLROYD:

Q Do you know where Ray Foy is? A No, sir. I don't.

Q Have you made any effort to try to reach him? A Yes, sir. We have tried to get hold of him. I understand he is in Florida. When he left the company he told me he was going to Florida to work.

Q What were the circumstances of him leaving the company, briefly? A He was dismissed.

* * * * *

[fol. 257] IVAN L. VICKERS

was recalled as a witness by and on behalf of the National [fol. 258] Labor Relations Board and, after having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. MITTENDORF:

Q Mr. Vickers, there was testimony in this proceeding by Mr. Darnell that Mr. Graley was not your supervisor at the Nitro warehouse. Is that true or false? A I would say false, sir.

Q Did you take orders from Mr. Graley? A Yes.

Q What was the nature of the orders you took from him? A He might have certain merchandise going to a certain store and it was written up on transfers. He would bring the transfers to me and tell me to fill these for this store and load it on a certain truck and have me to get someone to help me do it.

Q What you have just said with respect to yourself, did that apply to other employees at the store? A Yes, sir. He has done others the same way.

Q Who, specifically? A I can name Charles Ferrell and James Goins, and practically at one time or another everyone in the warehouse.

MR. MITTENDORF: That is all.

CROSS EXAMINATION

BY MR. HOLROYD:

A Are you saying, Mr. Vickers, that Mr. Graley would bring these orders to you and tell you who to pick to load [fol. 259] the trucks? A No, sir. He would tell me to get someone to help me.

Q Who would make the determination as to who you would get to help you? A I would get someone to help me.

Q You would go up to the men and you would tell them you wanted them to help and what you wanted them to do? A Anyone of them that wasn't busy.

REDIRECT EXAMINATION

BY MR. MITTENDORF:

Q Would the other employees do the same thing? Would they also have people— A Yes, sir.

Q Have you on occasions been asked by others to help? A Yes, sir.

MR. MITTENDORF: That is all.

RECROSS EXAMINATION

BY MR. HOLROYD:

Q Are you telling me Mr. Goins came up from time to time and instructed you to do work? A If he had the orders and I wasn't doing anything. Yes, sir.

MR. HOLROYD: That is all.

FURTHER REDIRECT EXAMINATION

BY MR. MITTENDORF:

Q Would you instruct these men to help you or would you request them to help you? A I would say request, because I wouldn't get anyone unless they didn't have any- [fol. 260] thing to do. If they were busy I would do it myself until someone was through with their other job.

MR. MITTENDORF: That is all.

FURTHER RECROSS EXAMINATION

BY MR. HOLROYD:

Q Was this the same situation over at the Lewis Street warehouse? A No, sir. Over there I requested them, because I was the warehouse manager.

Q You would request them to do it over at the other place? A Yes, sir.

MR. HOLROYD: That is all.

* * * *

[fol. 263] Senate Chambers
State Capitol Building
Charleston, West Virginia
Tuesday, November 15, 1966

* * * *

[fol. 270] LARRY WOODALL,

a witness called by and on behalf of the General Counsel, being first duly sworn was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name to the Reporter.

THE WITNESS: Larry Woodall, No. 2 Swans Court, St. Albans, West Virginia.

DIRECT EXAMINATION

BY MR. MITTENDORF:

Q Mr. Woodall, how long were you employed by Heck's? A I think around two years and two months.

Q How long ago did you leave there? A I left there [fol. 271] April 26th, 1964.

Q '64? A '65.

Q Because you were there at the time the Union campaign was going on? A Yes.

Q And at what branch of Heck's were you employed? A St. Albans store.

Q What was your position at St. Albans? A Truck driver.

Q And who was your immediate supervisor? A Albert Ferrell.

Q And what section of the St. Albans store did you work in? A In the stock room.

Q Is that also known as the warehouse? A Yes.

Q And would you describe for the Trial Examiner the location of the stock room or warehouse in relation to the store? A Well, it was on the rear of the store.

Q Was it separated from the store? A No; it was part of the same building but it was separated by a door that you went through when you left the store.

Q Was there a partition between the store and the [fol. 272] warehouse? A Yes.

Q What would your estimate of the size of the store be? A Thirty-eight thousand square feet, approximately.

Q Can you tell us in feet, by width and length, approximately? This does not have to be an exact figure. A Two hundred foot across the front, I imagine.

Q How deep? A Maybe 300 or better; I don't know.

Q All right. Now, what was the size of the warehouse area? A It ran the length of the store on the back.

Q The length or the width, sir? A The width.

* * * *

[fol. 273] Q Who were the employees that you worked with in the warehouse area? A Samuel Nelson; Evelyn Taylor.

Q Do you recall any others? A Everette Nichols.

Q Do you recall Wayne Baker? A Yes; Wayne Baker.

Q Now, you mentioned an Evelyn Taylor. A Yes.

Q Did Evelyn Taylor's duties differ from those of yourself, Mr. Nichols and Mr. Baker? A Yes.

Q To what extent? A She priced clothing and she [fol. 274] stayed in one separate area and we did stock work; unloading trucks, stock merchandise.

Q What department was she concerned with? A Clothing Department, on the floor.

Q What work would you do, you and the others who worked with you, on shipments that came in for the Clothing Department? A We would take it to their section to be priced.

Q Would you have any other contact with this merchandise? A She did the pricing.

Q Now, with respect to the selling personnel who work in the store area, do they have any regular duties in the warehouse? A No.

Q Do they come back into the warehouse area? A Sometimes they would price merchandise in the warehouse area.

Q What were their duties, essentially? A Selling.

Q What percentage of their time did they spend on the floor of the retail area?

* * * *

[fol. 275] THE WITNESS: I don't know.

BY MR. MITTENDORF:

* * * *

Q Now, with respect to Evelyn Taylor, what percentage of her time did she spend in the warehouse?

MR. HOLROYD: Object; he's already stated he didn't know.

MR. MITTENDORF: No, he didn't. He stated he didn't know insofar as the selling employees came into it.

TRIAL EXAMINER: I will overrule your objection.

BY MR. MITTENDORF:

Q How often was Evelyn Taylor—strike that—what percentage of Evelyn's time did she spend in the warehouse? A Most of her time was spent back there.

Q Percentage-wise, what would it be, approximately? A Maybe seven-eights of her time.

Q And where would she spend the balance of her time? A On the floor.

[fol. 276] Q And what would she do on the floor? A Sell, stocking.

Q In what departments? A Clothing Department.

Q Was it always the Clothing Department?

* * * *

BY MR. MITTENDORF:

Q Have you on occasion seen Mrs. Taylor working on the floor? A Yes.

Q And how frequently have you seen her there? A I don't know; I'm not sure of that.

Q Well, would you see her there some time every day? A Not every day; three days a week.

Q Would she sometimes be there over long periods? A No.

[fol. 277] Q How long would she be there? A An hour, maybe.

Q From whom did Mrs. Taylor receive her orders, if you know? A Clothing Department head.

Q Have you ever known Mr. Ferrell to give orders to Mrs. Taylor? A No.

* * * * *

BY MR. MITTENDORF:

Q Did Mr. Ferrell give all of the other warehouse employees their orders? A Yes.

Q Do the selling personnel wear a prescribed uniform or dress in a certain manner? A Yes.

Q What is that—for the men and the women? A Smocks for the women; white shirt and tie for men.

Q In addition to the smocks, do the women wear any kind of identifying badges? A Yes.

Q Would you describe those? A Small badge with [fol. 278] "Heck's" and their last name on it.

Q Does it have their department on it? A I don't know.

Q Now, did Mrs. Taylor wear such a smock in the warehouse. A She wore a smock; yes.

Q What is the approved dress for male employees on the selling floor? A White shirt and tie.

Q All right. What did the warehouse employees wear? A Casual work clothes.

* * * * *

[fol. 288] TRIAL EXAMINER: Now, what is your position with respect to Nitro prices? Should they or should they not be included in the unit?

MR. MITTENDORF: I am going to develop their duties in the course of this proceeding.

TRIAL EXAMINER: What is your contention?

MR. MITTENDORF: It appears that they are essentially warehouse employees and as such should be included.

MR. HOLROYD: We will stipulate to that.

TRIAL EXAMINER: All right.

MR. HOLROYD: In fact, we would propose the stipulation that the pricers in the warehouse be included as warehouse employees properly within the unit as described in the, as described by the Board in the Exhibit.

TRIAL EXAMINER: At Nitro?
MR. HOLROYD: At Nitro.

* * * *

[fol. 289] TRIAL EXAMINER: So I will accept this stipulation as it applies to the pricers at Nitro and that's one thing we don't have to worry about, that they are deemed by all the parties at Nitro, pricers are deemed by [fol. 290] all parts to be included in the unit.

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[fol. 291] MR HOLROYD: Your Honor, I believe we stipulated at the last hearing that Albert Ferrell and Henry Overton were supervisory, within the meaning of the Act.

* * * *

CROSS-EXAMINATION

BY MR. HOLROYD:

* * * *

[fol. 292] Q What were you doing there? Give a typical day. A I was hauling freight from the warehouse to the St. Albans store.

Q That is one thing you did. What else did you do? A I was working in the stock room, pricing, loading trucks.

Q What did you do? A We would mark the price on the outside of the carton.

Q Is it small individual packages that the customer saw? A No, the large cartons.

Q Now, this is inside the St. Albans warehouse; right? A Yes.

Q What cartons did you mark? Say a box had fifteen items; did you mark all the items? A We would mark the box.

Q My question said the box had fifteen items. Would you mark the box or fifteen items. His answer was "We would mark the box."

Would all employees in the warehouse mark the box? A [fol. 293] I think sometimes they did mark smaller items out of the box."

Q Now, would this be such employees as Samuel Nelson and Everett Nichols? Would they mark the small boxes, too? A Yes.

Q When—and this is what you refer to as pricing; is that correct? A Yes.

Q Now, would you ever take these items out on the floor, take a box of items out and put it down on the floor? A Yes.

Q Would other warehouse men do this? A Yes.

Q What would you do when you have taken a box of items on the floor? A We would set it on the floor and the clerks would take over.

Q Did you ever take it off and put it on the shelves? A Not that I know of.

Q Did you ever do that? A No.

Q Do you know if any of the other warehouse people did? A I don't know.

Q Who gave you instructions from time to time? A [fol. 294] Albert Ferrell.

Q Did Albert Ferrell give the other employees, such as Nelson and Nichols, instructions also? A Yes.

Q How much time did you spend in the warehouse? A Three or four hours a day.

Q Outside of driving your truck. A Three or four hours a day.

Q Would Mr. Ferrell give Evelyn Taylor any instructions? A No.

Q You never heard him give any? A I never heard him give any.

Q How was she set up back at the warehouse department? You testified that she spent seven-eights of her time in the warehouse. A Yes.

Q Now, what would she do, as you observed it, when she would go back in the warehouse? A She would price clothing.

Q Is that all, just clothing? A That's all; that's all.

Q Would she take the clothing out and put it, give it to the Clothing Department, or did you ever notice her do that? A Yes.

Q Did you ever hear anybody give her instructions, [fol. 295] tell her what to do? A The Clothing Department did.

Q And who was that? A Smith, I think.

Q What did Smith say? Was it a woman or a man? A Man.

Q What did Smith say when he talked to her? Tell us the time that you heard it. A He would tell her the prices and the items that he wanted priced.

Q Did he come back into the warehouse and give her these instructions? A Yes.

Q Did you ever go over and help her price clothing? A No; I helped her unpack cartons.

Q You helped her unpack cartons. Did any of the other employees, such as Nelson or Nichols, go back and help her unpack cartons or clothing? If you know. A I don't know.

Q Now, when you were working out on the floor, you say you spent seven-eights of your time on the truck and one-eighth of your time out on the floor—tell us what you would do when you were out on the floor. A Mop the floor.

Q What else? A I have helped arrange displays, [fol. 296] move the counters around and such.

Q Help put items on the shelf and move them from one place to another and things of that nature? A I don't know.

Q You don't know. Do you recall ever having done that? A No, I don't.

Q How about these other people, Nichols and Nelson; did they ever come in the store to do any type of work? A Well, yes.

Q Would you say they did more or less than you did? A More.

Q How much more would you say? A I don't know.

Q And what would they do when you were in there? Tell us what you heard. A Mr. Nichols would mop around the snack bar; that was in the bar, in several areas. He cleaned.

Q Would he do anything with the stock, help move the stock around or adjust the shelves? A I don't know.

Q You don't know. How about Mr. Nelson; did you ever observe him in the store? A Yes.

Q What would he do when you saw him in there? A [fol. 297] He built displays several times, stocked merchandise in them.

Q Stocked merchandise in displays.

Now, did you say that you wore casual clothes? A Yes.

Q Did you have a little thing stuck in your pocket that had "Heck's" name on it, where you put your pencils down in it, on your clothes? Did you have one of those? A I never wore one.

Q Were you given one to wear? A I think so; yes.

Q Did the other employees wear them? A Yes.

Q Now, you say Evelyn Taylor had a smock on? A Yes.

Q She has the same kind of smock the other floor employees had? A Yes.

Q She was the only female employee back in the warehouse; is that correct? A Yes.

Q Would you say it would be a fair statement that all female employees in the store, in the St. Albans store wore these smocks? A Yes.

[fol. 298] Q These are green smocks, aren't they? A Blue.

Q All female employees wore them? A Yes.

Q Who did most of the pricing in the St. Albans store; individual items? A Store clerks.

Q The selling clerks.

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: Back on the record.

BY MR. HOLROYD:

Q Larry, have you ever seen the clerks in the store back in the warehouse? A Yes.

Q What did they do when they came back there? A Price merchandise; bring customers back to show them the merchandise.

Q Anything else? A No.

Q Do they ever carry merchandise from the warehouse out into the selling store? A Yes.

Q Do you have any occasion where warehouse personnel would move in to take over the duties on the selling [fol. 299] floor as a clerk, selling clerk? A Yes.

Q Do you know of any occasion where a selling clerk would come back and take over the duties in the warehouse department, as a warehouse employee? A Yes.

* * * *

REDIRECT EXAMINATION

BY MR. MITTENDORF:

Q With respect to the pricing that you did, Mr. Woodall, was this essentially carton pricing only? A Yes.

Q Who would price the individual items within the carton? A Store clerks.

Q And I believe you said that you have on occasion marked some individual prices? A Yes.

Q How frequently did you do that? A I don't know.

Q Well, did you do some individual pricing every day? A No.

[fol. 300] Q Did you do some carton pricing every day? A Some days I didn't.

Q Well, was this usual procedure when you did individual pricing? A No.

Q What—you said essentially you do carton pricing. Now, under what circumstances do you do individual pricing? A Like, sometimes they would have a sale and clerks would be behind in their merchandise.

Q Oh, well, then, you did not ordinarily do individual pricing? A No.

Q I see. Then the only time you did individual pricing was sale time or something like that? A Yes.

* * * *

BY MR. MITTENDORF:

Q Is that the only time you did it, when there was sales or something like that? A Sometimes we would help the clerks out.

Q You said that there were occasions when you helped [fol. 301] Evelyn Taylor unpack; is that correct? A Yes.

Q What were the circumstances when you would do so? A She would have clothing cartons too heavy to move around or something.

Q All right. And how frequently did this happen, that you helped her with merchandise? A I don't know.

Q Was this just a matter of giving her a lift for a few minutes at a time? A Yes.

Q Now, the work that you did on the floor; you said that you were out sometimes. You said you mopped floors and you moved tables and racks, I think you said. A Yes.

Q And you built displays? A Yes.

Q Was your floor work essentially physical work? A Yes.

Q Now, you also said that the clerks, the selling clerks did some pricing in the warehouse; is that correct? A Yes.

Q Now, would they price individual items? A Yes.

Q And would they work from boxes which you had [fol. 302] previously priced or other warehouse employees had priced? A Yes.

Q Now, you said that customers sometimes got back in the warehouse. Was the warehouse actually open to members of the public? A No.

Q And when the customers did so, did come back, would they always be accompanied by someone from the selling floor? A Yes.

Q Now, you also mentioned that on occasion warehouse employees did some selling. What were the circumstances under which warehouse employees would sell? A I only remember one occasion, for myself.

Q I see. What was that occasion? A The store manager wanted some of the warehousemen to come in in white shirts. I worked maybe, I just worked on the floor and they told me I had to get in my truck and go to Nitro and pick up my freight.

Q I see. So you just walked on the floor and off, and so this was just a few minutes? A I didn't sell anything.

Q But you were on the floor with a white shirt and tie on? A Yes.

* * * *

[fol. 303] DOYLE THORNTON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: Doyle Thornton, and I am from Griffithsville, West Virginia.

DIRECT EXAMINATION

BY MR. MITTENDORF:

Q Mr. Thornton, you were formerly employed at Heck's; is that correct? A Yes, sir.

Q And you were at the Charleston, West Virginia, location? A Yes.

Q And how long did you work for Heck's? A I worked approximately two years.

[fol. 304] Q How long did you work in the warehouse? A The whole two years.

Q The whole two years. And I believe you worked under the immediate supervision of Mr. Overton; is that correct? A That's right.

Q Now, who were the employees that you worked with at Charleston? A I worked with Charles Ferrell and Ed Hugert, and I think a Bob Cantley.

Q Now, with respect to Mr. Cantley, didn't Mr. Cantley come over before the Union campaign or leave before the start? A I—yes, he came about two weeks after, I believe.

Q Was there anyone else who worked in the warehouse at Charleston? A There was a Miss Ernestine Russe. She was a pricer.

Q What department did Miss Russe work in? A She was under the direction of the supervisor of the Clothing Department.

Q And who was that? A I think Miss Pearl White was the head.

Q Will you describe the duties of yourself and Mr.

Ferrell and Mr. Hugert? A Our duties were mainly unloading trucks and checking in merchandise.

Q Did you spend any time on the sales floor at Charles-
[fol. 305] ton? A The only time we had been on the sales floor was when we took merchandise out there.

Q When you took merchandise out there, what would you do with it? A We just took it out and left it.

Q Where would you leave it? A In the department where the merchandise went?

Q When you said "left it", would you leave it on the floor or racks or what? A We left it on the floor.

Q Now, with respect to Miss Russ, what were her duties? A Well, mainly she was a pricer. She priced clothing; specifically clothing.

Q Did she price anything else? A I can't recall anything else that she priced.

Q Where was she located in the warehouse? A She had her own area there in the warehouse. It was partitioned off from the rest of the warehouse, just a doorway leading from the warehouse and where she was.

Q I see. When clothing items came in on the truck; would you unload them? A Yes, sir; I did.

Q Would Mr. Hugert also and Mr. Ferrell? A Yes, he did.

[fol. 306] Q Now, when these clothing items came in, what would you do with them? A We usually took them off the truck and wheeled them in to Miss McGraw, Miss Russe. McGraw was her name before she was married.

Q Would you have any other contact with these clothing items before you had delivered them to her section? A Well, sir, after she had priced them, at times we would get the merchandise after she priced it and take it on the floor.

Q You say "at times" you would. Did you usually move the clothing after she priced it? A Well, sometimes the clothing department came back and got the merchandise and took it out.

Q Which would happen the more frequently, that you would take it out or— A Well, I would say actually that the more frequently the Clothing Department came back and got it.

Q Now, were items—when you unloaded items other than clothing, for example, hardware or sporting goods, what would you do with those items? A Well, most of the time after we unloaded them we checked it in and we either priced this stuff individually or priced the master carton.

Q How did you price it? What was the physical means [fol. 307] of pricing? A Well, most usually we priced it by marking the master carton; you know, the price on the carton.

TRIAL EXAMINER: What would you use—a pencil?

THE WITNESS: Marking pencil.

TRIAL EXAMINER: Marking pencil. All right.

BY MR. MITTENDORF:

Q Under what circumstances would you price individual items? A Well, at times we got in large hardware orders, I don't know, and there was a lot of individual items and at times we would price those before we put them on the floor; mostly large hardware orders.

Q Well, if your hardware items came in packed several to a box, would you individually price them? A Most of the time we just marked the carton, but at times we probably have priced individual items.

Q Did the sales people who worked on the floor have any regular duties in the warehouse?

TRIAL EXAMINER: Hold the phone.

Would you mark that in your notes? I want to get some more on this pricing, for my own information.

Now, this person who priced the clothing, you say he priced the clothing in a separate room?

THE WITNESS: There was a partition in between the warehouse.

[fol. 308] TRIAL EXAMINER: Now, the pricing that you did of hardware and other things, do I understand that you priced them while they were in boxes, for the most part?

THE WITNESS: Well, for the—I would say for the most part we priced boxes.

TRIAL EXAMINER: I see.

THE WITNESS: But on occasion, orders demanded that they take boxes and price individual items.

TRIAL EXAMINER: An those items would be something like solid, hardware?

THE WITNESS: Hardware; mostly the Hardware Department, we did this.

TRIAL EXAMINER: Now, you say you delivered clothing goods to this walled-off partition. How did you deliver that, in boxes, as well?

THE WITNESS: What do you mean, to Miss Russe?

TRIAL EXAMINER: To Miss Russe.

THE WITNESS: Well, we took it off the truck.

TRIAL EXAMINER: What was the condition of the merchandise when you took it off the trucks?

THE WITNESS: It was in big boxes. We didn't mess with it.

TRIAL EXAMINER: Why didn't you mess with it?

THE WITNESS: Simply because she was the pricer [fol. 309] and we had nothing to do with pricing the clothing. As a matter of fact, I can't ever remember pricing clothing.

TRIAL EXAMINER: Now, if you know, when she priced clothing, did she price it, as you did, generally by pricing the box?

THE WITNESS: No; she priced the clothing individually. She took the dresses or whatever it was and put a tag on it and placed it on the floor.

TRIAL EXAMINER: On the dress itself?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: In this Waldorf wall-to-wall room?

THE WITNESS: In the partition, only there was a doorway there, to get into the warehouse.

TRIAL EXAMINER: Excuse me, Mr. Mittendorf, but I wanted to get the whole picture in the same place in the record.

All right.

BY MR. MITTENDORF:

Q. Now, did the sales people at Charleston have any regular duties in the warehouse? A. None that I can recall, not regular duties.

Q Did they on occasion come to the warehouse? A Yes, they would, to sell a certain, some kind of merchandise that was too large to put on the floor, like a TV antenna; they'd come back to look at it.

Q Did they do any pricing in the warehouse area? [fol. 310] A Oh, I would think possibly in an isolated case they may have, but it wasn't a habit.

Q Are the customers permitted in the warehouse area? A No, they are not, unless they are accompanied by sales personnel.

Q And this is for the purpose of selecting goods? A Selecting merchandise.

Q Or picking up merchandise that has already been purchased? A Yes.

Q Now, with respect to Charleston, how many warehouses were there at Charleston? A At the time we were there they had two warehouses; they had one at Lewis Street and the warehouse at the rear of the store.

Q The one at Lewis Street was how far away? A I don't know; a couple of blocks, I guess.

Q Which one was the bigger of the two? A In area, I suppose the Lewis Street warehouse was.

Q How much of your time did you spend at Lewis Street. A I spent very little time.

Q What about the other employees? A The other employees, they would go back and forth to Lewis Street, maybe two or three times a day, sometimes more.

Q Was there anyone employed at Lewis Street, who [fol. 311] regularly stayed there? A Not from the Charleston store.

Q Was there anyone who stayed at the Lewis Street store? A Not from the Charleston store.

Q Would you lock it as you left the place? A Yes, we did.

Q Now, Mr. Hugert was a driver. What percentage of his time did he spend in the warehouse, Mr. Thornton? A Well, some days he spent most of his time in the warehouse; other days he spent most of his time on the road. It varied.

MR. HOLROYD: I'm going to object to the materiality of this, Your Honor. We have narrowed the issues

down to the pricers, compared to the others. There is no question that this Hugert is in the unit, if it is determined appropriate.

MR. MITTENDORF: Okay.

TRIAL EXAMINER: All right. Are you withdrawing the question?

MR. MITTENDORF: I will withdraw the question.

BY MR. MITTENDORF:

Q With respect to Miss Russe, did Miss Russe spend any time working on the floor at Charleston? A I can recall times when she went out on the floor, yes.

Q How frequently would this happen? A I couldn't say.

[fol. 312] TRIAL EXAMINER: What floor?

MR. MITTENDORF: On the selling floor.

THE WITNESS: At times Miss McGraw or Mrs. Russe would work on the floor. I can't recall dates but I can recall times she did work out there.

BY MR. MITTENDORF:

Q Would she spend some time out there each day? A I can't say each day; some days she didn't dress appropriately to be on the floor, but at times she did go out on the floor.

Q Do the sales personnel at Charleston wear any particular type of dress? A Yes, they do. The women wear smocks and men wear white shirts.

Q What about the warehouse employees? A We just wear clothes like I have got on right now.

Q Did any of the warehouse employees ever go out on the floor and sell? A Well, I can't recall anyone that ever went out on the floor and sold except myself. I was transferred out there a couple of Christmases by the direct orders from the manager and I put up merchandise such as Christmas decorations and then I was told to go back to the warehouse after the holidays were over. I can't recall anyone else that did that, though.

[fol. 313] Q You said you were transferred but did you actually sell while you were on the floor? A Yes, I actually sold, but I was told to go out there with the understanding that I would go back to the warehouse.

Q Do you recall approximately when you first started, Mr. Thornton? A I started sometime in August of 1962. What do you mean—when I started to work?

Q Yes, at Heck's. A Yes, sometime in August of 1962.

Q Then when you went out on the floor, did you go out for Christmas of '62? A No; it was Christmas of '63.

Q Of '63? A That was the first time I went on the floor for approximately a month's time and then in 1964 I went out on the floor during Christmas of that year.

MR. MITTENDORF: That's all I have of Mr. Thornton.

You may examine, Mr. Holroyd.

CROSS EXAMINATION

BY MR. HOLROYD:

Q Doyle, these items of hardware that you priced, now, would this be nuts, screws and bolts, and things of that nature? A Well, I wouldn't necessarily say it would be nuts, screws and bolts.

[fol. 314] Q Did you price nuts, screws and bolts? A I can't recall ever pricing them.

Q Do you recall ever seeing other warehouse employees pricing nuts, screws and bolts? A No, I can't.

Q Now, having walked through the store myself at times, I noticed that a lot of very small hardware items, such as little drils, not as large as a pencil, would have a price tag on it. Who would put that on there? A I'm afraid I could not know.

Q Well, have you ever put it on items such as that? A I don't believe I can recall doing it. I have priced certain small items.

Q Such as— A But you say a drill, I don't recall.

Q What small items have you priced? A Well, I have priced such items as, probably, files; I don't know; I can't think of any right now, any more.

Q What about larger items of saws and hammers and— A Saws and hammers, yes; I have priced them, on occasion.

Q Individually? A Yes, sir.

Q How about the other warehouse people; did they [fol. 315] price those things, too? A I suppose so. They had the same duties I did.

Q Now, were you working for Heck's when they acquired this Charleston store? A No, sir; I was not.

Q You were not? A I went to work for Heck's after they had the Charleston store for something like a year or more.

Q This was the first store in the chain, then? A This was the first store in the chain; yes.

Q Now, you say Mr. Overton gave employees instructions. Did you ever hear him giving Ernestine Russe instructions? A I can't recall him ever, no.

Q Who was the head of the Clothing Department at that time? A I believe that it was Pearl White; I'm not sure.

Q Did you ever hear Miss White give her instructions? A Yes, I have.

Q What kind of instructions did she give? A Like certain merchandise would be sitting there; she would tell Mrs. Russe she wanted certain merchandise priced and put on the floor.

Q Now, you say on two Christmases—and I assume you mean a month each Christmas—that you worked out on the selling floor; is that correct? A Yes, sir; I did. [fol. 316] Q And I believe you also said that you knew of no other people who worked back in the warehouse department who also worked out on the selling floor; is that correct? A I can't recall anyone except myself who worked out there for a prolonged period.

Q Did anyone work out there for short periods? A I can't recall that they did.

Q Have you known of any of the warehouse people who were there while you were there that moved out to become full-time sales personnel? A I think, possibly, there might have been some. I can't recall names right at the present time.

Q You think there were some but you can't recall their names? A No, I can't.

Q Let's take the reverse. Do you know of any sales people who left the sales floor and came back as full-time warehouse people? A I can't recall any that I know. Perhaps they did.

Q Now, do all the female employees of the Heck's store in Charleston, at the time you worked there, wear these little smocks? A All the female employees that work on the floor do. Office personnel wouldn't.

[fol. 317] Q How about Mrs. Russe? A Mrs. Russe wore a smock.

Q All the time? A Practically all the time while they was in the warehouse she wore one.

Q Now, you testified earlier that sometimes her dress was not appropriate for selling. Would you tell us what you mean by that?

* * * *

[fol. 318] TRIAL EXAMINER: Just a minute, Mr. Thornton. I have a couple of more questions. I want to hear a little more about this warehouse.

Do you stock televisions and radios back in that warehouse?

THE WITNESS: Yes, we stored radios. I can't recall perhaps at times we have, have stored TV's back there, but at the time I was working—

TRIAL EXAMINER: Furniture, items of that nature?

THE WITNESS: Yes, sir; I can recall pool tables they stored back there.

TRIAL EXAMINER: Were you ever asked by any department head to price that sort of an item?

THE WITNESS: Price the box?

TRIAL EXAMINER: The box or the item itself, and was it put out?

THE WITNESS: We usually priced it, anyhow.

TRIAL EXAMINER: You did?

THE WITNESS: The master carton; the merchan-

[fol. 319] dise was in the carton. We priced them.

TRIAL EXAMINER: Well, now supposing there were six radios, let's say—I don't know if they pack radios that way, but I am thinking of table radios—and they were destined to go out on the selling floor immediately.

Were you ever instructed by a department head to price individual items of that sort and put them out on the floor?

THE WITNESS: Well, I can't recall being instructed to price an individual item. Whatever carton they came in, we put the price of the merchandise on it and they could take it out there.

TRIAL EXAMINER: Who is "they"?

THE WITNESS: Department head; Jewelry, for instance.

TRIAL EXAMINER: I'm talking about heavy items. Who would take it?

THE WITNESS: Most of the heavy items, except for a display, were kept there.

TRIAL EXAMINER: Kept where?

THE WITNESS: Back in the warehouse, so that when they were sold, the customer could have come out and picked them up.

TRIAL EXAMINER: But there must have been some items—

THE WITNESS: They have a display, of course.

TRIAL EXAMINER: How did they get out there?

THE WITNESS: We took them out.

[fol. 320] TRIAL EXAMINER: On whose instructions?

THE WITNESS: On the warehouse supervisor's, Mr. Overton.

TRIAL EXAMINER: How did he know that they were to go out there?

THE WITNESS: Probably the department head in Jewelry, or whatever department head this was, told him.

TRIAL EXAMINER: But you don't know; you are not sure?

THE WITNESS: I'm pretty sure; I'm positive.

TRIAL EXAMINER: Just one more question about this warehouse.

I'm considering the sanitary conditions of the overall place. Do you still work there?

THE WITNESS: No, sir; I haven't worked there for over two years.

TRIAL EXAMINER: Was it as clean in the warehouse as it was in the store?

THE WITNESS: No, sir; it wasn't.

TRIAL EXAMINER: Why not?

THE WITNESS: The store had tile on the floor and the warehouse was just bare concrete and, of course, dust accumulated on this and it wasn't swept out as often as the store was. The store was swept every night.

TRIAL EXAMINER: I have no further questions. [fol. 321] Does Counsel have any?

MR. HOLROYD: I'd like to ask him a couple that were raised by your examination.

TRIAL EXAMINER: All Right.

RECROSS EXAMINATION

BY MR. HOLROYD:

Q Doyle, first, most of the items that they sell in the store are relatively small items that a customer can carry out; isn't that correct? A I would say so; yes.

Q You don't sell any bedroom furniture? A Not at the time I was employed there. I can recall, in isolated cases, that they sold some chests or something like that, but not as a habit.

Q All right. Now, when a shipment of, say, table radios or food mixers or items such as that, that were already boxed up in the individual boxes, when they would come in, who would mark the individual box? Would you mark it, them in the warehouse? A Most usually I marked the prices on the boxes. We stacked them, all except what they needed on the floor.

Q And these boxes would be sold to the customers without taking them out of the carton? A Yes, if the customer wanted to pick one up there; yes, of course. [fol. 322] Q Now, do all the employees use the same lounge and rest room facilities? A Yes, sir, we did.

Q All the employees in the store? A Yes, we did, at the Charleston store.

* * * *

LEWIS VICKERS,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: Lewis Vickers, Griffithsville.

DIRECT EXAMINATION

BY MR. MITTENDORF:

Q Mr. Vickers, how long did you work at Heck's? A Well, approximately, in all, about two years.

Q And I believe you worked at the Nitro warehouse; is that correct? A Correct.

[fol. 323] Q And what were your duties at Nitro? A I was a shipping clerk.

* * * *

[fol. 326] BY MR. MITTENDORF:

Q Now, Mr. Vickers, would you describe the duties of the warehousemen at Nitro? A Well, the duties of the warehousemen were that they loaded and unloaded the trucks and stacked the incoming merchandise in their particular area and the ones that went out, they loaded back on the trucks, going to the individual stores.

Q All right. What type of merchandise would the warehousemen handle? A All the merchandise with the [fol. 327] exception of the Cosmetics Department's.

Q Who would handle cosmetics? A Cosmetics Department; they had an area of their own where they loaded and unloaded their own trucks.

Q All right. Now, these people in the Cosmetics Department were classed as pricers; is that correct? A I presume; yes.

Q Well, was Anna Lou Adkins one of these individuals? A Yes, sir.

Q Was Sheila Holstein one of them? A Yes, sir.

Q Was Franklin T. Lannon one of them? A Yes, sir.

Q And was Charles T. Lewis one of them? A Yes, sir.

Q Now, those people handled only cosmetics; is that correct? A Yes, sir.

Q All right. What would they do with the cosmetics? A Well, as the cosmetics came in on the trucks, they would unload, stack them in the order, and after they get the orders from the individual stores they would fill these orders and load them on the truck.

Q In short, these people in the Cosmetics Department [fol. 328] would do the same thing with cosmetics that you would do with other items? A Yes, sir.

Q It's been stipulated that Mr. Foy and Mr. Graley were supervisors of the Nitro warehouse. Did the warehousemen and truck drivers take their orders from Foy and Graley? A Yes.

Q Did the truck drivers take their instructions from Mr. Foy and Mr. Graley? A I presume they did.

Q Have you heard Mr. Foy and Mr. Graley give instructions to the truck drivers? A No, sir; not personally.

Q When pricers items were received from the store for items other than cosmetics what would be the procedure? A That would be written up on inter-store transfer and given to the shipper and—

Q You say he would fill the orders. What action would be performed? A We would take the inter-store transfer and, say, take the stock number on the transfer; I would find the stock at the transfer and put it on a 4-wheel buggy and take it to the loading docks.

Q Now, how did the Cosmetics Department fill the orders? A I presume the same way, as far as I know. [fol. 329] Q When items were sent to one of the stores, would both cosmetics and other items go on the same truck? A Yes, sir.

Q Who would load the truck, as far as cosmetic items are concerned? A The warehousemen would load. The Cosmetics Department brought the cosmetics to the loading dock and from there the warehousemen, they loaded the complete truck.

Q Did the male individuals who are classed as pricers, Mr. Lanham and Mr. Lewis, help you load the truck? A Not that I recall, as far as loading them.

TRIAL EXAMINER: Mr. Mittendorf, what does this prove?

MR. MITTENDORF: Well, I am attempting to show that the pricers were essentially warehouse personnel; they received goods; they filled orders, just as the warehousemen did, and by this testimony I am attempting to show a distinction between the classification of it at Nitro and the comparable classification at St. Albans and Charleston.

TRIAL EXAMINER: I see.

Now, is there any question in your mind but that the fact is that the cosmetic pricers received goods even as did the warehousemen at Nitro?

MR. MITTENDORF: No; no question.

TRIAL EXAMINER: The cosmetics pricers received goods at Nitro just as did the warehousemen?

[fol. 330] MR. MITTENDORF: Specifically limited to cosmetics?

TRIAL EXAMINER: Yes.

MR. MITTENDORF: Yes.

BY MR. MITTENDORF:

Q Now, did you know employee Charles Lewis? A Yes, sir.

Q What was Mr. Lewis' status as an employee? A He was a pricer, I presume.

Q What were his hours? A He was a part-time employee, the best I remember. I don't know the exact hours, but he came in the afternoon and worked the evening, five o'clock.

Q Did he have any other activity that you know of—not employment? A He was a college student.

Q At what college? A West Virginia State.

Q How many days a week did Mr. Lewis work, if you know? A He worked, the best I can remember, every day in the week, in the afternoons.

Q Is there any distinction, if you know, between the

benefits given a full-time employee and those given a part-time employee? A No, sir; I don't know.

Q You don't know? A No, sir; I don't know.

[fol. 331] Q Did you have any kind of health plan or hospitalization plan? A Yes, sir.

Q Do you know if Mr. Lewis participated in that? A No, sir; I don't.

Q You don't know? A I don't know.

Q Were there any employees in the warehouse, other than Mr. Lewis, who worked on a part-time basis at the time of the Union demand? A I can't remember any.

MR. MITTENDORF: That's all I have of Mr. Vickers.

MR. HOLROYD: Bill, I wonder if we can stipulate that that Charles Lewis is properly within the unit as a regular part-time employee.

MR. MITTENDORF: No, I don't think we can, because we have more on him, one other witness.

CROSS EXAMINATION

BY MR. HOLROYD:

Q Mr. Lewis, the pricers in the warehouse are separated from the rest of the warehouse, aren't they—their part is separated? A Yes, sir.

Q Female employees there wear white smocks, don't [fol. 332] they? A I believe they do.

Q And the male employees wear whatever they want to wear? A Right.

Q Now, Charles Lewis, you say, worked in the afternoon. He worked regularly, practically every afternoon, didn't he? A Yes, sir; the best I can remember.

Q You don't recall how long he worked after you left there, do you, or did he quit the same time you did? A No, he worked after I left.

Q So, as far as you know, he worked eight hours a day? A Yes.

Q He may well have worked eight hours a day; isn't that right? A He could have.

Q Do you know Mike Murdo? A Yes, sir.

Q What did he do? A I believe that he was a carpenter; I think.

Q Did he work around the warehouse? A Yes, sir; he did.

Q What would he do in the warehouse? A Actually, all I know, he built displays and things of that nature.

Q Did you ever help him? A No, sir; not personally, that I recall.

[fol. 333] Q Did you ever see any other employees help him? A I can't remember. They may have; I don't know.

Q You never did see them? A Not that I remember.

MR. HOLROYD: That's all we have.

REDIRECT EXAMINATION

BY MR. MITTENDORF:

Q With respect to this Murdo that you mentioned, you say he was a carpenter? A Yes, sir; that's all that I know that he was. He may have been something else.

Q Did he spend most of his time at Nitro; do you know? A Yes, sir; I believe he did.

Q Did he have a separate area that he worked in? A Yes, sir; he had his own area.

Q Did he have a helper or assistants of any kind? A Not that I know of.

Q Did he do any stock work along with you? A No, sir.

Q Or any other employees? A No, sir.

MR. MITTENDORF: That's all.

TRIAL EXAMINER: Did this fellow, Charles Lewis, work for you?

[fol. 334] THE WITNESS: Work for me?

TRIAL EXAMINER: Yes.

THE WITNESS: No, sir; he doesn't work for me.

TRIAL EXAMINER: You didn't immediately supervise him?

THE WITNESS: No, sir.

TRIAL EXAMINER: You never assigned him any work or anything of that sort, any jobs?

THE WITNESS: No, sir; not that I remember.

TRIAL EXAMINER: Well, if you know, how was his attendance record?

THE WITNESS: Good, I suppose; as far as I know.

TRIAL EXAMINER: He was a college student, wasn't he?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Did he take time off at Christmas time?

THE WITNESS: I don't know.

TRIAL EXAMINER: If you know. If you don't know, it's all right.

THE WITNESS: I don't know.

TRIAL EXAMINER: How about exam time?

THE WITNESS: He took time off, I believe, but—

TRIAL EXAMINER: But you don't know?

THE WITNESS: I don't know.

TRIAL EXAMINER: But outside of that he showed up regularly?

[fol. 335] THE WITNESS: Yes, as far as I know.

TRIAL EXAMINER: I have nothing further.

MR. HOLROYD: I would like to state for the record that even though Mr. Vickers was held to be a supervisor, I do not wish that holding to be construed in any way for the Respondent to be bound by his remarks here today, since he was called as General Counsel's witness and not as a witness for—

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JAMES E. GOINS,

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: James E. Goins, 1654 McClung Street, Charleston, West Virginia.

BY MR. MITTENDORF:

Q Mr. Goins, you were employed at the Nitro, West Virginia, warehouse; is that correct? A Yes, sir.

[fol. 336] Q Did you know an employee by the name of Charles E. Lewis? A Yes.

Q What was Mr. Lewis' status as an employee?

MR. HOLROYD: I'm going to object to that question.

TRIAL EXAMINER: What was his what?

MR. MITTENDORF: Status

TRIAL EXAMINER: If he knows.

* * * *

[fol. 341] RAY DARNALL,

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Please be seated and give your name and address to the Reporter.

THE WITNESS: Ray Darnall, 5102 Frederick Drive, Charleston, West Virginia.

DIRECT EXAMINATION

BY MR. HOLROYD:

Q Mr. Darnall, are you the same Ray Darnall who testified in this proceeding on June 29, 1965? A Yes, sir.

Q Have your duties changed in any way since that time? A No, sir.

Q Now, directing your attention to the so-called warehouse employees of the St. Albans and Charleston stores, would you tell us how pricers are carried on the company books in these two stores? A They are carried as warehouse employees.

[fol. 342] Q Are pricers in the stores—not in the warehouse but in the stores—are they male or female employees? A Normally they are male—female employees.

Q Now, you say they are carried as warehouse employees? A Correct.

Q Who do they answer directly to? A To the person in charge of the warehouse; warehouse supervisor.

Q Now, in St. Albans that would be—at the time this Union problem came up—that would be who? A Albert Ferrell, Jr.

Q And in the Charleston store that would have been who? A Henry Overton.

Q Now, there's been some testimony here that the Clothing Department head gave instructions to these female employees referred to as "pricers", from time to time. Now, would you explain this situation? A On several occasions the department had in Clothing Department, which in most cases the pricer in the warehouse, female pricer, does do more work for the Clothing Department than any other department in the store and they will ask them to make tickets or change prices on certain items that are going on ad for the following week.

Q Does the head of the Clothing Department have any [fol. 343] authority to change the number of hours or terms and conditions of employment of the pricers? A No, sir.

Q Are they responsible, are the heads of the Clothing Departments responsible to the company for the pricers? A No, sir.

Q Have the pricers ever been told that they are to take instructions from the head of the Clothing Department alone? A No, sir; they are under the jurisdiction of the warehouse manager.

Q When they were hired, who hired these people? A The manager does all the hiring in the store.

Q Do you ever participate in any of the hiring? A In some cases I do.

Q Have you ever participated in the hiring of pricers in the warehouse? A At the time Mrs. Taylor was hired in St. Albans I was the manager of that store at that time.

Q And you hired her; is that correct? A Yes, sir.

Q Who did you tell her she was to take her instructions from? A From the person in charge of the warehouse.

Q Now, I assume as department heads, as supervisors, they would have the authority to give instructions to any [fol. 344] non-supervisory employees; is that correct? A

They do; any employee in the warehouse, if they want to go back and ask any of them to bring merchandise to the floor or help them price it or bring our merchandise for them, they do it.

Q And if the employees do not follow the instructions, who would the department head go to? A They would go to the warehouse manger.

Q The earlier testimony said that the pricers in these two stores, that is, the St. Albans and the Charleston stores, do most of the pricing for the Clothing Department. A That's correct.

Q Do they do pricing for any other department? A On rare occasions they will help, yes. It's depending on if they are caught up in Clothing and have nothing else to do, they might help in Cosmetics, for instance, price their ad, which brings all the cosmetics ads in the store, rather than price it at a general warehouse.

Q Now, when you say "general warehouse" you are referring to Nitro? A Yes, sir; Nitro, yes.

Q And when you say "store" you are referring to the general store; is that correct? A Correct. On a lot of things—we are going into a heavy toy season, they might help price toys or they may make tickets for the toys, and helping—

[fol. 345] Q Now, let's assume you have had individual boxes coming in, coming off the trucks as individual boxes. Now, who prices that individual box? A The people in the warehouse.

Q Now, if it is a small box that has nothing but one item in it, that's still done by the people in the warehouse? A The people in the warehouse; yes.

Q And what happens to that box when it is priced? A On many occasions it goes right directly to your selling floor and is sold to the customer, in the box. We will use an example: say the trailer brought up a table radio. They are individually boxed when they come to the store. They are priced in the warehouse and take small appliances, and we then put one on display in that department and the others are sold, handed to the customer in the original carton they come into—

Q Does anyone else put an addtional price on these boxes? A On occasions, yes. This same radio that we bring in, we might bring in fifty in one shipment. We might decide to run this on ad, or it might be brought for an ad, and the department head might put a price on it with the ad price.

Q That's when you have a sale? A Yes.

[fol. 346] Q But as a general rule, when the item comes in, the warehouseman places the price on it? A Right.

Q Now, nobody puts any other price on that afterwards; is that correct? A No. Now, this isn't a hundred per cent. It depends entirely on our warehouse people. If they are real busy, a lot of times the people in our Jewelry and Small Appliance Departments are not busy and they themselves will price some of it.

MR. HOLROYD: May we go off the record, please?

TRIAL EXAMINER: Yes.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

BY MR. HOLROYD:

Q The testimony here has been that in the Charleston store clothing, the place where the clothing is priced is physically separated from the rest of the warehouse.

Now, would you explain this situation? A The building we are using in Charleston store was originally an old garage and the place that we are pricing clothing happened to be the paint room, within this garage, and it just happens to be an area that we can set up a pricing table and pricing machines and it is nothing that we built especially for a clothing pricing room. It just happened to [fol. 347] be there, part of the structure. We don't own the building so we can't tear it out.

By the same token, if they wanted to separate it, as has been indicated in this hearing, we have, right opposite, on the opposite side of the clothing pricing room, another little room where we store jewelry, small appliances and cosmetics, which we also are keeping separate but this is strictly because of the nature of the building, the way it was laid out.

Q Now, does the occasion ever arise where people on the sales floor would come back into the warehouse and assist in pricing items? A Very often, yes.

Q Very often, Now, do the warehouse people ever go out in the selling part of the store and assist in pricing items? A Not too often, but on occasions we have asked people in the warehouse to assist us in pricing.

Now, again, I refer to this season because it is a busy toy season and we will occasionally take the merchandise right to the floor and ask the people in the warehouse to give us a hand on pricing, putting it into stock.

Q Now, there has been some testimony here that the female pricers wear smocks. Now, is this correct? A They wear smocks. It's on their request. They have asked to wear smocks because, for various reasons—maybe it's [fol. 348] cold, as has been stated before, where they are pricing or they want to keep from soiling their street clothes that they are wearing. It isn't compulsory. We do ask, we do request that all female employees on the selling floor wear smocks and identifying badges with their names on it.

MR. MITTENDORF: May I ask if these questions are being directed to the pricers in the stores as distinguished from the main warehouse, Mr. Holroyd?

MR. HOLROYD: I'm going to elucidate on that, in my next question, Mr. Mittendorf—not the next one but the one after that.

MR. MITTENDORF: All right, sir; proceed.

BY MR. HOLROYD:

Q Are these girls required to wear these uniforms, the pricers? A No.

Q All right. Now, in the stores, the selling stores of St. Albans and Charleston, I assume that the femal pricers there wear these smocks. A Correct.

Q Do they at the central warehouse in Nitro? A Yes, they wear smocks. There, again, they don't wear them at all times. Summer months, when it is extremely hot, they don't want to wear their smocks, but they do request them and when they do request them we furnish them for them.

[fol. 349] Q Now, do you ever have occasions when there is interchange, in the stores, that is, selling stores of St. Albans and Charleston, do you ever have occasion where there is interchange between the people in the warehouse and the people on the selling floor? A Some, yes. In most cases it is people in the warehouse are moved from the warehouse to the floor, selling floor.

We have had, in fact, we had one about two months ago, St. Albans store, where the young man wasn't working on the floor so we moved him to the warehouse.

Q Do you ever have the reverse, where you move it from the warehouse to the store? A Yes, sir.

Q Does this happen very frequently? A Yes, sir.

Q Who is Charles Lewis? A Charles Lewis was an employee in the Nitro warehouse. He isn't presently employed. He's going to school full-time now.

Q Now, when he was employed, normally how many hours a week would he work? A He would come pretty close to putting in a full 40-hour work week. Charlie came in every day at twelve o'clock and worked a lot of the evenings until eight o'clock in the evening. He work d [fol. 350] as a full-time employee during the summer months on regular shifts.

Q Did you consider him and carry him on your books as—a regular part-time employee during the winter months? A Oh, yes; he had a regular schedule that he worked every day.

Q All right. Now, the warehouse people do some pricing, I understand. A Some pricing, yes.

Q Now, other than the boxes, the large boxes or the small boxes that come in, items that come in in cardboard boxes, what else do the pricers in the warehouse, the warehouse people, price? A We receive a lot of shipments from jobbers and within this we will have, we might buy six, we might buy twelve, 150, 200, 250 items. When they come into the warehouse they are checked in the warehouse and priced by the people in the warehouse.

Now, within this, there could be paint brushes; there could be hammers, chisels, oil filters, numerous items, any item that we carry in the warehouse, that we buy in small quantities while we are getting a direct shipment in. This

also is true in our Housewares Department. We buy glassware. We buy small plastics and things of this nature that come into our warehouse and not in all cases but a lot of [fol. 351] cases they are priced right by the warehouse crew.

Q Do you have such things as nuts and bolts that come in? A Yes.

Q I notice you have things even as small as a washer that will have a price on it. A Yes; our plumbing, electrical—this is one of our big suppliers that we receive a shipment from every two weeks.

We have a small T, very small; each one of those items have to have a price ticket on it.

You will have a plate just to go over a light switch; sells for ten cents or nine cents. This has to have a price ticket, sticker on it.

There are just too many items to mention. There's little clamps that you use in your electrical work that sell for eight cents. Each one of these items have to have a ticket.

Q Who puts the price on them? A This is done in our warehouse.

Q Who is Mike Murdo? A Mike Murdo is a maintenance man in the Nitro warehouse.

Q What does he do? A He is general maintenance. He will travel stores and put in light ballast for electrical lights or build display racks, shelves in our store, general maintenance work.

[fol. 352] Q Do any of the other employees in the warehouse, either in Nitro or the other warehouse, assist him in this work? A We have, yes, on occasions, where he has a job he can't handle we will give him some help from our warehouse.

Q Now, at your Nitro warehouse, do you have any janitors? A Yes, sir.

Q How many do you have? A At the time of this, at the time of this organizational campaign we had two.

Q And who were they? A Alton McCann and, I believe, Charles Whitman were there at the time.

Q What did they do as janitors? A Their duties were to clean and watch the warehouse as a night watchman.

Q Who did they take their orders from? A Their orders came most generally from myself.

Q From yourself? A Yes, sir.

Q Did they take any orders from either Ferrell or Overton? A Not in the Nitro warehouse, no.

Q Now, Everett Nicchols, who is listed here as an em-
[fol. 353] ployee in the St. Albans store, would you tell us what he does or what he did at that time?

MR. MITTENDORF: Who, Mr. Holroyd?

MR. HOLROYD: Everett Nichols.

THE WITNESS: He came in early in the morning before the regular warehouse crew. His duties were to clean, mop the bathrooms, both the office bathrooms and the, clean the bathrooms for the general public, see that all supplies were in the bathrooms, such as any toiletry items.

He normally mopped a little around the snack bar, where it would get messy from the day before.

After he finished his duties he went back in the warehouse and worked as a regular warehouse person.

Q About how long, each day, would these janitorial duties consume? A Normally it would take about two hours or two hours and a half.

Q Now, would Mr. Nichols do anything else in the course of his duties in a given week, other than what you have described to us? A We used him as a relief for the night watchman.

Q Was this a regular relief? A Yes, sir; relieved every Saturday night.

Q And as a night watchman, what did he do? A His duties were to guard the store; he carried a gun.

[fol. 354] Q He carried a gun, you say? A Yes, sir.

Q Did he protect the property against everyone, including the employees, if they should come on the job after hours? A Yes, sir.

Q Now, in the Charleston store, who does the janitor work? Or who did at that time? A At that time the night watchman was doing most of the janitorial work because that store was smaller than our St. Albans store.

Q How much smaller would the Charleston store be than the St. Albans? A It's about half as large as the St. Albans store.

Actually, it's 35,000 square feet in the St. Albans store and 17,000 square feet in the Charleston store.

* * * *

[fol. 356] TRIAL EXAMINER: As against the warehouse duties?

THE WITNESS: Yes.

MR. HOLROYD: And guard duties.

TRIAL EXAMINER: Is there any contention on your part that Nichols does not belong in the unit?

MR. HOLROYD: We are taking the position that Mr. Nichols should be excluded as a part-time guard from the unit; yes, sir.

* * * *

[fol. 358] CROSS EXAMINATION

BY MR. MITTENDORF:

Q Now, with respect to this Mr. Murdo, how long has he been with Heck's, Mr. Darnall? A I couldn't answer that, truthfully.

Q Was he with them at the time this Union campaign took place in October of 1964? A I wouldn't swear to it. I believe that he was. I could check the records for you and find out, but I am not absolutely sure.

Q And is he still with you? A No, sir; he isn't.

Q Did you have a predecessor to Mr. Murdo? A No, sir.

Q He was the only electrical—what is his title, maintenance man? A Maintenance man; general maintenance man.

Q You mentioned he repairs light ballast. Does he do other work when necessary? A Certainly. As I explained to the Hearing Officer, he builds racks, and shelves, general—

Q Are these racks and shelves in use in the other stores? A In the other stores.

[fol. 359] Q Does he sometimes go to the other stores? A Yes.

Q Does he install these racks that he builds. A Yes, sir.

Q I see. Does he have any duties in the warehouse? A He works out of the warehouse. He doesn't actually have a specific duty in the warehouse.

Q As far as the shipping and receiving of the merchandise, he does not do that? A No.

Q He does not report to Mr. Graley or Mr. Foy? A No, sir.

Q He reports directly to you? A Yes, sir.

Q Now, with respect to Mr. Nichols, was Mr. Nichols a full-time employee? A Yes, sir.

Q And you said that his duties as clean-up man take about two hours daily? A I would say about two hours; yes, sir.

Q Then the balance of his day is spent in the St. Albans warehouse area doing loading and unloading of merchandise; is that correct? A That is correct.

Q Now, you said that on one night a week—I believe you said on Saturday night, you said he is used as a watchman. A Yes, sir.

[fol. 360] Q Do his duties start after the store is closed? A Yes, sir.

Q Does this apply to just one night a week? A Yes, sir.

Q The store closes on Saturday night at nine o'clock? A At the time of this campaign it did, yes.

Q And his duties then began at nine and how long did they run? A His duties began at 8:30.

Q And how long did they run? A Until about 5:30 in the morning.

Q But that was on a one-night-a-week basis? A Correct.

Q Was there anyone else in the store when Mr. Nichols was there as a guard? A The only people—on a Saturday night?

Q Yes, sir. A No, no.

Q Did Mr. Nichols always operate on this same schedule? A He didn't always, no. I am not sure the date that we set him up on this schedule, as far as night watching. He did it for about, I'd say, a year, something like that.

Q He did it for a year. Was he doing it at the time of [fol. 361] the Union campaign in October, 1964? A I believe he was.

Q You are not certain of that? A No, sir; I am not certain. I could check the records, if you like.

* * * *

[fol. 362] BY MR. MITTENDORF:

Q Now, you said that the pricers at both St. Albans and Charleston do more work for the Clothing Department than for any other department; is that Correct? A Yes, sir.

Q Have these pricers always operated in this manner? My question is directed to the pricers at St. Albans and Charleston. Have they always engaged essentially in the work of marking and pricing clothes? A Yes, sir.

Q Now, you have told us that the separation of the clothing section of the warehouse in Charleston was a matter of accident because of the structure of the building that you took over. Now, what about St. Albans? A She used, prior to us remodeling down there and using part of the warehouse for a Shoe Department, she used a corner of that for her pricing, a corner of the warehouse.

At the present time—this, again, was a matter of the store being built the way it was—at one time our general office was in our St. Albans store. Now we have torn out a partition and she sets sets back. It is still within the warehouse but she sets back just a little ways.

Q I see. But the clothing is still physically separated from the other items? A Yes; the clothing is not by a matter of choice. It's just because we need a place to set [fol. 363] our pricing machines and so forth. We wouldn't want to locate it out in the center of our warehouse aisles, so for this reason we set it off to one side and designate a corner for her to work from.

Q Are the clothing marking machines located in the warehouse department? A Part of them. We use a crank machine; we also use a little hand-stamp machine that we use.

Q Now, you stated that the pricers on occasion, you said they may help price toys, for example. A Yes, sir.

Q You said that they may help price housewares. A That is correct.

Q And that they may help price— A I will rephrase that. They do help price toys; they do help price housewares.

Q All right. What is the frequency of their pricing of toys? A As I previously stated, during this season we are going to go into a very heavy toy season and if they are

not busy in the Clothing Department we will ask them to price toys.

Q I see. A As I stated before, this is not clothing—clothing is their biggest job, as far as pricing, but if we [fol. 364] need them in the other department, we ask them to go and they are—

Q Conversely, if they are needed in the Clothing Department, they would remain there and you would find other substitutions for them? A Quite possibly; yes.

Q Now, you made one statement on direct examination, if I am correct.

You said that at St. Albans the interchange between the warehouse and selling department is frequent in the direction from the warehouse to the selling department. A I said "quite frequently." You may have misunderstood me, but I said "quite frequently we do take people from our warehouse and put them into the selling area." Some people feel like that is a promotion.

We do find people that we hire as warehouse employees that we feel have the appearance and the ability to work on our selling floor.

Q Well, what is the nature of these transfers? Is it to accommodate a busy season in the selling area? A It could be either.

Q Or a safe, for example? A It could be a busy season; it could be that we lose an employee in one of our departments and we have someone in the warehouse that we feel like can do the job.

[fol. 365] In fact, there, as Mr. Thornton stated a while ago, I offered him a job in our Sportings Goods Department because we felt like he was qualified to work in this department, on the selling floor.

Q Now, both of the transfers that Mr. Thornton referred to referred to the Christmas rush? A That's correct.

Q So that is the normal picture? A No; I think you are trying to turn my words around. We do use people, as I stated, from our warehouse. In busy seasons we will take them out and ask them to work on the floor, but on a lot of occasions we take the people out of the warehouse and give them a job on the floor.

In fact, we have one of our managers in one of our stores who was originally a warehouseman.

Q Now in point of time—now confining your answer to the period in our campaign, the time of October, 1964—who were the individuals at that time who were transferred from the warehouse to the selling floor at either St. Albans or Charleston? A I couldn't tell you any person, because that's been two years ago. I couldn't say we had a specific person transferred out on the floor.

Q Is that—for your recollection, was Wayne Baker transferred? A Wayne Baker helped out on the floor.

[fol. 366] He helped out in the Cosmetics Department.

Q What did he do? A He helped price merchandise, put it on the shelf.

Q What about Sam Nelson, who was a man in the warehouse? A Sam Nelson worked primarily in the warehouse. I think someone—I don't know who it was—stated he did work out on the floor a few days.

Q What about Everett Nichols; did he ever work on the floor? A He would go out and help occasionally, yes. He would take merchandise to the floor.

Q I think all of the employees in the warehouse occasionally took merchandise out A Yes, sir; this is correct.

Q Now, on how many occasions did these people go out on the floor and sell? A Not too often. As I said, it was only in busy seasons that we asked them.

By the same token, we might be busy in the warehouse and some of our people in the departments go and help in the warehouse.

Q Wasn't this for the purpose of moving merchandise from the warehouse to the floor? A That's the whole principle of any operation, is getting merchandise from our warehouse to the floor.

[fol. 367] Q Yes; and, in short, the reason that the selling employees came to the warehouse was because there was merchandise in the warehouse that was in demand on the floor? A Not on all occasions; yes, sir. We have asked some of our people in the departments to help unload trucks when we were real busy.

Q Now, in your own position, Mr. Darnall, how much of your time do you spend in the main office, which at the

time of the proceeding was in Nitro, I believe? A Oh, it will vary. Some weeks I might be in the office all week; the next week I might be out all week, at stores.

Q Now, at the time of these proceedings, there were, in addition to the Nitro warehouse, there were five stores. At that time there was St. Albans, Charleston, Huntington, Parkersburg, and Ashland? A That's correct.

Q Now, how much of your time did you spend at the St. Albans store? A Oh, it would vary, again. As I say, my duties take me to all stores, so there is no percentage chart I could break it down.

Q Would you visit the St. Albans store at least once a month? A I was probably in the St. Albans store probably twice a week.

[fol. 368] Q And what about Charleston? A Probably about the same.

Q And what about Huntington? A Huntington and Ashland were a little off the beaten track so I might go once a week.

Q And what about Parkersburg? A Probably once every two weeks.

Q Now, when you visited those stores, would your contact be with the employees or would it be with the manager of the store? A Basically it would be with the manager of the stores and we would, on several occasions, visit with employees, have general meetings with the employees.

Q Your visits at St. Albans, when you went to St. Albans, would you spend a full day there or a portion of the day? A No; a portion of the day.

Q All right. Would you on occasion visit both the Charleston and St. Albans store on the same days? A Yes, sir.

Q Did you ever visit more than one store per day? A Quite often; yes, sir.

Q Now, you were referring, I believe, to some small items and you used as an example light switches and the small electrical connections that have to be individually priced.

[fol. 369] Now, you said that that is done in the warehouse. In which warehouse is that done? A Well, we do it, in most cases, in all warehouses; now, not at all times in Charleston warehouse, particularly.

We do it religiously, at all times—in the St. Albans warehouse it depends on how really busy they are on the floor, whether it is all done there, but our warehouse is set up.

Now, Huntington stores we would do it most of the time in the warehouse, but our stores are set up so that if need be we can price it all right in our warehouse.

Q Well, when it is done in the warehouse, who does it? Do the warehouse employees do it or the department? A The warehouse employees help. The people on the floor help.

We might, on occasions, pull cashiers off the registers in the afternoon, when we are not busy. They in turn help.

Q Now, you have a central warehouse at Nitro but all of your merchandise does not go through Nitro, does it? A No, sir.

Q What percentage of the merchandise is delivered directly to the stores? A Probably I would say 50 percent of it is delivered to the stores.

Q I see. Then, as far as any individual store is con- [fol. 370] cerned, half of their merchandise would come from Nitro and the other half would come directly from suppliers? A Yes, sir; all clothing is shipped direct. All of our jobbing orders which I referred to, we use about ten jobbers; that is all shipped direct.

In some cases, part of our cosmetics are shipped direct, where we buy large quantities, where we can get the manufacturer to break them down and ship them in this manner.

Q There was some reference to your now having two stores in the Charleston area, one on Washington Avenue, in Charleston, the other in Kanawha City. A Yes, sir.

Q Now, at the time this proceeding arose, isn't it correct that the Kanawha store was not opened at that time? A That's true; yes.

MR. MITTENDORF: That's all.

REDIRECT EXAMINATION

BY MR. HOLROYD:

Q Ray, the pricers in the warehouse, are they physically separated from the other employees of the warehouse,

and if so, in what way? A Are you talking about the Nitro warehouse?

Q The Nitro warehouse, yes. A The pricers in the Nitro warehouse are most of them in the Cosmetics Department. It is still within the given area of the general [fol. 371] warehouse. It is located on one side.

Q Just on the side of the store? A Yes, and we do have, around two sides, we have a partial partition, and the reason for this partition is because we put shelving to stock merchandise in.

Q Now, in the earlier hearing you testified as to your duties as personnel director, and I am not sure that this was covered, but I will ask you anyway: as personnel director, do you make such policy decisions as the description of each individual job, who should do what? A Yes.

Q And who they should be answerable to? A Yes; actually my job in personnel is director of the store operation, which includes personnel.

Q All right. And as I understand it, you are the top man in the company who makes the determination as to who should answer to whom among the employees? A That's right.

Q And it has been your determination that the pricers shall answer, that the pricers in the store shall answer to the warehouse foreman; is that correct? A Yes, sir; that is correct.

Q And you have also testified that all clothing is sent direct to the stores? A Yes.

[fol. 372] Q And also all other jobbing is sent to the stores. Do you receive any clothing at all in the central store in Nitro? A Occasionally we bulk merchandise.

Now, in our clothing department, we consider dosmestics. We might receive a truckload of bed pillows. We might buy a truckload of tennis shoes, which is also included in our shipping, that we might ship to Nitro warehouse.

Q Now, on these items that are received in the Nitro warehouse, who prices them? A They are in turn shipped, broken down and shipped to the stores and they are priced in the stores.

Q Priced in the stores.

Now, you say that at the time that this thing was set up that you had spent twice a week in the stores in issue here? A Normally, yes.

Q Now, when these stores were initially set up, that is, you weren't working for the company when the Washington Avenue store was set up? A I started in July, '61, prior to the opening of the St. Albans store and the Charleston store.

Q Then you are familiar with the duties of the employees there? A Yes, sir.

[fol. 373] Q As well as the duties of the employees in the St. Albans store? A Yes.

* * * *

TXD-647-65
Charleston, W. Va.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Cases Nos. 9-CA-3356,
3477

HECK'S, INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

William C. Mittendorf, Esq., of Cincinnati, Ohio, for the General Counsel.

Gardner, Gandal & Holroyd, by *Fredrick F. Holroyd, Esq.*, of Charleston, W. Va., and *George V. Gardner, Esq.*, of Washington, D. C., for the Respondent.

Pottenbarger & Bowles, by *Martin C. Bowles, Esq.*, of Charleston, W. Va., for the Charging Union.

Before: *Thomas F. Maher*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a charge and an amendment thereto filed on October 23 and December 4, 1964, and a second charge filed on February 15, 1965, by Chauffeurs, Teamsters and Helpers Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the Regional Director for the Ninth Region of the National Labor Relations Board, herein called the Board, issued a consolidated complaint and an amendment thereto on behalf of the General Counsel of the Board against Heck's, Inc.,

Respondent herein, alleging violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151, *et seq.*), herein called the Act. In its duly filed answer Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practice.

Pursuant to notice a hearing was held before me on June 28 and 29, 1965, at Charleston, West Virginia, where all parties were represented by counsel and afforded full opportunity to be heard, to present oral argument and to file briefs with me. Although the parties were specifically invited to file briefs with me on the issue of refusal to bargain presented herein, only Respondent complied.

Upon consideration of the entire record, including Respondent's brief, and upon my observation of each witness appearing before me, I make the following:

Findings of Fact and Conclusions of Law

I. The business of the Respondent

Heck's, Inc., Respondent herein, is a West Virginia corporation engaged in the retail sale of merchandise, including ready-to-wear clothing, sporting goods, hardware, household goods, toys and cosmetics at various locations in the States of Kentucky and West Virginia, including Ashland, Kentucky, and Huntington, Parkersburg, Nitro, St. Albans and Charleston, West Virginia. It is stipulated that during the 12-month period ending in May 1965 Respondent, in the course and conduct of its business operations, had a gross volume of retail sales in excess of $500,000, and purchased directly from points outside the State of West Virginia and had shipped directly to it in West Virginia goods and products valued in excess of $50,000. Upon the foregoing I conclude and find that Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

It is conceded and I accordingly conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The issues

1. The discrimination against James Goins.
2. The supervisory status of Ivan Vickers.
3. The failure of Vickers to use due prudence in seeking reinstatement.
4. Respondent's threats to and interrogation of employees.
5. The failure of proof as to the appropriateness of the bargaining unit.

IV. The unfair labor practices

A. *Sequence of events*

1. The Union demand for recognition and Respondent's refusal

In the Charleston, West Virginia area, and specifically in Charleston itself, and nearby Nitro and St. Albans, Respondent operated discount department stores, each with its own warehouse, separately supervised and manned with its own distinct work force. Early in October 1964 some of these warehouse employees developed an interest in the Union, sought out the Union's business agent, Robert Jackson, and obtained from him instructions on organizing the employees together with a supply of blank authorization cards. Prominent in this initial activity were Employees James E. Goins and Virgil R. Searls, and Ivan L. Vickers, whose supervisory status is in issue. By October 9, 13 cards authorizing the Union to represent them had been signed by employees in the three warehouses and submitted to Jackson. The signers and their designated occupations were:

Charles D. Curry	Receiving and Shipping Clerk
Charles G. Ferrell	Warehouseman
James E. Gions	Laborer
Edward L. Hughart	Warehouseman
Richard Johnson	Truckdriver
Franklin T. Lanham	Laborer
James A. May	Laborer

Opie G. Nelson	Warehouseman
Samuel D. Nelson	Warehouseman
Virgil R. Searls	Warehouseman
Doyle Thornton	Warehouseman
Ivan L. Vickers	Shipper
Larry Woodall	Truckdriver-Warehouseman

Thereafter, on October 10, Everett Nichols, Warehouse Clerk, signed an authorization card, and on October 13 Anna L. Adkins, a Cosmetics Pricer, did likewise.

On the afternoon of Friday, October 9 Jackson met with Respondent's president, Fred Haddad, and informed him that a majority of employees having signed up with the Union he was requesting recognition of the Union for the truckdrivers and warehousemen employed at the warehouses in Nitro, Charleston and St. Albans. In support of his claim and request Jackson presented the cards to Haddad who inspected each one in turn. After expressing surprise at the identity of some of those who had signed the cards and some consultation with Personnel Manager Ray Darnell he suggested going through the warehouses and talking with the men involved. This idea was vetoed by Jackson.[1] Haddad then sent for Ivan Vickers whose card was among those in the pack and, showing him the card, asked him if he signed it. Vickers replied that he had. Whereupon Haddad directed Vickers to return to work.

During the course of the conversation generated by Jackson's request for recognition he indicated, as noted above, that it was for the warehouses at Nitro, Charleston,

[1] The foregoing is the credited testimony of Jackson. President Haddad denied having seen the cards, testifying that he only looked at the top one, Vickers', and then after "flipping through them" without looking at them he handed them to Personnel Manager Darnell whom he had meanwhile summoned to the meeting. Darnell was not questioned concerning this. I do not accept Haddad's uncorroborated denial that he saw these cards, contradicting as it does Jackson's credited account of the incident. Moreover, Employee S. D. Nelson corroborates Jackson to the extent that Haddad inspected the cards. Thus he credibly testified that Haddad told him that "the union representative had been there and showed him cards signed by the employees of Heck's" and that when Haddad say Nelson's name "he almost passed out."

and St. Albans. At this point Haddad informed him, according to Jackson, "that he also had stores in Huntington and Parkersburg, West Virginia, and Ashland, Kentucky, each of them having warehouses," but Jackson persisted in his original request for a unit limited to the local warehouses and expressed a willingness to limit the scope of the unit further.[3] Jackson added that "there was some discussion of the clerks and all and I informed him that there was no request for recognition of the clerks, that we did not historically negotiate for clerks." Haddad refused Jackson's several requests for recognition and negotiation of a contract, stating each time, "No comment."

Thereafter on October 12 or 13, in the course of a conversation with Haddad concerning the reinstatement of a recently discharged employee (*infra*, p. 5) Jackson again asked for recognition and bargaining and Haddad again refused.

2. Interference, restraint and coercion of employees

Immediately following Haddad's conference with Jackson on October 9, Warehouse Manager Roy Foy called a meeting of the warehouse emloyees. Haddad addressed the group on this occasion telling them he was surprised at their selection of the Union and asking them as a group what it could do for them, pointed out to them the things he could do regardless of unionization. Thus he explained that he did not have to guarantee a 40-hour week, and that he could require the men to work split shifts. He then singled out an employee in the group, Charles Lewis, and asked him if he had signed a Union application. Lewis replied that he had not. Haddad concluded his remarks by assuring the employees that anyone could withdraw from the Union if he wished and that Respondent would not discharge anyone for joining.[4]

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[3] Ivan Vickers credibly testified that at an employee meeting later the same day Haddad stated he did not believe the Union could win an election because the warehouses of all five stores would be involved.

[4] When Personnel Manager Darnell addressed the meeting, he stated that FMC, a local industry, was in the midst of a strike, and

On the next day, October 10, Harry Turner, also known as Junior Turner, Department Head of Housewares at the Charleston store, drove to the Nitro warehouse, sought out Employee S. D. Nelson and invited him to his car in the parking lot where the two talked, at some length. In the course of this conversation Turner asked him to verify the fact that he and another employee, Woodall, had joined the Union. According to Turner himsef, whom I credit, he said:

> We got to talking about the union. I got to telling him the good points that we had at the store and what the company could do if they wanted to. They didn't have to give us the bonus and they didn't have to have these parties for us and stuff like that. I was explaining the good points to him about it.
>
> * * * *
>
> Q. Did you make any threats or promises to him as to what would happen if he did or did not join the union?
>
> A. I told him what could happen. The company could cut our raises off, cut it off short, and stuff like that. It was to your own advantages. And our vacations.
>
> * * * *

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if it were forced to move out of town Respondents business would suffer. Counsel for General Counsel contends that this statement on the part of Darnell supports an allegation in the complaint (Par. 5(b)(i)) that the statement, coupled with another to the effect that unionization of Respondent's operations would reduce its discount potential and business, constituted an unlawful threat. There is nothing in the record to indicate that Darnell made any reference to the reduction of Respondent's discount potential.

Actually it was Warehouse Manager Foy, according to Goins, who made the statement in question, specifically that Heck's could not operate with a union and continue as a discount house. At the hearing counsel for the General Counsel was apprised of the fact that the complaint contained no allegation of statements attributable to Foy, an admitted supervisor, and he replied that "this does not go directly to any allegation of the complaint." Under such circumstances, I believe that Respondent was relieved of an obligation to refute the statement or to otherwise litigate the issue. Accordingly, I will not consider the Foy statement in any conclusion I make herein.

Q. Did you tell Mr. Nelson that if the union was voted in that the company would discontinue granting bonuses or reduce the work hours of the employees?

A. No. I said they could.

Q. Did you tell Mr. Nelson that you knew that he and another man, Mr. Woodall, had signed union cards for the union?

A. Yes, sir.

(Tr. 207-209)

A week later, on October 17, Employee S. D. Nelson had another significant conversation, this time with President Haddad who summoned him to his office. After telling Nelson he had seen his union card among those presented by Jackson (*supra*) Haddad offered him a salaried job of $325 per month if Nelson would help "break up the union in the St. Albans store." When Nelson refused Haddad then asked if he believed he was due for a raise. Nelson expressed doubt because of his union activity whereupon Haddad sent for Personnel Manager Darnell and the two of them checked out a list and stated their conclusion that Nelson was not due for his raise. Then Darnell said, "I wished that you could be on our side."[4]

A week later, on October 23, Haddad made the same proposition to Ivan Vickers who, unlike Nelson, accepted it. Haddad sent for Vickers and in the presence of Personnel Manager Darnell and Merchandise Manager Ellis complimented him upon his work and said he wanted to make a "deal" with him. The "deal" was to put Vickers on a $350 per month salary to help break up the Union by exerting his influence over his fellow workers.[5]

The foregoing statements and incidents portray a pattern of interference, restraint and coercion of employees.

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[4] The credited testimony of Employee Nelson. Neither Haddad nor Darnell denied the conduct or statements attributed to them.

[5] The credited testimony of Vickers. Ellis was not questioned about the incident. Haddad and Darnell both corroborate the details of Vickers' transfer to salary status, and Haddad denies any reference was made to the Union. I do not accept Haddad's denial. Darnell testified simply that nothing was said about the Union "to his recollection." I do not accept this as a denial on his part.

Thus Respondent, through its officials and supervisors, in reprisal for the employees joining the Union, threatened to cut this workweek, and, tantamount to a threat in each case, stated that it *could* withdraw bonus payments, eliminate company parties and cut off raises. Similarly, and during the same period it publicly interrogated Employee Lewis concerning his union membership, and sought to bribe Employee S. D. Nelson to work against the Union.[6] Citation of authority is unnecessary to establish that such conduct violates Section 8(a) (1) of the Act and I so conclude and find.

3. The discharge of James Goins

On the following morning, Saturday, October 10, Employee James Goins was assigned the duty of washing down the warehouse driveway with a fire hose and in the course of it became water soaked to an extent that is in serious dispute. Goins testified he was "sopping wet" from the shoulders down, as the consequence of wielding a leaky nozzle. Ivan Vickers testified merely that he was wet, whereas Goins' supervisor, Graley, testified that Goins' clothing was wet for a distance of 18 inches above the floor.[7] A synthesis of the testimony does establish, then, that Goins was wet and that his request to go home had factual justification. Whereupon, having requested and obtained Supervisor Foy's permission to leave, he did so. Upon his return on Monday, October 12, Goins found his timecard missing from the rack. He questioned Foy who first told him that he had left on the previous Saturday without permission and then stated that his work had been unsatisfactory during his 90-day probation period and that they were going to have to let him go.

The foregoing findings are based on the credited testimony of Employee Goins. I do not accept Supervisor Graley's testimony as credible, having observed him on the

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[6] In view of my finding that Employee Vickers is a supervisor (*infra*) I make no finding as to whether the successful bribing of him for the same purpose is violative of the Act.

[7] Dependent upon the length of the leg involved this would place the high water mark somewhere between Goins' calf and knee.

witness stand. Throughout his testimony he was hesitant and evasive, and on a number of occasions completely confused, all to such an extent that he inspired no confidence whatever in his testimony respecting Goins. As an example of Graley's confused testimony I would cite his insistence that he knew nothing at all about the Union campaign. It had been credibly testified to by both Goins and Vickers without contradiction, however, by any of Respondent's witnesses that President Haddad had called an employee meeting on October 9, following Jackson's request for recognition, and that Darnell and Graley were present and had spoken to the men. Under such circumstances Graley's professed ignorance of Union matters cannot be accepted. Accordingly I reject all of Graley's testimony, and particularly his testimony that he smelled alcohol on Goins' breath on several occasions, and that this was why he reported him to Foy on Saturday, October 10. Not discounting the possibility that Goins may well have exuded an odor comparable to alcohol, which could have been anything from bonbons to beer to mouthwash Graley did not impress me as one capable of making a refined judgment in such matters. Judging from the manner in which he conducted himself when confronted with questions concerning this subject on cross-examination, indeed a complete unwillingness to give a straight-forward answer, I conclude and find that his story was a fabrication.

I can give no more credence to the report as it comes from Personnel Manager Darnell, who approved Goins' discharge. Thus Darnell testified that Supervisor Foy, in reporting the details of the entire incident to him, included Graley's report that he had smelled alcohol on Goins' breath. Darnell's testimony becomes, at best, hearsay twice removed,—and specifically, hearsay whose source I reject at the outset. I accordingly reject any suggestion in the record that Goins was ever known to have indulged in alcoholic beverages to excess or that he had the odor of such on his breath.[8]

[8] It is significant to note that Goins testified credibly that he does not drink, and that Foy, the supervisor who discharged him, has himself been discharged and cannot be located to testify.

Upon the foregoing facts and conclusions certain other conclusions emerged. Thus it appears that Goins, who had permission to leave was discharged (1) for leaving, (2) for unsatisfactory performance that was unsubstantiated on the record, and (3) inferentially for conduct, if such we may classify bad breath, that was never proven. Occurring as it did on the day following the Union's request to bargain *after* which Respondent's officials engaged in conduct which I have found to constitute unlawful interference, restraint and coercion I have no hesitation in concluding that Foy, the missing supervisor, with Darnell's knowledge, dismissed Goins for the reason that he was known, by Haddad's inspection of union cards, to be a member of the Union and, by the proximity in which he worked with such supervisors as Graley and Foy, to be the one who was soliciting Union memberships.[9] In so concluding I further find and conclude that the reasons suggested by Respondent, unsubstantiated and conflicting as they are, are but pretexts to mask Respondent's true purpose, its attempt to thwart the Union's campaign. Such conduct has consistently been held to constitute discrimination in violation of 8(a) (3) and (1) and I so find and conclude here.

4. The failure to reinstate Ivan Vickers

Ivan Vickers, who has figured prominently in the Union activity described heretofore, is claimed by Respondent to be a supervisor. To this end it adduced considerable evidence in support of its contention, through testimony of President Haddad, Darnell, and Ellis. Moreover, Vickers himself testified that prior to his transfer to the Nitro warehouse he had been manager of Respondent's Lewis Street warehouse and while claiming he did not consider himself to be a supervisor at Nitro because he "wasn't in charge of the warehouse," he was told he was in charge of shipping and he did, in fact, assign warehouse employees to loading and unloading trucks and directed them to filling orders. He also attended supervisory meetings. Accordingly, based upon Vickers' own description of his

[9] *Wiese Plow Welding Co., Inc.*, 123 NLRB 616.

duties as they existed both before and after his Nitro assignment, I conclude and find him to be a supervisor within the meaning of the Act.

On December 3, 1964, Vickers left Respondent's employ to enlist in the United States Air Force. Thereafter, on December 31 he was granted a temporary medical discharge from the service and immediately sought to return to Respondent's employ. He called Merchandising Manager Ellis who took his telephone number and assured him "he thought it would be fine" and would check with Personnel Manager Darnell. Ellis never called back and Vickers heard nothing further. Ellis' testimony lends confusion to the situation. Thus he stated that he *either* referred Vickers to Darnell or said he would check with Darnell, *or* that Vickers should come in and see them. Under such confused circumstances Ellis' testimony is of little value and I rely completely upon Vickers' account. Vickers was returned to his job in March upon the intervention of officials of the United States Veterans Administration. General Counsel alleges Respondent's refusal to recall Vickers during the intervening period to be discriminatory in violation of Section 8(a)(3) of the Act.

Common prudence would suggest that an employee do something more than make a telephone call to secure the reemployment rights due him upon return from military service. Here Vickers, by his own admission, did nothing more and was content to wait for the two or three months during which the governmental wheels turned sufficiently to obtain his job for him. Under these relaxed circumstances I am not disposed to equate Vickers' disinterest with a manifestation of Respondent's discriminatory motive. If, indeed, Respondent was disposed to discriminate against him, Vickers at least had the obligation to establish a case in his own behalf. Sitting upon any rights he may have thought he had is a far cry from this. I accordingly conclude and find upon the record made by Vickers himself that he was not being deprived of employment as a supervisor [10] during the period in which

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[10] Assuming, contrary to any conclusion herein, that the equities preponderated in Vickers' favor in this matter, it is well established

he blithely waited for someone to return his telephone call. I therefore recommend that so much of the complaint as alleges discrimination against Ivan Vickers in violation of Section 8(a) (3) be dismissed.

5. The alleged refusal to bargain

It is clear from the testimony of Union Representative Jackson, General Counsel's own witness, that President Haddad questioned the scope of the bargaining unit when Jackson requested bargaining on October 9. Thus Haddad told Jackson he had warehouses other than the three whose employees' cards were presented him. In elaboration Jackson testified:

> Mr. Haddad said that he had warehouses in all his stores and as a result questioned the unit. However, I told him that I was amenable to negotiate either on behalf of the Nitro Warehouse or separate contracts for the warehouses in the stores.
>
> (Tr. 35)

At this juncture none of the events which I have detailed above, and have found to constitute violations of the Act, had occurred. Under usual circumstances it would be appropriate to inquire, therefore, whether Haddad's refusal in this context was or was not a good faith doubt, particularly in view of his and associates' subsequent conduct. But these do not appear to be usual circumstances and it would seem that as there is so much confusion surrounding the identity and composition of the unit—as sought initially by Jackson, as understood by Respondent, and as urged by General Counsel—that the element of good faith refusal to bargain in a unit appropriate for bargaining need never be reached.

Jackson concededly requested bargaining in behalf of the drivers and warehousemen at the Nitro, St. Albans, and Charleston warehouses and three days later filed a petition for an election in the same unit. Nevertheless, as

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that an employer may lawfully refuse to rehire a former supervisor who applies for a supervisory position. *Pacific American Shipowners Assn.*, 98 NLRB 582, 596.

quoted above, he expressed a willingness at the time *not to be bound* by the scope of the unit he requested.[11] General Counsel, on the other hand, in a consolidated complaint initially issued on April 22, 1965, alleged as the appropriate unit all truckdrivers and warehousemen at Respondent's Nitro warehouse and St. Albans store, with the usual exclusions, and by a June 3 amendment added to this unit the same classifications employed at Respondent's Charleston "store and warehouse." And finally by a document introduced into the record by counsel for the General Counsel entitled "Warehouse Employees" it is claimed that those employees listed thereon as Truck Drivers or Warehousemen at Nitro, St. Albans, and Charleston warehouses constitute the total eligibility list, plus Employee Goins who had been discharged by that time (*supra*, pp. 5-7) and was therefore not on the list. For reasons which follow the total number of employees eligible for inclusion in the unit cannot be precisely determined.

It should now be noted that a distinction exists on the so-called eligibility list between "Drivers and Warehousemen" and other classifications such as "Pricer" and "Receiving Clerk," both of whom General Counsel explicitly stated he would exclude from the unit. This distinction becomes dim, however, at certain points and to such an extent that the terms "Warehousemen" and "Warehouse Employees" are used interchangeably. Thus when Jackson was asked by me to repeat precisely the unit for which he was seeking recognition he stated to me, "Truckdrivers and warehouse employees." And when counsel for General Counsel introduced what, upon refinement, becomes the eligibility list, he referred to it as "a list of the warehouse employees." While it is true that after considerable

[11] Cf. *Sportswear Industries, Inc.*, 147 NLRB 758, wherein the Board, at p. 760, stated:

> Once having defined the unit it claims to represent, and having made a demand on that basis, the Union has thereby established the frame of reference for measuring the validity of its demand. "Such a requirement imposes on the union representative only the obligation to say what he means. Failing to do so [the union] cannot be considered as having made the sort of request to bargain which imposes upon an employer a legal obligation to comply" (footnote omitted).

probing on my part the purpose of this list was clarified as being relevant only had it contained the names of all the drivers and warehousemen at the three designated warehouses, nonetheless it is significant to note that ambiguity certainly attended the proceedings at this point.

Upon further development of the evidence as to the appropriate unit other elements of confusion appear. Thus, although General Counsel stated specifically that Pricers "were not to be included in the unit," his own witness, Franklin T. Lanham, corroborated Personnel Manager Darnell's undenied testimony that the duties of the male Pricers differed little, if any, from those of "Warehousemen," the difference being that in addition to loading and unloading trucks and stocking shelves, as do Warehousemen, the Pricers also mark the merchandise. Female Pricers are not required to do the heavy work, it being performed by the Warehousemen.

Nor does the election petition filed by the Union on October 12, 1964, add clarity. Thus, while giving the several addresses of the Employer in one section of the petition form it describes the unit requested as "all employees of the Employer employed *at its places of business* as warehousemen and truckdrivers" (emphasis added).

Finally, as the hearing progressed and in the course of determining the unit eligibility of an employee in one of the warehouses (Anna Lou Adkins) counsel for the General Counsel was reminded that the employee whose card was being discussed was a "Pricer," the category previously excluded from the unit by counsel's earlier statement of position. In reply counsel stated to me:

> I am aware of that, sir. But I still have this problem of what the final unit determination is going to be.
> (Tr. 162)

And earlier in the record when asked by me to clarify the duties of an allegedly eligible employee to determine his inclusion as a Warehouseman counsel stated:

> I am aware of the problem you would have with this. But at the same time I am aware that we can concerned with the situation that the appropriate unit has not actually been determined as of this time.
> (Tr. 135)

Upon the foregoing conglomeration of scanty data the Board, through me, is being asked to conclude that the Union represented the majority of the Respondent's employees in a unit appropriate for bargaining and that President Haddad's refusal to bargain, as detailed above, was not grounded in good faith either as to his doubt of the majority, or of the appropriateness or scope of the unit requested, or both.

Section 9 of the Act provides the framework for the laboratory conditions which the Board deems so essential for the determination of employee representation. Through appropriate rules of decision and its regulations [12] procedures have historically been availed of to provide a forum to assess the duties of those sought in a bargaining unit, the extent of the unit's scope, and a myriad of complications that must be resolved to achieve a reasonable determination of the unit in which a fair election is to be held; all of this through the orderly participation and contribution of both employer and union representatives. Similarly in the conduct of the election itself, where ineligible employees are permitted the privacy of their choice, safeguards are provided in the form of challenge available to all parties to insure that eligibility is maintained and that irregularity is eliminated.

With all due respect to able counsel participating in this proceeding and with full recognition of my own procedural limitations I fail to see how the materials presented in evidence here provides an adequate substitute for the orderly procedure and determination customarily available.

The essence of this case is twofold: that Jackson claimed a majority in an appropriate unit, and that Haddad's refusal was or was not in good faith. As to the former, upon full consideration of evidence presented and the conflicts this evidence contains, I am persuaded that General Counsel has failed to meet the burden of establishing what precisely was the appropriate unit in which the Union had its majority. Failing in this respect and thus creating for me an unresolved doubt concerning the unit, I am not

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[12] See Rules and Regulations, Series 8, as amended, Sec. 102.61 *et seq.*

disposed to conclude that Respondent's refusal or *its* doubt was any less reasonable, particularly when this refusal rested, at least in part, upon the fact that Respondent had in its employ warehousemen not included in the unit requested.

Upon all of the foregoing considerations, therefore, I would recommend that so much of the complaint as alleges Respondent's refusal to bargain be dismissed.

V. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section IV, above, occurring in connection with its business operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The remedy

Having found that Respondent has engaged in unfair labor practices I shall recommend that it cease and desist therefrom and, because of the gravity of its conduct I shall also recommend that it cease and desist from infringing in any other manner upon the rights of employees guaranteed by Section 7 of the Act.[13]

Affirmatively I shall recommend that James Goins, whom it discriminatorily discharged, be reinstated to his former or substantially equivalent position, if this has not already been done, without prejudice to seniority or any other rights and privileges, and that he be made whole for any loss of earnings suffered by him because of Respondent's discrimination against him, with backpay computed by access to the Company's books, records and accounts, and in the customary manner,[14] with interest added thereto at the rate of 6 percent per annum.[15]

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[13] *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 433.

[14] *F. W. Woolworth Co.*, 90 NLRB 289.

[15] *Isis Plumbing & Heating Co.*, 138 NLRB 716.

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend [16] that Heck's, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, activities or desires.

(b) Threatening their employees with reprisals if they select the Union as their representative.

(c) Offering or granting their employees wage increases and/or promotions in exchange for their active opposition to the Union.

(d) Discharging or otherwise discriminating against employees in respect to hire and tenure of employment for the purpose of discouraging union membership or engaging in concerted activities.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to James Goins to his former or substantially equivalent position and make him whole in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Post at its Nitro, St. Albans and Charleston, West Virginia stores and warehouses copies of the notice attached hereto as "Appendix." Copies of said notice to be furnished by the Regional Director for the Ninth Region shall after being duly signed by the Respondent, be posted immediately upon receipt thereof, in conspicuous places, including places where notices to employees are

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[16] In the event that this Recommended Order be adopted by the Board, the word "RECOMMENDED" shall be deleted from its caption and wherever else it thereafter appears; and for the words "I RECOMMEND" there shall be substituted "THE NATIONAL LABOR RELATIONS BOARD HEREBY ORDERS."

customarily posted, and be maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director in writing within 20 days from the receipt of this Decision what steps the Respondent has taken to comply therewith.[17]

(d) Notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

It is FURTHER RECOMMENDED that so much of the complaint in this proceeding as alleges unlawful discrimination against Ivan Vickers and Respondent's unlawful refusal to bargain with the Union be dismissed.

Dated at Washington, D. C.

/s/ Thomas F. Maher
Trial Examiner

[17] In the event this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

TXD-647-65

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT unlawfully interrogate our employees concerning their union membership, activities, or desires.

WE WILL NOT threaten our employees with reprisal for engaging in union activities or for supporting CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization.

WE WILL NOT offer or grant our employees wage increases and/or promotions in exchange for this opposition to the aforesaid union.

WE WILL NOT discharge, or otherwise discriminate against our employees in respect to hire or tenure because they are leaders in the aforesaid union or have participated in concerted activities protected by Section 7 of the National Labor Relations Act.

WE offer immediate and full reinstatement to his former or substantialy equivalent position to James Goins, and WE WILL make him whole for any loss of pay he may have suffered, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

WE WILL notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All of our employees are free to become or refrain from becoming members of the above-named union, or any other labor organization.

HECK'S, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2023, Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684-3627).

TXD-149-67
Charleston, W. Va.

* * *

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

Statement of the Case

On November 30, 1965, a Decision was issued by me in this proceeding finding and concluding that Respondent herein, Heck's, Inc., had not unlawfully refused to bargain collectively with Chauffeurs, Teamsters and Helpers, Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as the Union Company, and I accordingly dismissed the Section 8(a)(5) allegation, for the reason that the General Counsel had failed to meet the burden of establishing what precisely was the appropriate unit in which the Union had its majority. In addition, I made certain findings of violations of Section 8(a)(1) and (3) of the Act and recommended that specified remedial action be taken with respect thereto. The case was transferred to the National Labor Relations Board, herein called the Board, on the same day. Thereafter counsel for the General Counsel and Respondent filed exceptions to my Decision and counsel for the General Counsel filed a brief in support of his exceptions.

In due course the Board, upon review of my Decision, the exceptions, supporting briefs and the record, on March 23, 1966 issued its Order Reopening Record and Remanding Proceeding to Regional Director for Further Hearing. The Board found "on the basis of the entire record that the General Counsel was plainly contending that the appropriate unit consisted of all truckdrivers and warehouse employees at the Nitro, St. Albans and Charleston warehouses" of the Respondent. It ordered that the hearing be reopened for the purpose of adducing additional evidence concerning the nature and appropriateness of the bargaining unit, the majority status of the Union, and the alleged refusal of the Respondent to bargain with it, and directed that I prepare and serve upon the parties a Supplemental Decision containing findings of fact, conclu-

sions of law and recommendations to the Board based upon the evidence contained in the entire record.

Pursuant to notice issued on September 28, 1966, by the Regional Director a further hearing was held before me in Charleston, West Virginia. All parties appeared and were afforded full opportunity to be heard, to adduce relevant evidence, to examine and cross-examine witnesses, to present oral argument and to file briefs. Briefs were filed with me on December 15, 1966, by counsel for Respondent and the General Counsel.

Upon the entire record, including the evidence adduced at both the original and subsequent hearings, and all briefs submitted by the parties, I make the following:

Findings of Fact and Conclusions of Law

A. *The Scope of the Remand*

In its Order of Remand the Board specifically found "on the basis of the entire record that the General Counsel was plainly contending that the appropriate unit consisted of all truckdrivers and warehouse employees of the Nitro, St. Albans and Charleston warehouses," these being the three stores and warehouse locations established in the Charleston area, and discussed and identified in further detail in my original Decision.[1]

Because the Board deemed the record before it inadequate "to determine the unit and majority questions" I have been directed to adduce evidence as to (1) whether the unit sought by the Union was in fact "appropriate" for the purposes of collective bargaining, (2) whether the Union represented a majority of employees in said unit, (3) whether the Respondent's refusal in said unit was lawful.

B. *The Unit Claimed by General Counsel*

As determined by the Board in its Order of Remand the General Counsel contends that the unit appropriate for collective bargaining herein consisted of

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[1] Reference to my original Decision at a designated page will be indicated herein as TXD, p. ——.

> All truckdrivers and warehouse employees at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees.[2]

C. *The Appropriate Unit*

In response to the Board's inquiry in its Order of Remand as to the appropriateness of the bargaining unit sought by the Union there is a basic difficulty. It has not been established by the record that when the Union made its demands it did so in a given unit. Thus, as previously found, Union Representative Jackson credibly testified at one point

> Mr. Haddad said that he had the warehouses in all his stores and as a result questions the unit. However, I told him that I was amenable to negotiate either on behalf of the Nitro Warehouse or separate contracts for the warehouses in these stores.
>
> (Tr. 35)

Precinding from this for purposes of determining the appropriateness of the unit which the General Counsel contends for, that unit may be identified as comprising the employees at the several warehouses of the Respondent's retail chain stores located in the Charleston, West Virginia, geographical area.

As to the retail stores themselves it is settled that all of such located in a geographical area may constitute a single bargaining unit.[3] It is equally well settled that a unit of employees in the retail industry engaged in warehouse functions, including the truckdrivers, constitutes an appro-

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[2] The excluded categories were not set forth in the General Counsel's original contention but appeared for the first time in his most recent brief to me. At the further hearing counsel for the General Counsel indicated on the record as intent to set forth an alternate unit position. As the Board has specifically ruled on the nature of the unit being contended for I precluded counsel from further discussion of alternatives.

[3] *Sav-On Drugs Inc.*, 138 NLRB 1032.

priate bargaining unit.[4] *A fortiori*, two or more groups of employees constituting all of the employer's warehouse employees in the geographical area would likewise constitute an appropriate unit.

The record in the instant proceeding discloses that in the respective warehouses there is a complete separation of functions of the warehouse employees and the selling personnel, and no interchange between either group. Thus the respective warehouse areas are completely partitioned off from the selling areas, inter-access being by door; the individuals employed in the warehouse are separately supervised there; they perform the usual warehousing functions such as a truck unloading, unpacking, pricing, storing, and the delivery of items to the selling floor. There is, however, a dispute as to whether certain Pricrs should be included in the unit, it being stipulated, nevertheless, that those at the Nitro store be included. The General Counsel would exclude the Clothing Pricers at the St. Albans and Charleston warehouses, Employees Taylor and Russe, while on the other hand the Company would include them. Everyone agrees the Pricers at Nitro should be included. Both Taylor and Russe, each of whom price clothing exclusively, work in warehouse areas, but in each case in a section partitioned off from the rest of the warehouse. In the course of their duties each of them receive pricing instructions from the supervisor of the Clothing Department. Each employee is carried on Respondent's personnel records as a warehouse employee and there is no evidence that they are engaged in selling functions as part of their usual duties.

From the credited testimony of Employees Larry Woodall and Doyle Thornton, called as witnesses by the General Counsel, and of Personnel Manager Ray Darnell, it is clear that except for the segregated work areas provided for Clothing Pricers at each warehouse the nature of their duties does not differ substantially from that of other pricers, and indeed the separation at St. Albans was explained by the existence of such a separate room in the warehouse when first the building was acquired. Certainly the in-

[4] *The May Department Stores Company*, 153 NLRB 342; *Loveman, Joseph and Loeb*, 152 NLRB 719.

herent character of clothing merchandise should itself explain why warehousing it separately from the general stock would be prudent practice, avoiding soilage and spoilage. And finally it is evident that the instructions which the Clothing Pricers receive from the Clothing Department supervisors would constitute a reasonable source of pricing information. Nor is there anything in the record to suggest why the Clothing Pricers at two warehouses should be treated differently from those at the third warehouse, Nitro.

Upon review of all of the foregoing considerations it is apparent that the element of community of interest and integration of the Clothing Pricers at St. Albans and Charleston with the other warehouse employees are not lessen by any routine contacts these employees may have with personnel in other areas of the store anymore than would the truckdrivers' like community of interest be destroyed by their regular absence from the warehouse, driving about the city. On the contrary, the Pricers in question, both female employees, have warehouse supervision, do the same general type of work, excepting the heavy lifting, wear clothing appropriate to their duties, and associate occupationally with the warehouse employees, meeting with others only on an "emergency" or sporadic basis. I would therefore conclude and find that *all* Pricers are appropriately a part of the warehouse unit.

Upon all of the foregoing I would conclude and find as a unit appropriate for the purposes of collective bargaining

> All truckdrivers and warehouse employees, including all pricers at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors, as defined in the Act, and all other employees.

D. *Majority Status of the Union in the Above-Described Unit Found to be Appropriate*

As previously found by me (TXD, pp. 2-3), by October 9, 1964, thirteen employees in the three warehouses had signed cards authorizing the Union to represent them and

submitted them to Union Representative Jackson. These cards presented to President Haddad as evidence of the Union's claim and inspected by him were for the following:

Charles D. Curry	James A. May
Charles G. Ferrell	Opie G. Nelson
James E. Goins	Samuel D. Nelson
Edward L. Hughart	Virgil R. Searls
Richard Johnson	Doyle Thornton
Franklin T. Lanham	Ivan L. Vickers
	Larry Woodall [8]

As I have previously found and concluded that Ivan Vickers was a supervisor at all relevant times herein (TXD, p. 7) his card cannot be included among those cards availed of by the Union to support its claim of majority status on October 9. I accordingly conclude and find that upon that date, on the occasion of Union Representative Jackson's request of President Haddad that Respondent bargain with the Union (TXD, p. 3), the Union represented 12 employees, as evidenced by cards in its possession.

As a means of establishing the composition of the bargaining unit claimed by General Counsel to be appropriate a list of warehouse employees at Nitro, St. Albans and Charleston, supplied by Respondent, was admitted into evidence. The list is as follows, excluding four individuals, Graley, Vickers, Elbert, Ferrell, and Overton, who have either been found by me or stipulated to be supervisors:

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[8] Everett Nichols, Warehouse Clerk, and Anna L. Adkins, Cosmetics Pricer, signed the cards on October 10 and 13 respectively. Obviously these were not included among the cards submitted to Haddad.

All cards received in evidence were identified by the respective employees or by Jackson in whose presence they were signed. There is no contest as to either their authenticity or to the fact that each was signed for the purpose of selecting the Union as bargaining representative.

Nitro, West Virginia

Anna Lou Adkins	Pricer
James A. Cooper	Warehouseman
Charles D. Curry	Warehouseman
Charles F. Ferrell	Warehouseman
Sheila V. Hostein	Pricer
Richard Johnson	Driver
Earl Keeney	Driver
Franklin T. Lanham	Pricer
Charles E. Lewis	Pricer
James A. May	Warehouseman
Opie Nelson	Warehouseman
Dallas T. Queen	Warehouseman
Virgil Searls	Warehouseman
Lloyd J. Slack	Driver
Roger Stackey	Warehouseman

St. Albans, West Virginia

Wayne Baker	Warehouseman
Samuel D. Nelson	Warehouseman
Everett Nichols	Warehouseman
Evelyn Taylor	Pricer
Larry Woodall	Driver

Charleston, West Virginia

Charles G. Ferrell	Warehouseman
Edward L. Hughart	Driver
Ernestine Russe	Pricer
Doyle Thornton	Warehouseman

A tabulation of this list indicates that there are a total of 24 eligible employees in the bargaining unit claimed by General Counsel and found by me to be appropriate.

Of the foregoing it is apparent that on October 9, 1964, when Union Representative Jackson presented the cards for Supervisor Vickers and the 12 warehouse employees to President Haddad and requested recognition and bargaining the Union represented only 12 of the 24 eligible rank-and-file employees in the unit which I find herein to be appropriate. It did not *at that time* represent a majority.

E. *Subsequent Activity Relating to the Bargaining Unit*

Two more cards came into the possession of the Union after it had shown the original group of cards to Haddad: the cards of Nichols and Adkins, signed on October 10 and 13, respectively. Meanwhile a number of events had transpired. Harry Turner, Department Head of Housewares at Charleston, engaged in conversations on the following day, October 10, which I have already found to contain unlawful threats to cancel wage increases and discontinue bonuses if the Union got in (TXD, pp. 4-5). A week later President Haddad offered a promotion to one of the employees who had joined the Union on condition that the employee would agree to work against the Union (TXD, p. 5). And again a week later he offered a similar inducement to Supervisor Vickers for the same purpose (TXD, pp. 5, 7). These incidents I have already found to constitute unlawful interference, restraint and coercion. Additionally I found that on October 10 Respondent discriminatorily discharged Employee James Goins (TXD, pp. 5-7).

Meanwhile, on October 12, the Union filed its petition in Case No. 9-RC-6097, later withdrawn, seeking an election among

> all employees of the Employer employed at its places of business as warehousemen and truckdrivers; excluding all office clerical employees, all guards, professional employees and supervisors, and any others excluded in the Act, as amended.

The petition indicates the Union's belief that there were 19 employees in the bargaining unit, and it makes no reference to Pricers, all of whom I have found (over General Counsel's objection as to those in St. Albans and Charleston) to be included in the appropriate unit (*supra*, p. 4).

While it is evident that the Union did not have a majority of the 24 employees when it requested recognition on October 9 it did achieve this majority on October 10, with Nichols' card, and it increased it by one more with

Adkins' card on October 12. If, then, on October 10, and thereafter, the Union continued to claim recognition the issue of Respondent's refusal becomes a real one indeed.

During the week after his initial request for recognition, "about the 12th or 13th of October," Jackson, as I have already found (TXD, p. 4), in the course of seeking the reinstatement of the discharged Employee Goins (TXD, p. 5), asked President Haddad a second time to recognize and bargain with the Union, and again received the same reply: "No comment."

I would conclude and find that Jackson's reqeust for recognition first made on October 9, 1964, became a continuing request thereafter for the reason that (1) it was followed by the filing of a representation petition the next day,[6] (2) it was followed immediately by an effort on the part of Supervisor Turner to procure defections from the Union, and finally (3) on October 12, a new request was made of Haddad by Jackson and refused, to be followed thereafter by Haddad's efforts to induce union members to defect from the Union.

In summary, therefore, it is apparent that during the pendency of its claimed majority status prior to October 12, the Union possessed the cards of out of the total complement of 24; and that after October 13, upon receipt of Adkins' card and after Jackson's second request for bargaining, and at a point when a further request would be deemed futile,[7] I would conclude and find that in support of its continuing demand for recognition the Union then had 14 valid designation cards, of a possible total of 24, in its possession. Thus there is conclusive evidence that during the period in question the Union had established and maintained its majority status in a unit which I find to be approporiate for the purposes of collective bargaining.

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[6] *See Ivy Hill Lithograph Co.*, 121 NLRB 831, 835, fn. 13; *Automotive Supply Co., Inc.*, 119 NLRB 1074.

[7] *America Compressed Steel Corporation*, 146 NLRB 1463, enfd. 343 F.2d 307 (C.A., D.C.).

F. *The Legality of Respondent's Request to Bargain*

Jackson's demand of Haddad for recognition has, at first glance, the appearance of a flexible one. Thus after testifying at several points that he requested recognition and bargaining for truckdrivers and warehousemen at the *three* local facilities he then testified in response to questioning of counsel for the Union, as follows:

> Mr. Haddad said that he had warehouses in all of his stores and as a result questioned the unit. However, I told him that I was amendable to negotiate either on behalf of the Nitro Warehouse or separate contracts for the warehouses in the stores (Tr. 35).

It is true, of course, that an employer cannot be held to have refused the bargain collectively with the representative of an approporiate unit until the representative has first sought or indicated a desire to bargain for the unit.[8] Thus any variance between the unit requested and that found appropriate raises an issue in this respect. It has long been held by the Board, however, that to be fatal any variance must be a substantial one.[9] Such is not the case here. Indeed there is no variance, but rather an alternative, if even that could be spelled out. Jackson made his demand for truckdrivers and warehousemen, the latter being deemed by me to include Pricers. In an effort to accommodate he then suggested the alternative of separate contracts. But he certainly cannot be said to have abandoned his original claim. Therefore, I do not view this offer of accommodation to be the substantial variation intended by the Board and I see no other variance. Accordingly, I would conclude and find that a valid demand in the appropriate unit was made on October 9, and for reasons already stated continued thereafter.

It is apparent from Respondent's intervening and subsequent conduct which I have already found to be violative

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[8] *N.L.R.B.* v. *Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300.

[9] *Barlow-Maney Laboratories*, 65 NLRB 928.

of the Act (TXD, *supra*) that it was engaging in a course of conduct calculated to undermine the Union and reflected a rejection of the principles of collective bargaining. I am persuaded therefore, that its refusal to bargain with the Union as a majority representative of the employees in the unit which I have found to be appropriate was not grounded upon any element of good faith but constituted a refusal to bargain in violation of Section 8(a)(5) of the Act, thereby interfering with, restraining and coercing its employees in violation of Section 8(a)(1).[10]

G. *The Remedy*

I have already found that the Respondent has engaged in certain unfair labor practices which I recommend be remedied by the issuance of an order that Respondent cease and desist from the conduct found and that it further cease and desist from infringing in any other manner upon the statutory rights of its employees and an affirmative order reinstating Employee James Goins with backpay (TXD, pp. 10-12). I shall reaffirm these recommendations by appropriate reference in my Supplemental Recommendations herein. In addition, I shall recommend that Respondent bargain collectively with the Union in the unit which I have found to be appropriate for bargaining purposes, and I shall further recommend that it be required to post a notice of compliance which consolidates the matters contained in both my original and supplemental recommendations.

SUPPLEMENTAL RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, and the National Labor Relations Board's Order of Remand issued to me in this proceeding, I hereby reaffirm my recommendations contained in my Decision is-

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[10] *The Great Atlantic and Pacific Tea Company, Inc.*, 162 NLRB No. 110.

sued on November 30, 1965, and I further recommend [11] that Heck's, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from refusing to bargain with CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA as the exclusive representative of employees in the following unit found to be appropriate for the purposes of collective bargaining:

> All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request bargain collectively with the above-named labor organization as the exclusive representative of all Respondent's employees in the unit found to be appropriate and, if an agreement is reached, embody such an understanding in a signed agreement.

(b) Post at its Nitro, St. Albans and Charleston, West Virginia, stores and warehouses copies of the notice attached hereto as "Appendix," it being a consolidation with the notice previously recommended be posted in this proceeding.[12] Copies of said attached notice to be forwarded

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[11] In the event that this Supplemental Recommended Order be adopted by the Board, the words "RECOMMENDED" shall be deleted from its caption and wherever else it appears thereafter; and for the words "I RECOMMEND" or "I FURTHER RECOMMEND" there shall be substituted "NATIONAL LABOR RELATIONS BOARD HEREBY ORDERS."

[12] In the event that this Supplemental Recommended Order be adopted by the Board the words "A DECISION AND ORDER" shall be substituted for the words "THE SUPPLEMENTAL RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by

by the Regional Director for Region Nine shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof, in conspicuous places, including places where notices to employees are customarily posted, and be maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director in writing within 20 days from the receipt of this Supplemental Decision what steps the Respondent has taken to comply therewith.[12]

Dated at Washington, D. C.

/s/ Thomas F. Maher
Trial Examiner

a United States Court of Appeals, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[12] In the event that this Supplemental Recommended Order is adopted by the Board, this provision shall be modified to read "Notify the said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE SUPPLEMENTAL RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT (As Amended)

we hereby notify our employees that:

WE WILL NOT unlawfully interrogate our employees concerning their union membership, activities or desires.

WE WILL NOT threaten our employees with reprisal for engaging in union activities or for supporting CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization.

WE WILL NOT offer or grant our employees wage increases and/or promotions in exchange for this opposition to the aforesaid union.

WE WILL NOT discharge, or otherwise discriminate against our employees in respect to hire or tenure because they are leaders in the aforesaid union or have participated in concerted activities protected by Section 7 of the National Labor Relations Act.

WE offer immediate and full reinstatement to his former or substantially equivalent position to James Goins, and WE WILL make him whole for any loss of pay he may have suffered, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

WE WILL notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in ac-

cordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

WE WILL upon request bargain collectively with CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive representative of all the employees in the bargaining unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is

All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All of our employees are free to become or refrain from becoming members of the above-named union, or any other labor organization.

HECK'S INC.
(Employer)

By .....
(Representative) (Title)

Dated .....

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407 Federal Office Building, 550 Main St., Cincinnati, Ohio 45202 (Tel. No. 684-3686).

Charleston, W. Va.

* * *

DECISION AND ORDER

On November 30, 1965, Trial Examiner Thomas F. Maher issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended dismissal of these allegations. Thereafter, the General Counsel filed limited exceptions to the Trial Examiner's Decision with a supporting brief, and Respondent filed limited exceptions.

On March 23, 1966, the Board entered an order reopening the record and remanding the proceeding to the Regional Director for further hearing before the Trial Examiner to receive evidence from the parties concerning the nature and appropriateness of the bargaining unit, the majority status of the Union, and the alleged refusal of the Respondent to bargain with it.

On March 28, 1967, the Trial Examiner issued his Supplemental Decision, in which, on the basis of the evidence adduced at the reopened hearing, he found that Respondent had engaged in certain unfair labor practices, and recommended that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Supplemental Decision. The Respondent filed exceptions to the Trial Examiner's Supplemental Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated 166 NLRB No. 38 its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The Board has considered the Trial Examiner's Decision, the Supplemental Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified.[1]

ORDER[2]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Heck's Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, activities, or desires.

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[1] Contrary to the Trial Examiner, we find that during the period when Ivan Vickers was employed at Respondent's Nitro store warehouse, he was not a supervisor. Although normally in charge of shipping, Vickers worked under either Foy, the warehouse manager, or Graley, the assistant warehouse manager; his authority to direct other warehouse employees was limited to using warehouse employees who were not otherwise occupied to assist him. In loading and unloading merchandise, Vickers worked alongside the other employees with no authority to hire, fire, or discipline. Moreover, although Respondent's policy was to pay its supervisors on a salary rather than on an hourly basis, up to one month prior to his leaving the job for the Air Force, Vickers was paid an hourly rate with no greater benefits than those received by other warehouse employees. Further, we note that at the hearing in response to a question as to who were the suprevisors at the Nitro warehouse, Graley replied that they consisted of himself and Foy; he failed to mention Vickers.

The Trial Examiner inadvertently excluded employee James Goins from the unit. With the inclusion of Goins and Vickers, the bargaining unit consisted of 26 rather than 24 employees on October 9, 1964, when the Union sought recognition. The record is corrected accordingly.

On Page 6, line 37 of the Trial Examiner's Supplemental Decision, the date October 12 is corrected to read October 13.

[2] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

(b) Threatening their employees with reprisals if they select the Union as their representative.

(c) Offering or granting their employees wage increases and/or promotions in exchange for their opposition to the Union.

(d) Discharging or otherwise discriminating against employees in respect to hire and tenure of employment for the purpose of discouraging union membership or concerted activities.

(e) Refusing to bargain with Chauffeurs, Teamsters and Helpers Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of employees in the following appropriate unit:

> All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans, and Charleston warehouses, excluding office clericals, guards, professional employees, and supervisors as defined in the Act, and all other employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all Respondent's employees in the unit found to be appropriate and, if an agreement is reached, embody such an understanding in a signed agreement.

(b) Offer James Goins immediate and full reinstatement to his former or substantially equivalent position, and make him whole for any losses he may have suffered, together with 6 percent interest thereon, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

(c) Notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Train-

ing and Service Act, as amended, after discharge from tht Armed Forces.

(d) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records relevant and necessary to the determination of backpay due and the reinstatement provided under the terms of the order.

(e) Post at its Nitro, St. Albans, and Charleston, West Virginia, stores and warehouses, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 9, shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

It is further ordered that so much of the complaint in this proceeding as alleges unlawful discrimination against Ivan Vickers, be, and it hereby, is dismissed.

Dated, Washington, D. C. June 30, 1967.

/s/ Frank W. McCulloch, Chairman
/s/ John H. Fanning, Member
/s/ Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT unlawfully interrogate our employees concerning their union membership, activities or desires.

WE WILL NOT threaten our employees with reprisal for engaging in union activities or for supporting CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization.

WE WILL NOT offer or grant our employees wage increases and/or promotions in exchange for opposition to the aforesaid Union.

WE WILL NOT discharge, or otherwise discriminate against our employees in respect to hire or tenure because they are leaders in the aforesaid Union or have participated in concerted activities protected by Section 7 of the National Labor Relations Act.

WE offer immediate and full reinstatement to his former or substantially equivalent position to James Goins, and WE WILL make him whole for any loss of pay he may have suffered.

WE WILL notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL, upon request, bargain collectively with CHAUFFEURS, TEAMSTERS AND HELPERS,

LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive representative of all the employees in the bargaining unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is

> All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans, and Charleston warehouses, excluding office clericals, guards, professional employees, and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All of our employees are free to become or refrain from becoming members of the above-named Union, or any other labor organization.

HECK'S INC.
(Employer)

By .....
(Representative) (Title)

Dated .....

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407 Federal Office Building, 550 Main St., Cincinnati, Ohio 45202 (Tel. No. 684-3686).

ERRATUM

Through inadvertence the words "where ineligible employees" were used on page 10 line 10 of the Trial Examiner's Decision in this matter. For them there should be substituted the following words: "wherein eligible employees."

/s/ Thomas F. Maher
Trial Examiner

Dated: December 2, 1965.

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[fol. 1] BEFORE THE
NATIONAL LABOR RELATIONS BOARD
NINTH REGION

Case No. 9-CA-3728

In the Matter of:

HECK'S, INC.

and

FOOD STORE EMPLOYEES UNION, LOCAL # 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

Civil Service Room
Post Office Building
Ashland, Kentucky
Wednesday, February 1, 1967

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock, a.m.

BEFORE:

SIDNEY SHERMAN, Esq. Trial Examiner

* * * *

[fol. 11] SHERWOOD M. SPENCER

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRAVITT:

Q State your full name and address. A Sherwood M. Spencer, Secretary-Treasurer of the Food Store Employees Union. Our post office address is Post Office Box 2751, Charleston 25330.

Q Are you associated with the Food Store Employees Union, Local Number 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO? A I am.

[fol. 12] Q In what capacity? A Secretary-Treasurer.

Q And how long have you served in that capacity? A About 23 years.

* * * *

[fol. 15] BY MR. GRAVITT:

Q Now, prior to October the 11th, 1965, Mr. Spencer, did you have a conversation with anyone in regard to organizing Heck's? A With Mr. Holroyd, yes.

Q And how was this conversation handled? A By telephone.

Q And did you call him? A I did. He returned my call.

[fol. 16] Q And did you identify yourself? A Oh, yes.

Q Did he identify himself? A Oh, yes.

Q Well, can you give us the date on which you had this telephone call? A October the 8th, 1965.

Q And now tell us what you said and Mr. Holroyd said. A I asked Mr. Holroyd for recognition in bargaining. Discussed what we considered an appropriate unit. Told Mr. Holroyd that department heads were at that time not yet included in the bargaining, or at least the decision of the Board had not been handed down in those cases; the same Heck's company. And that we had a majority either with or without the department heads, whichever way the Board would rule. I offered also to deliver the cards to him.

Q Did you tell him you had a majority? A Yes.

Q What did he say, if anything? A He said we should send, I said we would have to confirm it in writing. He said, go ahead and do it and he'll give me the answer later on.

Q Did he ever ask you to see the cards? A No.

[fol. 17] Q Did anyone associated with Respondent ever ask you to see the cards? A No.

TRIAL EXAMINER: You told him you had cards for a majority of the employees?

THE WITNESS: Yes. Either with or without the department heads, which at that time had not been settled in another Heck's case before the Board.

TRIAL EXAMINER: Uh-huh.

BY MR. GRAVITT:

Q We have your letter here of October the 25th, as GC 4, to Mr. Holroyd. Did he ever answer that letter? A No, he did not.

Q Have you ever heard from the company since that time as to whether they would recognize you or not? A No.

* * * *

[fol. 20] WOODROW ROOSEVELT GUNNOE

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give your full name and address.

THE WITNESS: Woodrow Roosevelt Gunnoe.

DIRECT EXAMINATION

BY MR. GRAVITT:

Q And your address? A 2450 21st Avenue, Parkersburg, West Virginia.

Q And are you associated with the Food Handlers, Mr. Spencer's union in this case? A Yes, I am.

[fol. 21] Q And in what capacity? A I'm business agent for Local 347.

Q Did you engage in a union campaign of employees here at the Heck's store? A Yes, I have.

Q And under whose direction? A Under Mr. Spencer's.

Q Can you tell me, sir, when you began that campaign? A Yes. In early 1965. The first card was signed on February the 25th.

Q Of what year? A 1965.

Q 1965. I see, sir. Directing your attention to October, 1965, were you in the Heck's store in Ashland? A Repeat that question please.

* * * *

[fol. 33] JACK L. BROOKS

[fol. 34] was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRAVITT:

Q State your name and address please. A Jack L. Brooks, 942 Hazelwood Avenue, Charleston, West Virginia.

Q And what is your occupation? A Business Representative.

Q Of what union? A For the Food Store Employees Union, Local 347.

Q How long have you been in that work? A About eight years.

Q Did you work with Mr. Gunnoe in the union campaign regarding the Heck's store here in Ashland? A Yes, I did.

* * * *

[fol. 35] RAY DARNELL

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: State your full name and address for the record.

THE WITNESS: Ray Darnell, 5102 Frederick Drive, Charleston, West Virginia.

DIRECT EXAMINATION

BY MR. GRAVITT:

Q And are you associated with Heck's in this case? A Yes, sir.

Q In what capacity?. A Operations manager.

Q And how long have you served in that capacity? A About three years.

Q And are you acquainted with the operations of the Heck's store here in Ashland? A Yes, sir.

[fol. 36] Q And do you handle the personnel records for that store or are they under your supervision? A Yes, sir.

Q How long have you done that? A For about three, four years.

Q Were you engaged in making the decision not to recognize the union in this case? A No, sir.

Q Who made that decision if you know? A It was turned over to our counselor Mr. Holroyd.

Q Mr. Holroyd. Did you turn it over to him? A Yes, sir.

Q Then you followed his advice? A Yes, sir.

Q And discussed the matter with him at various times? A Yes, sir.

* * * *

[fol. 38] Q And your version of the unit was that it was appropriate without the department heads and you haven't changed that position. Is that right? A No, sir.

Q Sir? A No, sir.

Q Well, what is your position?

TRIAL EXAMINER: He hasn't changed it.

THE WITNESS: I haven't changed it. That was his question.

MR. GRAVITT: You haven't changed it. I see. Yes.

* * * *

[fol. 44] TRIAL EXAMINER: Well, you will stipulate that these forms are taken from the company's files won't you?

MR. HOLROYD: Yes, sir.

TRIAL EXAMINER: Yes.

MR. HOLROYD: And as far as we know they are the signatures of the employees. Yes, sir.

* * * *

[fol. 46] TRIAL EXAMINER: Mr. Darnell, do you [fol. 47] know a William Morris?

THE WITNESS: Mr. Morris worked for Heck's. He isn't presently employed.

* * * *

TRIAL EXAMINER: On the record.

I will receive the card of William Morris, also who signs his authorization as Bill Morris, but I'm satisfied with the comparison of the last name at any rate that it's an authentic signature, and in view of the fact that he's not available, his whereabouts are not known, I will receive his card. That's GC 5-4B and 4A. It's the w-4 form?

* * * *

[fol. 50] DORIS J. CLARE

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Doris J. Clare, 3918½ Winchester Avenue, Ashland, Kentucky.

DIRECT EXAMINATION

BY MR. GRAVITT:

Q Where are you employed? A Heck's.

Q That's here in Ashland? A Yes.

[fol. 51] Q And how long have you worked there? A It will be two years in March.

Q Two years in March? A Uh-huh.

Q And were you working there all during 1965? A No. I came to work in March of 1965.

Q March of 1965 you began working for them and worked for them throughout that year of 1965? A Yes.

Q Still there? A Yes, sir.

Q In what department do you work? A Housewares.

Q Now, on or about May 24, 1965, did you attend a

meeting in which Fred Hadead talked to employees? A I guess if he had one I attended it if I was at work.

Q It's your best recollection on the matter? A I don't know

Q Beg your pardon? A I don't know. I guess I did.

Q That's your best recollection, that you attended the meeting? A Well, if I was there at the store I did.

* * * *

[fol. 52] TRIAL EXAMINER: Well, can you remember if anything was said at all about the union?

THE WITNESS: Yes, there was.

TRIAL EXAMINER: Was it for or against the union?

THE WITNESS: He just told us we could sign all of the cards we wanted to sign.

TRIAL EXAMINER: Go on.

BY MR. GRAVITT:

Q And then what else did he say after that? A He [fol. 53] said we could sign all the cards that we wanted to sign. That it didn't make any difference, but that we still had to do our work. And that he was in at one of the other stores and one of the girls wasn't doing something or the other, I don't know what it was, and so she told him she didn't have to when he asked her so he fired her.

TRIAL EXAMINER: Did you get that answer? Would you read it back to me?

(Pending answer read)

THE WITNESS: Due to the fact that she had signed a union card. And that's why she said she didn't have to do what, whatever it was. That's where they get the wrong impression.

TRIAL EXAMINER: I see. In other words, he said she told him she signed a union card and that's why she didn't have to do any work. So he fired her.

THE WITNESS: Yeah. That's where a lot of them are getting the wrong impression. They're telling them they don't have to do this and don't have to do that.

TRIAL EXAMINER: All right.

BY MR. GRAVITT:

Q Did he identify this store in which the girl was fired as the Parkersburg store? A He probably did. I don't remember.

Q That's your best recollection? A That's my best recollection.

[fol. 54] Q And this girl had told him that she had signed a card. And then did he say he fired her on the spot? A Yeah. That's what Mr. Hadead told the employees.

MR. HOLROYD: That's not her testimony. I'm going to object to that, Your Honor.

TRIAL EXAMINER: He said he fired her. Now, where did you get this on the spot business?

THE WITNESS: Well, that's what he said. He said he fired her on the spot.

BY MR. GRAVITT:

Q Who said that? A Mr. Hadead.

Q I see. Now, did you ever know of anyone by the name of Robert Mitchell? A Yes, I did.

Q And who is he? Or, who was he at the time he was working at Heck's, in the store? A First he was department head of jewelry, and then he was assistant manager.

Q And did he have conversations with you concerning the union? A Yeah. Me and Bob, we talked quite a bit.

Q And say in the early part of October, 1965, did you have conversations with Mr. Mitchell concerning the union? A Yes, I guess so.

Q Well, now I want you to give me your best recollec-

[fol. 55] tion. You did talk with him? A Yeah. I, like—

Q Now, tell me what you recall Mr. Mitchell saying to you and what you said to him on this occasion, the best you can remember. A Well, I talked to him several times. Or I talked to him about it.

Q Well, just tell me about all of them please. Do you recall them? I know it's been a long time. Just take your time. A Well, we just, we just talked about it. And he said everybody to their own opinion. If that's what I

wanted that's fine. He said at one time he was for unions, but he wasn't. But that was quite a few years ago whenever he worked in different kinds of work. And he thought, well, more or less that we didn't need a union down there. But if that's what we wanted that's OK.

Q Uh-huh. Did he ever mention Mr. McCann's name in any of these conversations? A No.

Q Did he say anything about the Food Handlers Union trying to get in the store? A Who? Mr. Mitchell?

Q Yes. A I brought it up.

[fol. 56] Q Uh-huh. What did he say about it? A Really I don't know.

Q Did he mention about union cards to you? A Yeah. At one time he said they pretty well knew who had signed and who hadn't and that—

Q I didn't get that first part. Would you take that a little slower and let me have that again, please. A I forgot what I said. He said that they pretty well knew who had signed and who hadn't. And when I signed there was only a few of us left that hadn't signed. And when I signed then that was, that was enough. I mean, you know, to give them a majority.

Q That's what Mr. Mitchell told you? A Yeah. I mean, well, in round about words, yes, I guess.

Q I see. Uh-huh. Do you recall him saying that when you signed, well, that put the camel over the hump? A Camel over the hump. Uh-huh.

Q How was it he said it? A When I signed that put the camel over the hump.

Q I see. Now, think if you can, and recall anything that Mr. Mitchell said to you about Mr. McCann, the store manager? A Well, the only thing Mr. Mitchell ever said to me about Mr. McCann was that at the time whenever they said that Mr. McCann was fired. That was the only time that Mr. Mitchell ever mentioned anything to me about Mr. McCann as far as I remember.

[fol. 57] Q And what did he say? A Well, we had a discussion over it.

Q You and Mr. Mitchell? A Well, yeah, in a round about way. There was several of us there.

Q And what did Mitchell say? A Well, he said that we weren't going to do him like we did Mr. McCann.

Because Mr. McCann had been with the company a long time and for him to get fired over it, and from then on we would go by the rules and there wouldn't be no, no other way.

Q Getting fired over it. Can you explain that a little more? What did he say? A Well, at that time the union, we had had quite a little fracas over the union. And they, that's what they said. Now, that was just hearsay more or less.

Q Uh-huh. A Because that don't come right out. But they said Mr. McCann was fired and that was the reason why.

TRIAL EXAMINER: What was the reason he was fired?

THE WITNESS: Because of the union and the employees.

TRIAL EXAMINER: When was he fired?

THE WITNESS: When? Back in '65 I guess. Yes. '65.

[fol. 58] Q (By Mr. Gravitt) Well, you don't know whether he was ever fired or not do you? A No, I don't.

Q You're testifying as to what Mitchell told you? A No, Mitchell didn't tell me. It was just a saying that Mr. McCann was fired. Mitchell didn't know for sure himself because they hadn't told him as far as I know.

TRIAL EXAMINER: Off the record.

(Discussion off the record)

TRIAL EXAMINER: On the record.

Q (By Mr. Gravitt) Mr. Mitchell was the department head or the assistant manager? A Well, he was the assistant manager at that time.

Q Assistant manager at the time. Will you stipulate that, Mr. Holroyd? That—

MR. HOLROYD: Yes. And we withdraw our, or we move to amend our answer to so reflect that he is a supervisor within the meaning of Section 2 (11) of the National Labor Relations Act, as amended.

MR. GRAVITT: Thank you very much.

Q (By Mr. Gravitt) Now, when you talked to Mitchell and McCann's name was mentioned how long was

that after this first conversation that you told us about. A The first conversation where we talked about the union?

Q Yes. A Well, I really don't know.

[fol. 59] Q Well, was it in the same month? A I doubt it. I don't know. It could have been.

Q Well, can you think about anything else he said to you about McCann? A No, I can't.

Q But did he tell you that you people and the union had shafted McCann? A Yes.

MR. HOLROYD: I object to that.

TRIAL EXAMINER: Had what?

MR. GRAVITT: Had shafted McCann over this union.

THE WITNESS: Well, this, what he meant by that . . .

TRIAL EXAMINER: Wait a minute. There was an objection. I'll overrule it because her recollection has been exhausted. Go on. Go on. Explain.

Q (By Mr. Gravitt) Go ahead. Tell us now. A Well, what he meant by that, that was just a phrased used. And me and Mr. Mitchell, we were good friends. And we had a disagreement. But he apoligized to me. Because he was so upset over the matter, too. He was upset because of Mr. McCann leaving.

Q Well, in talking about this union did Mitchell use the words that you and people have shafted McCann? A Yes. Yes, he did. That was a matter of phrase though I imagine. Because that's just the way—

[fol. 60] Q Well, you knew what he was talking about, didn't you? A Why, yeah.

Q In fact, he expressed it in pretty strong language, did he not? A Yeah. He sure did.

Q Well, can you just tell us how he did word that particular phase, the whole thing? We want it in the record. A No, I can't. Because I don't remember it.

TRIAL EXAMINER: Well, then you can ask a leading question.

Q (By Mr. Gravitt) You did give an affidavit to an agent of the National Labor Relations Board, did you not? A Yes, I did. But I don't have it now. So I don't remember it.

Q And you told the truth as to what happened at that time? A That's right. Do you want me to read it?

Q And it was in your mind a little better at that time than it is now, was it not?

TRIAL EXAMINER: You don't have to ask her questions if you want to refresh her recollection. You can show her the affidavit.

Q (By Mr. Gravitt) Yes. Look right here where it says that. Read that in there and then tell me what [fol. 61] Mitchell told you. A How far down do you want me to read?

Q Well, just tell me what he told you. A Well, he said, he said, let me tell you one goddamn thing. You son-of-a-bitches shafted McCann. And you're not going to shaft me.

Q And that's what he said? A That's what he said.

* * * *

[fol. 72] Q (By Mr. Gravitt) Now, directing your attention to on or about October the 8th, 1965, do you recall seeing Mr. Darnell in the store? A Yes, I do.

Q And did Mr. Darnell talk to you on this occasion? A Yes, he did.

Q And did he talk to you during work? A Yes, sir.

Q And was anybody with Mr. Darnell when he spoke to you? A Yes. Mr. McCann.

Q And what did Mr. Darnell say to you? A He just asked that he understood that we were wanting to be represented by the other union. He gave the local.

Q The— A And—

[fol. 73] Q He gave the Food Handlers Local 347? A Yeah.

Q All right. A And—

TRIAL EXAMINER: Was he talking just to you or to all the employees?

THE WITNESS: He talked to me; myself.

TRIAL EXAMINER: Just you privately?

THE WITNESS: Yes.

TRIAL EXAMINER: All right. Go on.

THE WITNESS: And I told him yes. I explained why at the time I did it.

Q (By Mr. Gravitt) Well, how, did he ask you why? A Huh?

Q Did he ask you why? A No, I don't think he asked me why. I told him I would like to explain the answer to him why I did. And he said he would be glad to listen to me.

Q Did he make any further comments to you? A He told me that everybody to their own opinion and he didn't want any hard feelings. I mean there would be no hard feelings because of this. And I told him, no, I didn't want none either.

Q And did you say he asked you if you wanted this Food Handlers Local and named the Local 347 to represent you? A He said that he understood that that was what we was wanting.

[fol. 74] Q I see. Did he tell you you wouldn't lose your job over it? A Yes. He told me this had nothing to do, no effect on my job at all or friendship.

Q Or friendship. Had he ever done this before when you had been working there in the store? A You mean ask about—

Q Yes. Come around and ask if you wanted a union? A No.

Q Did he give you any explaination as to why he was doing it at this time? A If he did I don't recall.

TRIAL EXAMINER: Well, he didn't ask you if you wanted a union. He just told you that—

THE WITNESS: Yeah.

TRIAL EXAMINER: That he understood that the employees wanted it.

THE WITNESS: That we wanted to be represented by it.

TRIAL EXAMINER: That the employees wanted to be represented by it. He never came out and asked you if you wanted a union to you?

THE WITNESS: No. And I said, in other words you want to know if I signed or if I didn't. Yes. That I'd signed and that I would like to explain why I did. And he said he would be glad to hear it.

[fol. 75] TRIAL EXAMINER: Well, did he, you answered that. You said, in other words you want to know if I signed it or if I didn't. Did he say anything at that point or did you just continue to talk? Did he say yes I want to know whether you signed?

THE WITNESS: No, I don't think he said that.

TRIAL EXAMINER: All right.

THE WTINESS: Because I just told him I wanted to explain why I did it.

* * * *

Q (By Mr. Gravitt) I show you GC 5-5 for identification, and ask you to look at it and tell me if that's your signature on that card? A Yes.

Q You read it and signed it? A Yes, I read it and signed it.

Q And what date's on the card? A 10th of the 6th of '65.

Q And that's the date you signed the card? A That's the date I signed.

* * * *

[fol. 77] CROSS EXAMINATION

* * * *

Q (By Mr. Holroyd) Who asked you to sign that, Doris? A Oh, I don't know their names. They came up to the house to see me.

Q Do you know an employee by the name of Paul France? A Yes, sir.

Q Was he in this group that came up and asked you to sign the card? A No.

Q He wasn't? A No. It was just the representatives of the union.

Q Of the union? A They was up to my house.

Q Did you ever talk to Paul France about the union? [fol. 78] A No, I never talked to him about it. But I knew he was for it.

Q Did he tell you he was for it? A Yeah.

Q Did he tell you that he thought it would be a good idea if you joined? A No.

MR. GRAVITT: Objection.

TRIAL EXAMINER: Well, wait a while. Wait a while. Wait a while. What's the objection?

MR. GRAVITT: It isn't material what one employee told another employee concerning her union card or any union card.

MR. HOLROYD: If you'll read your subpoenaed exhibit there, Bill, you'll find out that this is not another employee.

TRIAL EXAMINER: Who in France?

MR. HOLROYD: Department head.

TRIAL EXAMINER: Was France a department head? All right.

Q (By Mr. Holroyd) Did he ever tell you that he thought it was a good thing, a good idea that you sign a union card? A He told me that he was for it and that he thought it would be a good thing if they got it in.

Q Was this before you signed it? A Huh?

[fol. 79] Q Was this before you signed the card? A Yeah. But I'd talked to him a lot about it.

Q You say you don't remember who asked you to sign the card? Do you see a gentlemen sitting around— A I know that Mr. Cass—

Q Mr. Cass. Well, tell us—

MR. GRAVITT: Can we have him identify himself? She's motioning to a gentlemen in this room.

MR. HOLROYD: We called his name out. Cass.

TRIAL EXAMINER: Mr. Camp?

MR. HOLROYD: Cass. Mr. Cass. He's in this room. Will he identify himself?

MR. CASS: Right here.

TRIAL EXAMINER: Well, he doesn't have to for this record. What was the question? Whether, who got her to sign the card?

MR. HOLROYD: Yes, that was the question. Who asked her to sign.

TRIAL EXAMINER: I thought you said France asked her to sign the card. I'm getting confused.

MR. HOLROYD: No.

TRIAL EXAMINER: Did France—

MR. HOLROYD: She said he did not ask her to sign it. And I asked her if she said anything prior to his signing whether or not she had signed. And she—

TRIAL EXAMINER: All right. Mr. Cass asked her to sign.

[fol. 80] Go on. Who is Mr. Cass?

THE WITNESS: He's a representative of the union.

Q (By Mr. Holroyd) And would you say Mr. Gunnoe, this good looking fellow in the corner, was also there? A Yeah, he was there.

Q Now, would you tell us as best you can remember what the conversation was you had with them in reference to signing the union card? What they said to you and what you said to them.

MR. GRAVITT: I object, Your Honor. This card is not ambiguous. It's a clear designation of the union to represent her. She said she read it, she signed it. And I object to this as being immaterial.

TRIAL EXAMINER: Overruled. Go on.

Q (By Mr. Holroyd) Go ahead. A Well, I don't remember everything.

Q Well, just tell us what you do remember, Doris, please. A Well, they just talked to me and they explained it. And we talked about the good points, the bad points, and what we thought was best about the union, and the company, and this and that. I mean just—

Q Did they say anything would happen if you did or did not sign a union card? A No.

* * * *

[fol. 91] TRIAL EXAMINER: Go on. I'm getting into, I admit, a rather touchy area. But I think the best way to clear it up is to ask the witness why she signed the card.

THE WITNESS: I signed the card because I didn't like how things were. I didn't like Paul France. I didn't like how he ran things. That is my reason why.

TRIAL EXAMINER: And you signed a card. Well, the fact that Paul France said it was a good idea to have a union, did that have any effect on you signing your card?

[fol. 92] THE WITNESS: No. It didn't matter what he said.

TRIAL EXAMINER: All right.

REDIRECT EXAMINATION (Furtner)

Q (By Mr. Gravitt) Well, you understood what the card meant when you read it did you not? A Yes, I did.

Q And you wanted the union in there to change a few things and to make it better, did you not? A Yes, I did.

* * * *

[fol. 93] RUBY RIFFE

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Lawrence) Will you give us your name and address for the record please? A Ruby V. Riffe, 2456 Henderson Street, Ashland, Kentucky.

Q And where are you working now? A I work at Heck's store.

Q And when did you begin to work for Heck's .A I started at Heck's in July; before the store opened in August. That was in '63.

Q And this is the Ashland store that we are talking of? A Yes, sir.

* * * *

[fol. 94] Q (By Mr. Lawrence) Mrs. Riffe, I show you what's been marked for identification as General Counsel's Exhibit 5-6, and ask you if you know whose card that is? A That's the card I signed.

Q And is that your signature appearing on the card? A Yes, it is.

* * * *

[fol. 95] Q (By Mr. Lawrence) Directing your attention to May 24, 1965, had, did you attend a meeting with a Mr. Hadead? A Yes, I did.

Q And where was this meeting held? A In the lounge.

Q This is the lounge of the Ashland store? A That's right.

Q Were you working that day? A Yes, I was.

Q And approximately when was the meeting held during the day? A Well, I don't know. I've forgotten what

turn I was on. I don't know, remember what turn I was on. But Mr. Fred Hadead came down. He came in the lounge and sat down on the corner of a table. And in the course of the meeting he said that he didn't care how many cards we had signed we still had to do our work. And he said one girl came up to him in Parkersburg and said she's signed a card and he fired her on the spot.

[fol. 96] Q Was this meeting held during your work time? A Yes, it was.

Q On the 24th? Directing your attention now to October 8, 1965, did Mr. Darnell talk to you on that day? A Yes, he did.

Q And did you talk about the union on that day? A Yes, we did.

Q As best you can recall what Mr. Darnell say to you? A I was on day turn and it was just previous before I went home. It was late in the evening. He and Mr. McCann came back. And I was in my department. They came up. And Mr. McCann told Mr. Darnell this is Ruby Riffe. And he spoke to me, Mr. Darnell spoke and he said, Ruby, I'd like to ask you a few questions. A few, a personal question. Just answer yes or no. He said, I won't ask you what you had for breakfast, but he said, just answer yes or no. He said, are you aware that the Food Handlers Union is, uh, let me see. The words he said, he said, the Food Handlers Union was coming into the store. Do you want to be represented by Heck's or the Food Handlers. That's the words he used. And I said, Yes, sir, I do. He said, he checked—

TRIAL EXAMINER: You do what? You want represented?

THE WITNESS: Be represented by the Food Handlers or Heck's. And I said, yes, sir, I do.

TRIAL EXAMINER: Well, what did that mean?

THE WITNESS: I wanted to be represented by the Food Handlers. I said yes, sir. Before he finished his sentence I said yes, sir, I do. And he checked a mark. He had a pencil and a pad in his hand.

TRIAL EXAMINER: He must have said do you want to be represented by the Food Handlers first if you answered yes before he finished the sentence.

THE WITNESS: Whenever he said, I said, he said do you want to be represented, he said, by Heck's or the Food Handlers. And before he finished the sentence I said yes, sir, I do. And he thanked me and went back to the next department.

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[fol. 105] CROSS EXAMINATION

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[fol. 109] THE WITNESS: Sir?

TRIAL EXAMINER: Are you sure it wasn't said by Mr. Haddad?

THE WITNESS: I'm not sure. I don't want to tell something I don't know.

THE TRIAL EXAMINER: All right, next question.

Q (By Mr. Holroyd) Ruby, we've got in here an authorization card from you, General Counsel's Exhibit 5-6, which was signed on, on March the 6th, 1965. Now, had you signed, prior to that time had you signed a union card for any other union?

MR. GRAVITT: Objection. It isn't material.

MR. HOLROYD: It is material.

MR. GRAVITT: Beyond the scope of the direct examination.

TRIAL EXAMINATION: Well, is that your defense? That you have conflicting claims here?

MR. HOLROYD: Yes, sir, this is part of it.

TRIAL EXAMINER: Well, why didn't you so state in your letter? I think you'll have to get up and testify to that effect because there's no evidence to that effect that that was your motivation.

MR. HOLROYD: All right. Well, we have witnesses who are prepared to testify on that, sir.

TRIAL EXAMINER: Are you prepared to testify on that?

MR. HOLROYD: Me personally?

[fol. 110] TRIAL EXAMINER: Yes.

* * * *

[fol. 112] Q (By Mr. Holroyd) Ruby, did you sign a union card for any other union prior to signing this card for the Food Handlers Union?

MR. GRAVITT: Objection.
TRIAL EXAMINER: Overruled.
THE WITNESS: Sometime before, yes.
Q (By Mr. Holroyd) Can you recall how long before?
MR. GRAVITT: Object. The card's the best evidence.
TRIAL EXAMINER: You have a continuing objection. Go on.
THE WITNESS: Well, I don't know what the date, when the date was.
Q (By Mr. Holroyd) Well, how long before?
TRIAL EXAMINER: A month or two or three?
THE WITNESS: Well, now let's see. I can almost tell you when it was. I went to work there in July. And I would say it was probably, it was about the first of December I would say; thereabouts. I, uh, I'm just not positive on that date now. I'm just saying it was about the first of December.
[fol. 113] TRIAL EXAMINER: '63?
THE WITNESS: Of, yes. I went to work in March and this was in '63.
Q (By Mr. Holroyd) '63 or '64? This card was signed in March of '65. A Are you speaking of this other one?
Q Yes. A That one I singed on March the 6th.
Q Of 1965? A That's right.
Q When was the Retail Clerks card signed? A In, I'd say about the first of December in '63.
Q In '63.
TRIAL EXAMINER: A year and a half earlier?
THE WITNESS: Yes.
Q (By Mr. Holroyd) All right. That was for the Retail Clerks that you signed it? A Retail Clerks, yes.
Q Were the Retail Clerks still doing anything in the store at that time? A Sir?
MR. GRAVITT: Objection to that question.
TRIAL EXAMINER: Were the—
[fol. 114] Q (By Mr. Holroyd) Well, let me rephrase it. Were the Retail Clerks still active, talking to the employees, or passing out cards, or anything during this period that the Meat Cutters or Food Store Employees were getting cards signed?
MR. GRAVITT: Objection.

TRIAL EXAMINER: Well, I'll permit it. It's kind of border line.

Were there any agents of the Retail Clerks around in March of '65 or only the Food Handlers?

THE WITNESS: The Food Handlers.

TRIAL EXAMINER: Just the Food Handlers. All right.

* * * *

[fol. 118] AUDREY SMITH

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address. Give us your full name.

THE WITNESS: Audrey Jane Smith.

TRIAL EXAMINER: Audrey Jane Smith?

THE WITNESS: Yes.

TRIAL EXAMINER: Where do you live, Mrs. Smith?

THE WITNESS: Renee Street, in Flatwoods.

TRIAL EXAMINER: How long have you worked for Heck's?

THE WITNESS: I went there the day after Mothers' Day in '65, I believe.

TRIAL EXAMINER: It would be May, '65?

THE WITNESS: Uh-huh.

TRIAL EXAMINER: And you're still there?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: And you've been there all the time?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Go ahead.

DIRECT EXAMINATION

Q (By Mr. Lawrence) Mrs. Smith, you were working at Heck's all during the period of 1965 after you came there in May?

[fol. 119] TRIAL EXAMINER: She's already answered that.

THE WITNESS: Yes.

Q (By Mr. Lawrence) In what department do you work? A Housewares.

Q And who was the department head of that department in 1965? A Mr. Joe Weekley.

TRIAL EXAMINER: Joe who?

THE WITNESS: Joe Weekly.

* * * *

[fol. 120] Q (By Mr. Lawrence) I'm going to show you what has been marked for identification as General Counsel's Exhibit 5-7, and ask you if you can tell me whose card that is? A It's my card.

Q Is that your signature that appears on the card? A Yes, sir.

TRIAL EXAMINER: You signed it on the date shown there on?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: And what date is that?

THE WITNESS: June, June the 13th, '65.

* * * *

Q (By Mr. Lawrence) Mrs. Smith, directing your attention to October 8, 1965, did Mr. Darnell talk with you on that date? A On the 8th of?

Q October, 1965. On or about that day. A It was around the first of that month. I don't know just what date it was.

Q Around the first of October, 1965? A Yes.

Q And you did have a conversation with Mr. Darnell at [fol. 121] that time? A Well, it was just when he came, they came thru. Mr. McCann and Mr. Darnell came thru and was asked if I wanted to be represented by the Food Handlers.

Q Well, now would you tell the Trial Examiner what Mr. Darnell said to you on this day and what, if anything, you said to him in reply? Just take your time and try to reconstruct the conversation that you had together. A Well, he, Mr. McCann introduced us; introduced me to Mr. Darnell. And said that he would like to ask me a question. And he just asked me if it, if I knew that there were, they were going around wanting them to be represented by the union, you know, to represent the persons.

And I said, yes, sir. And I said, yes, sir, I want to be represented by it. He asked me if I wanted to represented by the union. And I said, yes, sir. And that's all. I mean there wasn't no more.

Q Did he mention what union he was talking about? A The Food Handlers Union is all.

Q I see. And when he asked you this question what was your reply to him? A I said, yes, sir. And that's all. I walked back to my job.

Q Did he ask you why, tell you why he was asking. A No.

[fol. 122] Q He was asking this question? A, No, sir.

TRIAL EXAMINER: Did you ask him why he was asking you?

THE WITNESS: No, sir.

TRIAL EXAMINER: Did he say anything about your job being safe no matter what your answer was?

THE WITNESS: No, sir.

TRIAL EXAMINER: And wouldn't affect your job?

THE WITNESS: No, sir.

TRIAL EXAMINER: Whether you were for the union or against the union?

THE WITNESS: No, sir.

* * * *

[fol. 127] REDIRECT EXAMINATION

Q (By Mr. Lawrence:) Directing your attention once more to the conversation that you had with Mr. Darnell, was he loooking right at you when he was speaking to you? A Well, I guess so, sir. He walked up there to speak to me. I mean to talk, I mean.

TRIAL EXAMINER: Well, was he reading from a paper when he talked to you?

THE WITNESS: No, sir.

TRIAL EXAMINER: Or was he just talking in a usual way?

THE WITNESS: No. He was talking his usual way.

* * * *

[fol. 128] MARLENE CARTER

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Marlene Carter. 419 Cardinal Road, Kenwood Acres, Russel, Kentucky.

TRIAL EXAMINER: How long have you worked for Heck's?

THE WITNESS: Four years this coming October, sir.

TRIAL EXAMINER: You still work there?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: You've been there all the time since you started work?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: All right.

DIRECT EXAMINATION

Q (By Mr. Lawrence) In what department do you work, Mrs. Carter? A Clothing.

Q And who was the department head of the clothing department in 1965 when you were there? A I think Mr. Imus, Joe Imus.

[fol. 129] Q Did you sign a union authorization card? A Yes, sir.

MR. LAWRENCE: I would like to have this card marked for identification as General Counsel's Exhibit—

TRIAL EXAMINER: 8. 5-8.

MR. LAWRENCE: 5-8.

(The above-referred to document was marked as General Councel's Exhibit No. 5-8 for identification.)

Q (By Mr. Lawrence) I'm going to show you what has been marked for identification as General Counsel's—

TRIAL EXAMINER: Let me see the card.

Did you sign this card on the date shown thereon, GC 5-8?

THF WITNESS: Yes, sir.

* * * *

Q (By Mr. Lawrence) Directing your attention to May 24th in 1965, did you attend a meeting with Mr. Hadead? A Yes, sir.

Q And where was this meeting held? A In the store lounge.

[fol. 130] Q Was it during work time? A Yes.

Q Or other time? A Work time.

Q Now, what do you, what did Mr. Hadead say at that time about the union? A He said that we could sign all the cards that we wanted to, but just because we signed a card this was no reason that we didn't have to do our work. Because he had a girl tell him that in one of the other stores and he fired her.

Q Now, directing your attention to October 8th—

TRIAL EXAMINER: Had a girl tell him what? We want to get the story.

THE WITNESS: That's all.

* * * *

Q (By Mr. Lawrence) Now, directing your attention to October 8, 1965, did a Mr. Darnell speak with you? A Yes, sir.

Q And was this during work time or at some other time? A Working time, sir.

Q And where did this conversation occur? A In my department.

[fol. 131] Q And what did Mr. Darnell say to you at this time? A He told me he would like to ask me a question. And he'd like for me to give him either a yes or no. And he asked if I was for the union. I said, yes, sir, I signed a card. He said, thank you and walked off.

Q Now, did he give you any explanation as to why he was asking you these questions? A Not to my knowledge he didn't, sir.

Q Did he say anything at this time about your not losing your job if you answered him or if you don't answer him? A No, sir.

Q Was he looking right at you when you were having this conversation with him? A Yes, sir.

TRIAL EXAMINER: Well, looking at her, that doesn't help. He could be reading from a paper and still looking at her. Was he reading from a paper at the time?

THE WITNESS: I do believe he had a clip board or something in his hand, sir. Now, if hewas reading that off, I don't think he was.

TRIAL EXAMINER: All right.

* * * *

[fol. 135] JEANELLE GATES

was called as a witness by and on behalf of the General Counsel and, after being duly sworn, was examined and testified as follows.

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Jeanelle Gates.

TRIAL EXAMINER: Jeanelle. How do you spell that?

THE WITNESS: J-E-A-N-E-L-L-E.

TRIAL EXAMINER: All right.

THE WITNESS: And I live at 1015 Russell Street, Ashland, Kentucky. My phone number is—

TRIAL EXAMINER: No, we don't need your phone number.

THE WITNESS: Well, I thought you said you needed my phone number.

TRIAL EXAMINER: When did you start to work for Heck's?

THE WITNESS: It was about a week before Thanksgiving.

TRIAL EXAMINER: November of what year?

THE WITNESS: '64.

TRIAL EXAMINER: '64. You still work there?

THE WITNESS: Yes.

TRIAL EXAMINER: Been there all that time?

THE WITNESS: Yes, sir.

* * * *

[fol. 136] DIRECT EXAMINATION

* * * *

Q (By Mr. Lawrence) Did you sign that card on the [fol. 137] date indicated? June 19, 1965? A Yes, sir, I did.

Q Is that your signature? A Yes, sir.

* * * *

Q (By Mr. Lawrence) Directing your attention, Mrs. Gates, to October 8, 1965, did Mr. Darnell speak with you on that day? A Yes, sir, he did.

Q What, where did this conversation occur? A I was in the infants aisle I believe.

Q By the entrance you mean what? A The infants. See, I work in the infants department and the lingerie department. And I was in the infants department at the time.

Q And was this during work time? A Yes, sir.

Q Now, what exactly did Mr. Darnell say to you at this time and what did you, if anything, say to him? A Well, he just walked around to where I was and Mr. McCann was with him. And Mr. McCann introduced [fol. 138] me to Mr. Darnell. I remember Mr. McCann introducing me as Jeanelle Roberts. And he just said he would like to talk to me a minute. And asked me if, if I wanted the Food Handlers to represent me. And I said, yes, sir, I think we should have someone to represent us. And then he asked me how long I had worked there. And I told him that I had worked there, how long I had been there. And I told him that I had worked seven straight months before I was even tardy or absent from work. And he told me that was a good record and that I had done a good job. And he thanked me and then he just, just general conversation. It wasn't anything about the union or anything. And he thanked me then and went on and talked to some one else.

Q Did either Mr. Darnell or Mr. McCann give you any reason why they were asking you about whether you wanted the Food Handlers to represent you? A No. No, they didn't.

Q Did either— A They didn't say anything else to me.

Q I'm sorry? A I said they didn't say anything else to me about it.

Q Did they mention anything about how long you were going to continue to work there?

MR. HOLROYD: Objection to the leading nature of the question.

[fol. 139] TRIAL EXAMINER: Let me see your exhibit please.

Did Mr. Darnell read from a paper when he was talking to you?

THE WITNESS: I don't remember whether he had a paper or not.

TRIAL EXAMINER: Did he say to you you are probably aware that the Food Handlers union are trying to organize this store?

THE WITNESS: I don't remember him saying that. I just remember his asking me if I wanted them to.

TRIAL EXAMINER: Did he say they had made a demand on the company stating that they had a majority of our employees who desire them to represent them?

THE WITNESS: No, he didn't say that to me at all.

TRIAL EXAMINER: Did he say do you want the union to represent you?

THE WITNESS: He said that.

TRIAL EXAMINER: He said that?

THE WITNESS: He said do you want the union to represent you.

TRIAL EXAMINER: That part you remember?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Did he say in no way would this have a bearing on your job? Did he say that?

THE WITNESS: No, he didn't say that to me.

[fol. 140] TRIAL EXAMINER: Did he say you do not have to answer this question? Did he say that to you?

THE WITNESS: Now, he may have. Now, I wouldn't swear to it because I'm not sure.

* * * *

[fol. 143] CROSS EXAMINATION

Q (By Mr. Holroyd) Mrs. Gates, now who asked you to sign this card? A Miss Perry.

Q Ruby Perry? A Yes. She came to my home on two different occasions.

Q Tell us what she said when she talked to you and asked you to sign. A Well, she came to my home and my husband was there. And she talked to me about the union. I had heard others talking about it. But I had never, you know, discussed it with anyone before; until she came to see me.

Q What conversation, can you tell us, as best you can recall, exactly what she said? A Well, she just discussed, I mean, the good points of the union and, and explained to me what, what it was all about. I don't remember just exactly. I mean the words. And I know I told her I just, I just didn't want to talk about it then. I mean I couldn't. It was right at dinner time. I had just gotten home from work. I was getting ready to prepare dinner. And so she wasn't there but just a few moments. And then she said, well, she would come back later. So I went home another time. When I got home from work, and she was parked [fol. 144] there in the drive way waiting for me to, to get home. And so she came in and was talking to me about it again. And so I told her, well, I hadn't made up my mind. And so she left the card with me. And I think that was along sometime in May. And then it was a good month later then before that I decided then to sign the card. And after I'd signed it and sealed it up in an envelope I kept it about a week before I even mailed it.

Q Well, did you talk to anybody else about signing that card other than Mrs. Perry? A No. Just different one. I mean employees, employees that had already signed cards. And, of course, I had talked with them about it on different occasions.

Q Well, had anybody said anything would happen to you if you didn't sign the card? A No.

Q That you would be discharged or anything? A No.

Q Did you know Mr. France? A I just know who he was. I mean working in the store. I had no conversation with him or anything.

* * * * *

[fol. 145] RUIE PERRY

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Gravitt) Would you state your name and give us your address please? A Ruie Perry, 1712 Heights Street, Parkersburg, West Virginia.

Q During—

TRIAL EXAMINER: How do you spell that first name?

THE WITNESS: R-U-I-E.

Q (By Mr. Gravitt) During 1965 did you solicit union cards here for the Ashland, for the Heck's employees at the Ashland store? A Yes, I did.

Q You had some signed? A Yes, sir.

* * * *

Q (By Mr. Gravitt) Now, you look at GC 5-10, and tell me whose union card that is. A Roger Davis.

Q Did you see him sign it? A Yes, sir.

Q And what day did you see him sign it? A On May the 5th of 1965.

Q What day was it now? A May the 4th, 1965.

TRIAL EXAMINER: On 5-4-65. Is that right?

THE WITNESS: Right.

* * * *

Q (By Mr. Gravitt) Showing you GC 5-11, I ask you if you saw, or whose name is on this card? A Howard Green.

Q Did you see him sign the card? A Yes, sir, I did.

Q And what day did you see him sign the card?

[fol. 147] A The 3rd of May, 1965.

* * * *

[fol. 150] TRIAL EXAMINER: Next question.

Q (By Mr. Gravitt) I show you GC 5-12, and ask you if you can tell me whose union card that is? A Leon, Lester Leon Holstein.

Q Did you see him sign the card? A Yes, sir, I did.

Q On what date? A May the 3rd, 1965.

* * * *

[fol. 153] JAMES E. McCANN

was called as a witness by and on behalf of the Trial Examiner and, after being first duly sworn, was examined and testified as follows:

* * * *

EXAMINATION

* * * *

[fol. 155] Q (By the Trial Examiner) These were employed on October 8th and during the following week. Is that what you're saying? A Yes.

Q And were any of these people department heads? A Yes, sir. They're marked.

Q Those were marked department heads. Those were Carter? A No. Cahal

Q Oh, Cahal? A Uh-hum. And Conley.

Q What about Cartwright? Is that a department head? A Cartwright. Yes. Jewelry.

Q Clarke. Is Clarke a department head? A Yes. Her name is Gale Clark, in cosmetics.

Q Colm? A Colm is wareheuse.

Q You seem to have more department heads than employees, don't you? A No, sir. We've got seven, isn't there?

Q Roger Davis. Was he a department head? A Yes. Sporting goods.

[fol. 156] Q And Russell Paul France? A Housewares.

Q And Joe Imus. A Clothing. Imes. I-M-E-S.

Q I-M-U-S. Is this all the department heads you had? A Uh-huh.

* * * *

[fol. 168] MR. HOLROYD: Criswell was a department head, wasn't he?

THE WITNESS: At that time he wasn't.

* * * *

[fol. 178] CARLTON S. CASS

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

Thank you, Mr. Gunnoe.

Give us your name and address.

THE WITNESS: My name is Carlton S. Cass, Elkland, Pennsylvania.

TRIAL EXAMINER: Can you identify those cards as cards you saw signed on the dates shown thereon?

THE WITNESS: Yes, I can. The first one is—

TRIAL EXAMINER: Just a moment. He saw them signed.

* * * *

[fol. 180] JUNE MENSHOUSE

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Gravitt) State your name and address. A My name is June Menshouse. I live at 23 Jones Street.

Q And where are you employed? A At Heck's.

Q Did you work there all during 1965? A Yes, sir.

Q Did you assist the Meat Cutter in organizing em-[fol. 181] ployees? A Yes, sir.

Q And did you get cards signed? A Yes, sir.

Q I show you GC 5-16 thru 26, and ask you to look at these cards and tell me—

TRIAL EXAMINER: Were these signed in your presence by the persons whose names appear thereon on the dates shown thereon?

THE WITNESS: Yes, Sir.

TRIAL EXAMINER: All of them? Look them over.

THE WITNESS: That's correct.

TRIAL EXAMINER: You personally know all of the people that signed these cards?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: And you know that they did sign those cards in your presence?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: All right. Next question.

Q (By Mr. Gravitt) And on the dates on the cards. Is that right? A Yes, sir.

* * * *

[fol. 187] Q (By Mr. Gravitt) Now, I show you what's been marked as General Counsel's Exhibit 5-21, and tell me whose union card that is? A This is Linda Fields.

Q And did she work there in October, to your knowledge? A Yes, sir, she did.

Q In 1965?

TRIAL EXAMINER: Did she sign that card in your presence?

THE WITNESS: Yes, sir, she did.

* * * *

Q (By Mr. Gravitt) Now, during, you heard that, strike that. You heard the testimony here this morning that the union in this case began organizing the employees in early 1965. Do you recall that? And when did you start getting cards signed for the Meat Handlers, or Food Handlers Local 347? A In April.

Q Of what year? A Of 1965.

Q And you continued working for them right on. Is that right? A Yes, sir.

Q And during that time were you aware of the Clerks trying to organize employees during this particular time? A They had already left out of the store.

Q They weren't there from, say, early 1965 and thru '65? A Well, it was in '64, the latter part of '64 since we had seen anything of the Clerks.

Q And when you got these cards signed by the employees for what union did you get them signed? A For the Food Handlers Union.

* * * *

[fol. 197] Q Do you know a Mr., strike that. Directing your attention to May 24, 1965, did you attend a meeting, or one of the meetings in which Fred Haddead talked to the employees? A Yes, sir, I did.

Q What did you hear him say? A Well, we had to go to the lounge for this meeting. And Mr. Haddead, when we got in the lounge, half of the employees had gone on over to the—

TRIAL EXAMINER: Well, that's not the answer to the question. Tell him what Haddead said.

THE WITNESS: Well, Mr. Haddead said, when we got to the lounge, that he wanted to talk to us about union business that had been going on in the store.

Q (By Mr. Gravitt) And what did he say about it? A He said as far as he was concerned we could sign all of the cards that we wanted to sign, but because we did it, because we signed a card that was no sign that we didn't have to do our job.

Q Yes. A And he said, if you don't believe this, he said, I was at the Parkersburg store and a girl came up and said she signed a card and and he said he fired her on the spot.

Q Now, are you sure he said that a girl in the Parkersburg store came up and said she signed a union card and he fired her on the spot? Is that what he said?

[fol. 198] A He didn't say that.

Q Oh, well, tell me what he said. A He said that a gir in the Parkersburg, if, he said, if you don't believe me, he said, there was a girl in the Parkersburg store that said she signed a union card and he said I fired her on the spot.

* * * *

[fol. 200] TRIAL EXAMINER: Is this all of the testimony you have on this point?

MR. HOLROYD: Well, at best he's got a conflict between his own witnesses. And I move to strike it, Your Honor.

TRIAL EXAMINER: Well, suppose we wait until the end of his case and then I will act on any motions.

All right. Next question.

MR. GRAVITT: The day is long past when on the advice of legal counsel they come out and give you direct evidence.

MR. HOLROYD: Object to that.

Q (By Mr. Gravitt) Well, directing your attention to October the 8th, 1965, did Mr. Darnell ask you any questions about the union? A Yes, sir.

Q Where were you when he talked to you? A I was on the floor in the department I worked in.

Q Were you being paid for this time? A Yes, sir.

Q Well, what did he ask you?

[fol. 201] A He said, Mrs. Menshouse, I would like to ask you a personal question. I said, well, providing it's not too personal. He said, well, it's not going to be that personal. He said, I want to know if you were aware that the Food Handlers Union were wanting to represent you employees. And I said, well, whether it would be the Food Handlers or who it would be we should have someone recognize us. And he asked me why did I feel that way.

TRIAL EXAMINER: What did you say?

THE WITNESS: Well, I told him when I came there to the store that the store manager had told me that you were given automatic raises every six months. But I worked there a long time before I got my raise.

TRIAL EXAMINER: And what did he say?

THE WITNESS: Well, he didn't have anything else to say. He said he would like to talk longer but he had some other people to see.

TRIAL EXAMINER: All right.

BY MR. GRAVITT:

Q Did he tell you that he wouldn't fire you again over the union? A He said the questions he asked me wouldn't have any bearing on my job and my answer would be yes or no.

Q Did he tell you anything about the union offering to show him the union cards? A No, sir. He just asked me [fol. 202] if I was aware that the union was wanting to represent us.

Q Did he give you any explanation as to why he was asking you that question? A Outside of what I stated.

Q Well, he didn't ask you did you sign a card, did he? A No, he didn't.

Q And never at anytime during this conversation did he ask you if you'd signed a union card. Right? He simply asked you do you want the Food Handlers to represent you. Is that right? A That's right.

Q Do you know if he asked any employee in the store if they'd signed a union card?

MR. HOLROYD: Objection, Your Honor. It's outside the scope of the complaint.

TRIAL EXAMINER: Sustained. That's not the reason. How would she know.

MR. GRAVITT: Well, they told—

TRIAL EXAMINER: Unless she was there.

Q (By Mr. Gravitt) Did you hear him talk to any other employees? A No, sir, I didn't.

* * * *

[fol. 218] RONALD SKAGGS

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

[fol. 219] TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Ronald Skaggs.

TRIAL EXAMINER: S-K-A—

THE WITNESS: S-K-A-G-G-S.

TRIAL EXAMINER: And your address?

THE WITNESS: 6202 Little Seven Mile Road.

TRIAL EXAMINER: You work for the Food Handlers Union?

THE WITNESS: Yes, sir, I do.

TRIAL EXAMINER: Business agent?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: How Long?

THE WITNESS: November 1 of '65.

TRIAL EXAMINER: And you were involved in the organizational campaign at the Ashland store of Heck's?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: And you obtained signatures on some cards there did you?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: All right, show him your cards.

DIRECT EXAMINATION

BY MR. GRAVITT:

Q Look at these cards and tell me if you saw these employees sign and on those dates?

TRIAL EXAMINER: What numbers did you hand [fol. 220] him? Would you tell us, Mr. Gravitt?

MR. GRAVITT: Yes, sir. 6-1, 6-3, 6-4, 6-5, 6-6, 6-7.

TRIAL EXAMINER: Did you see all of those cards signed by persons whose names appear thereon?

THE WITNESS: Yes, sir, I did.

TRIAL EXAMINER: Were they signed in your presence?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: Did you know those people personally?

THE WITNESS: I had met them; several of these were the first time.

* * * *

[fol. 222] EVA H. MAYNARD

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your name and address.

THE WITNESS: Eva H. Maynard, 3224 Central Avenue, Ashland.

DIRECT EXAMINATION

BY MR. GRAVITT:

Q Now, how long nave you been working for Heck's? [fol. 223] A I would say about three and a half years.

Q Do you remember when Mr. Hadead came to town on May 24, do you not? A Yes, sir.

Q He talked to you and a group of employees? A That's right.

Q What did he say on that occasion regarding union cards? A Well, the very first thing when he came in, of course, he greeted us, but he did tell us that he had heard that cards were being signed. That we coud sign all that we wanted to. And after that, now, he didn't, he talked just a little while.

Q Uh-huh. A And then he stayed on the same subject. But now I don't recall what he talked about.

Q Uh-huh. A But he did say that a girl in, I can't say Parkersburg because I'm not sure, in another store, come up to him and flaunted in his face that she had signed a union card and he said I fired her on the spot.

Q Fired her on the spot? A That's right.

* * * * *

[fol. 224]

REDIRECT EXAMINATION

BY MR. GRAVITT:

* * * *

[fol. 225] Q Just one question. You thought that he meant that he fired a girl from the Parkersburg store when she told him she signed a card, didn't you?

THE WITNESS: Yeah. And I think that was—

MR. GRAVITT: That was clear to you?

THE WITNESS: Yes, I think that was clear.

[fol. 226] MR. GRAVITT: That's the way you felt about it?

THE WITNESS: Yes.

* * * *

[fol. 227] MARLENE CARTER

was recalled as a witness by and on behalf of the General Counsel and, after being first reminded that she was still under oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRAVITT:

Q You're the same Mr. Carter that testified here earlier? A Yes, sir.

Q All right. I show you what's been marked as GC Exhibit 6-16, 6-17, and 6-19, and ask you to look at those and tell me if you saw those people sign those cards and on the dates shown thereon? A These two, I was with those two when they were signing it.

Q You're talking GC 6-17 and 6-19? A Yes, sir.
Q You saw them signed? A Yes, sir.
Q And on the date shown on the card? A Yes, sir.
Q On what date? A 1-26-67. 1-28-67.

MR. GRAVITT: I ask that 6-17 and 6-19 be received in evidence.

MR. HOLROYD: Same objection.

TRIAL EXAMINER: Same ruling. Received.

(The above-referred two documents, heretofore marked as General Counsel's Exhibits Nos. 6-17 and 6-19 were received.)

Q (By Mr. Gravitt) Now, tell us about this 6-16. A This one, this boy here, I didn't see him.
Q But he handed you the card? A Yes, sir.
Q And was it filled out when he handed it to you? A Yes, sir.

TRIAL EXAMINER: Do you know who gave it to him? Did you give it to him?

THE WITNESS: He gave it to me, sir, to pass on.

TRIAL EXAMINER: Who gave him the blank card? Do you know?

THE WITNESS: I did.

TRIAL EXAMINER: Did you give it to him that day or the day before? When did you give it to him?

THE WITNESS: I gave it to him about three or four days before he gave it back to me.

* * * *

[fol. 230] JUNE MENSHOUSE

was recalled as a witness by and on behalf of the General Counsel, and after being first reminded that she was still under oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRAVITT:

Mrs. Menshouse, I show you GC 6-19, and ask you whose union card that is?

TRIAL EXAMINER: 19's been received.

Q (By Mr. Gravitt) 6-8. GC 6-8. A It's Wanda Jean Carsons.

Q Did you see her sign the card? A Yes, sir.

Q And on what date? A On January the 14th, 1967.

* * * *

[fol. 231] RUBY RIFFE

was recalled as a witness by and on behalf of the General Counsel, and after being first reminded that she was still under oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRAVITT:

Q Showing you GC 6-15 can you tell me whose union card that is? A It's Mitchell Daniels.

Q Did you see him sign it? A Yes, sir.

Q On what date? A January 29th of '67.

* * * *

[fol. 240] MR. HOLROYD: All right. Then paragraph 7, from the letter of Mr. Spencer to me it's clear that the demand was vague and inconclusive and, because of this matter about department heads. He didn't know whether he wanted them or he didn't want them. And therefore the demand that he made was—

TRIAL EXAMINER: He was willing to bargain with [fol. 241] you in any either unit. And you didn't want to bargain in any unit.

MR. HOLROYD: Well, he's got to pick the unit and we've got to decide on the unit that he picks. He can't just pick anyone he wants. I mean a whole bunch of them.

TRIAL EXAMINER: He can say we'll bargain with you in this one and not in that one. What's so hard about that?

MR. HOLROYD: At any rate we base our motion to dismiss on the evidence.

* * * *

[fol. 245] RAY DARNELL

was called as a witness by and on behalf of the Respondent and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOLROYD:

Q Mr. Darnell, did you prepare General Counsel's Exhibit, or Respondent's Exhibit Number 1? A Yes, sir.

Q You wrote the matter up at the top of that? A Yes, sir, I did.

Q Did you write the names of the employees listed [fol. 246] down on the side? A Yes, sir, I did.

Q And did you write the X's in the columns opposite their names? A Yes, sir.

Q Did you ask the employees the list of the question that is written out on that document? A Yes, sir.

* * * *

[fol. 247] TRIAL EXAMINER: And tell me just how you went about it. What did you say to them?

THE WITNESS: I had this all prepared. I had exactly what's on there on a clip board.

TRIAL EXAMINER: Respondent's Number 1?

THE WITNESS: Yes, sir. Mr. McCann and I walked thru the entire store. I'd talk to each individual separately.

TRIAL EXAMINER: Did you read this? Did you read this to all of them?

THE WITNESS: Yes, sir, I read that to all of them.

TRIAL EXAMINER: You never departed from the words that are written here?

THE WITNESS: I would say no. No, sir.

TRIAL EXAMINER: Were you reading as you spoke to them or did you have this committed to memory?

THE WITNESS: I read it and I would glance at the, my—

TRIAL EXAMINER: You would look up from the paper and glance at the employee?

THE WITNESS: Yes.

TRIAL EXAMINER: As you read it?
THE WITNESS: Yes, sir.
TRIAL EXAMINER: You never did just memorize it and then talk to them?
THE WITNESS: No, sir. I never had it memorized.
TRIAL EXAMINER: And then what did you do when [fol. 248] they, you asked each of them do you want the union to represent you. Is that right?
THE WITNESS: Yes, sir.
TRIAL EXAMINER: And what did you do when you got the answer to that question?
THE WITNESS: I marked an X.
TRIAL EXAMINER: Under yes or no depending on the answer?
THE WITNESS: That's right. Depending on the answer. Yes, sir.
TRIAL EXAMINER: Well, did most of them give you negative answers or positive answers?
THE WITNESS: I marked them just the way that they gave them to me.
TRIAL EXAMINER: Well, I'm asking you, what was the result? Did you count up the result?
THE WITNESS: Yes. We had more no's than we had yes's; according to our poll.

* * * *

[fol. 256] CROSS EXAMINATION

* * * *

[fol. 258] BY MR. GRAVITT:

Q. Now, in your testimony about Respondent's Exhibit 1, do you see that document? A. This Exhibit 1?
Q Yes, sir. A Yes, sir.
Q Well, doesn't that show that you didn't check each employee like you told me earlier, on the document? Is that right? A The ones that I talked to I checked, yes.
Q Well, you didn't check them all. Is that your testimony now? A My testimony is that the ones that I talked to I did check, yes.
TRIAL EXAMINER: You didn't talk to all of them?

THE WITNESS: I'm not positive I talked to all of them. I could have missed someone.

Q How many did you talk to? A All that were marked on here with X's.

Q Why did you leave some out? A There could have been reasons; they were off the day that I made the poll.

Q If all of the employees on there that you've got listed had told you that they wanted a union you still wouldn't have recognized this Food Handlers Union, would you?

* * * *

THE WITNESS: I would have referred it to Mr. Holroyd. The decision would have been with him.

* * * *

TRIAL EXAMINER: * * * You might want to ask Mr. Holroyd that question. It would be more pertinent.

Q And you still won't recognize this union today will you. A I think I previously stated that I would turn that over to Mr. Holroyd.

[fol. 260] Q Yes, sir. You wouldn't make any decision on it? A That's the reason we have a counsel.

Q You wouldn't tell them you recognized them? A That's the reason we have a counsel.

Q Is that right? A That's reason we have a counsel.

Q Yes, sir. But the question was you would not tell the Food Handlers that you would recognize them today would you? A I would not—

TRIAL EXAMINER: He would not make the decision he says.

MR. GRAVITT: Yes, sir.

TRIAL EXAMINER: Now, if this company is passing the decision along to his lawyer, they are thereby making the lawyer a part of management and I think the lawyer is subject to examination on that point if you want to examine him. There's no use pressing this any further.

Q Well, now when you conducted the poll whether they represented the employees or not had nothing to do with you recognizing the union did it? A Would you mind asking that again?

MR. GRAVITT: Would you read it to him please?

[fol. 261] TRIAL EXAMINER: When you conducted

this poll was it for the purpose of determining whether you recognized the union?

THE WITNESS: It was as per instructions of Mr. Holroyd.

TRIAL EXAMINER: There's no use pressing this man further. If you want the answer you'll have to ask Mr. Holroyd. I'll have to sustain an objection to any further questions on that. This is a rather unique situation where the company has made the lawyer a part of management.

MR. GRAVITT: Well, I take the position—

TRIAL EXAMINER: And delegate to him management decisions.

MR. GRAVITT: Well, Your Honor, even if they take his advice and it's erroneous—

TRIAL EXAMINER: Well, he's just performing administerial actions under his lawyer's instructions. They advocated in favor of their lawyer. They forget to credit this witness.

Q And your lawyer told you not to recognize them. Is that right? A He's the one I think that answered the letter.

Q Well, he told you not to recognize the Food Handlers did he not? A In the letter he told Mr. Sherwood Spencer that they didn't feel that the—

TRIAL EXAMINER: Don't answer the question. The letter speaks for itself.

Q (By Mr. Gravitt) Can you tell me, as a matter of fact, on October the 8th, just from your own knowledge, sir, how many of the employees had signed cards for this Local 347? A No, sir, I can't tell you.

Q You don't know? A No, sir, I do not know.

Q And you don't know today, do you? A From the looks of the evidence that's been produced here there's quite a few, yes.

Q And you didn't know from, during the time, October the 8th to the 13th, 1965, did you? A I didn't know, no, sir. I haven't seen the cards. I hadn't asked to see the cards.

MR. GRAVITT: No more questions.

TRIAL EXAMINER: All right.

MR. GUNNOE: Mr. Darnell, now out of all the cards that have been presented we are again asking you for recognition.

MR. HOLROYD: Object to this question. It's outside the scope of direct examination. It's not a question at any rate.

MR. GUNNOE: He didn't give me time to finish.

TRIAL EXAMINER: Finish the question, but don't answer until I rule.

MR. GUNNOE: And if you don't have the authority to make the decision on whether to recognize the union or [fol. 263] not who are we to contact to, that would have the authority to make this decision?

TRIAL EXAMINER: All right. Do you object to that question?

MR. HOLROYD: Object to that question. It's outside the scope of the direct examination.

TRIAL EXAMINER: It's already been answered since he's delegated everything to his lawyer.

MR. GUNNOE: Mr. Holroyd we'd like to ask you—

TRIAL EXAMINER: Do you want to put him on the witness stand? Do you want to call him as a witness?

MR. GUNNOE: Yes, sir.

TRIAL EXAMINER: You may do so at a later point.

MR. HOLROYD: This is all you've got of him?

MR. GRAVITT: No more questions.

MR. HOLROYD: All right. We rest our case.

TRIAL EXAMINER: Well, if you rest your case and you don't call Mr. Haddad to explain what he's told the employees the Board may well draw an adverse interest, Mr. Holroyd, for one thing. It's a rather crucial point. And the whole case may turn on whether he made that statement or not.

You still wish to rest your case?

MR. HOLROYD: Yes, sir. We rested.

TRIAL EXAMINER: You're willing to risk that adverse influence?

[fol. 264] MR. HOLROYD: I'm familiar with the—

TRIAL EXAMINER: All right. That's enough. That doesn't leave me much choice in making my decision on that point.

* * * *

EXHIBITS IN CASE NO. 9-CA-3728

GENERAL COUNSEL'S EXHIBIT NO. 2

FOOD STORE EMPLOYEES UNION
Local No. 347

* * * * *

October 11, 1965

Mr. Frederick Holroyd
Attorney at Law
521 Central Avenue
Charleston, West Virginia

Dear Mr. Holroyd:

This letter will serve to confirm my conversation with you on Friday, October 8, 1965, wherein I told you we represented a majority of the employees of Heck's Ashland store and asked for recognition and bargaining. You asked if I included the department heads and I told you we represented the majority with or without the department heads and that we would have that majority regardless of the Board's disposition of the department heads. I specifically explained that the two office girls, the store manager and the assistant manager as well as the watchman would not be included in the unit.

Our majority is firm either with or without department heads and knowing Heck's as I do I told you it would probably be a case to be decided by the Board. If the Board includes them we will have a majority and if the Board excludes them we will have a majority.

I offered to turn the cards over to you and they are still available. We will turn them over to you or Heck's for examination.

Very truly yours,

/s/ Sherwood M. Spencer

SMS:d

cc: Tri-State Distributors
19th Street
Nitro, West Virginia

CERTIFIED MAIL

G.C. 6 (a)

(Do not write in this space)

NATIONAL LABOR RELATIONS BOARD APPLICATION BLANK

9CA 3556

Name _____ Docket No 8490 OFFICIAL EXHIBIT NO G C42(a)

Ledger No. _____ Disposition: Identified ✓ Received _____ Rejected _____

Obligated _____

In the matter of Heck's

JUN 28 1965 Witness _____ Reporter G.B. Dorsey Oct 6, 1964

Initiation Fee $ _____ Date Oct 6 19 64

No. Pages Date Employed Oct 3-1964

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 175
CHARLESTON - - WEST VIRGINIA

Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, or your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours, or any other condition of employment.

Signature James C. Haines Soc. Sec. No. _____

Address 2104 Kanawha Blvd. Date of Birth 12-26-37 Tel. No. 343-7268

Employed at Weikel Tri State Dist Job Classification Labor

Chauffeurs License No. _____ Beneficiary Janet Haines

Relationship of Beneficiary Wife

QUESTIONS

1. Have you ever been a member of any Local Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers? Answer YES or NO yes

2. Have you ever applied for admission and been rejected by any Local Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers. Answer YES or NO no

3. Are you able to command the average wages of the craft in this locality? Answer YES or No yes

4. Are you willing to take an obligation that will bind you to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, and that will in no way conflict with your religious belief, or your duties as a citizen? Answer Yes or NO yes

OBLIGATION

I, of my own free will and accord, in the presence of these witnesses, and on my own sacred honor, I do now covenant to keep the affairs of this Union strictly private unless authorized to reveal the same.

I will abide by its laws, both general and local, and will use all honorable means to procure employment for brother members.

I will make every possible effort to attend the meeting, and will pay all dues and assessments levied in accordance with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers' laws.

I further agree, that should it be hereafter discovered that I have made any misstatements as to my qualifications for membership, that I be debarred from all benefits provided by this Union. I will be obedient to authority, orderly in its meetings, respectful in words and actions, charitable in judgment of my brother members, and will never from self-motives wrong a brother, or see him wronged if in my power to prevent it. I will render full allegiance to this Union and never consent to subordinate its interests to those of any other organization of which I am now or may hereafter become a member.

To all this I pledge my sacred word and honor—to observe and keep the same—as long as I remain—a member of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers.

SIGNED James C. Haines

WITNESS _____

DATE _____

8 OCT 12 10 08 N.L.R.B. 7TH FLOOR-CINCINNATI

GENERAL COUNSEL'S EXHIBIT NO. 3

GARDNER, GANDAL AND HOLROYD
Law Offices

October 13, 1965

Honorable Sherwood M. Spencer
Secretary-Treasurer
Food Handlers Local Union 347
Nelson Building
Charleston, West Virginia

RE: HECK'S IN ASHLAND

Dear Sherwood:

This is to confirm your telephone call to me Friday, October 8, 1965, wherein your asserted that you represented a majority of the empoyees in Heck's Ashland, Kentucky store. Pursuant to my questioning you stated that such majority existed with or without the department heads and you were making a demand to include the department heads or to exclude them depending upon what the Board decided in this case. This answer resulted in a very confused demand and we must therefore conclude that you did not demand recognition in an appropriate unit.

Irrespective of this and in addition, we have caused a poll of all employees in that store to be conducted, the resulting answers produced an overwhelming statement that you did not represent the employees.

Accordingly recognition is declined until such time as you have been certified as the majority representative of the employees involved by the N.L.R.B.

Very truly yours,

GARDNER AND HOLROYD
/s/ Frederick F. Holroyd

FFH/ab
cc. Ray Darnell

GENERAL COUNSEL'S EXHIBIT NO. 4

October 25, 1965

Frederick Holroyd
Attorney at Law
521 Central Avenue
Charleston, West Virginia

Re: Your letter of October 13, 1965—
Heck's Ashland, Ky.

Dear Mr. Holroyd:

It is understandable that you attempted to misconstrue my phone conversation with you of October 8, 1965. You are attempting in your letter to me to deny an appropriate unit under any and all circumstances and this should be clear to the Board.

Inasmuch as a hearing was held concerning the Ashland store before the National Labor Relations Board and either through lack of information which the hearing officer had available to him in Parkersburg or because the hearing officer firmly felt that the department heads in Ashland were supervisors, we have two hearing officers in two different cases involving Heck's in which they differed in the status of certain department heads.

Therefore, so there can be no misunderstanding I am specifically making a request for bargaining and recognition for each of the units. I am requesting recognition and bargaining for all the employees at your Ashland store including non-supervisory department heads but excluding the store manager, the assistant manager, and two office employees and the night guard (watchman). I am specifically requesting recognition and bargaining for all the employees excluding the department heads, the store manager, the assistant store manager, office clerical employees and your guard or watchman.

Again, I am certain Heck's will follow the procedure as in the past and will deny as you did in your letter of the 13th, recognition and bargaining.

I am again offering to deliver to you or to any other person a majority of the signed authorization cards authorizing this Union to represent the employees of Heck's at the Ashland store in either of the above units or the unit the Board will finally determine to be appropriate. These cards are available at any time for your inspection for comparison with the payroll.

I note you claim you caused a poll of the employees to be taken in the store and that you state "the resulting answers produced an ovewhelming statement that you did not represent the employees."

In the face of the letters which have previously been sent to the employees of that and other stores it should be apparent to you the members in that store would be fearful of admitting they belonged to a Union inasmuch as Heck's has a record of discharging employees because of their sympathies for and on behalf of the Union and the Board has so held.

Very truly yours,

/s/ Sherwood M. Spencer

SMS:d

cc. Mr. Fred Haddad

GENERAL COUNSEL'S EXHIBIT NO. 4A

GENERAL COUNSEL'S EXHIBIT NO. 4B

APPLICATION

FOOD STORE EMPLOYEES UNION, LOCAL #347

P. O. Box 2751 Charleston, W. Va.

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions.

Heck's	Bill Morris
Company Name	Your Name
Ashland, Ky.	2420 Roosevelt St.
Company's Address	Your Street Address
Oct. 2, 1965	Ashland, Ky.
Date	City & State
/s/ John Hale	324-8082
Witness	Your Phone Number

RESPONDENT'S EXHIBIT NO. 1

You are probably aware that the Food Handlers Union are trying to organize the store. They have made a demand of the Co. stating that they have a majority of our employees who desire them (the union) to represent them. Do you want the union to represent you? This will in no way have any bearing on your job. You do not have to answer this.

	Name	Yes	No	Neutral
	John Hale	X		
	Larry Kinney		X	
	Ruby McGuire	X		
	Audrey Smith		X	
	Aseriath Toney		X	
	Belua Galliher		X	
Dept. Head	Emmett Moore		X	
	Dave Back		X	
	Gary Quillen	X		
	Susie Murphy		X	
	Marlene Carter	X		
	Eva Maynard		X	
	Ruby Riffe	X		
	June Menshouse	X		
	Jeanelle Roberts		X	
	Judy Jones		X	
	Fanny Lou Conley			
	Karen Layne		X	
	Roger Davis		X	
	Dave Kersey		X	
	Ruth Harris		X	
	Richard Brown		X	
	Jonell Gates	X		
	Jerry Layne—Signed wants card back		X	
	Gareyl Fluty		X	
	Dorise Clare	X		

	Name	Yes	No	Neutral
Dept. Head	Paul France	X		
	Bill Wheeler—Signed wants card back		X	
	Judy Wells		X	
Dept. Head	Bob Cartwright		X	
	Kenneth Bainey		X	
	Terry Cristwell—Signed wants card back	X		
	Josie Whitt	X		
	Pat Riley		X	
	Fern Saunders		X	
	Alice Hobson		X	
	Linda Fields	X		
Bag Boy	Bill Morris	X		
Dept. Head	Joe Imas			
Officer Cashier	Betty Cahall—		X	
Dept. Head	Gail Clarke			
Bag Boy	Gregg Pennington			
Dept. Head	Howard Colm	X		
Bag Boy	Clifton Salyers			

RESPONDENT'S EXHIBIT NO. 2

RETAIL CLERKS UNION LOCAL 1059

October 1, 1965

Mr. Fred Haddad, President
Tri-State Distributors Inc.
19th Street
Nitro, West Virginia

Dear Mr. Haddad:

This is to notify you that Retail Clerks Union Local 1059 has interest in your Hecks Inc. store located 3503 Winchester Avenue, Ashland, Kentucky, therefore, we hereby inform you that any agreements with any other Labor Organization would be in contradiction to the above stated interest and we will take all necessary legal action to protect such interest.

Please contact the undersigned in the event you have any questions concerning this matter.

Sincerely,

/s/ William E. Harvey

William E. Harvey, President
Retail Clerks Union Local 1059
187 South High Street
Columbus, Ohio 43215

CA 4-9237

WEH:br

EXHIBITS IN CASES Nos. 9-CA-3356 & 9-CA-3477

GENERAL COUNSEL'S EXHIBIT NO. 1-(a)
UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases Nos. 9-CA-3356, 9-CA-3477

HECK'S, INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ORDER REOPENING RECORD AND REMANDING PROCEEDING TO REGIONAL DIRECTOR FOR FURTHER HEARING

On November 30, 1965, Trial Examiner, Thomas F. Maher, issued his Decision in the above-entitled proceeding. Thereafter, the General Counsel and the Respondent filed exceptions to the Decision, and the General Counsel filed a brief in support of his exceptions.

In his Decision, the Trial Examiner dismissed the 8(a)(5) allegation of the complaint without determining the appropriateness of the unit, the Union's majority representation therein, or the lawfulness of the Respondent's refusal to recognize the Union as such representative upon the ground that "General Counsel has failed to meet the burden of establishing what precisely was the appropriate unit in which the Union had its majority." We do not agree with this conclusion of the Trial Examiner. On the contrary, we find on the basis of the entire record that the General Counsel was plainly contending that the appropriate unit consisted of all truck drivers and warehouse employees at the Nitro, St. Albans and Charleston warehouses. As the present record is inadequate to enable the Board to determine the unit and majority questions, we

shall remand the cases to the Trial Examiner for the purpose of receiving additional evidence and making the determination necessary to decide the complaint allegation that Respondent had unlawfully refused to bargain with the Union. Accordingly,

IT IS HEREBY ORDERED that the record in this proceeding be, and it hereby is, reopened, and that a further hearing be held before Trial Examiner Maher for the purpose of adducing additional evidence concerning

(1) Whether the unit sought by the Union herein was in fact "appropriate" for the purposes of collective bargaining.

(2) Whether the Union represented a majority of employees in said unit.

(3) Whether Respondent's refusal to recognize the Union as bargaining representative of employees in said unit was lawful.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 9 for the purpose of arranging such hearing, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that, upon conclusion of the hearing, the Trial Examiner shall prepare and serve upon the parties a Supplemental Decision containing findings of fact, conclusions of law, and recommendations based upon the evidence contained in the entire record, and that following service of such Trial Examiner's Supplemental Decision upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D. C., March 23, 1966.

By direction of the Board:

/s/ George A. Leet
Associate Executive Secretary

GENERAL COUNSEL'S EXHIBIT NO. 4

CHAUFFEURS, TEAMSTERS AND HELPERS
Local Union No. 175

* * * *

October 9, 1964

Mr. Fred Haddad
Tri-State Distributors, Inc.
Viscose Road
Nitro, West Virginia

Dear Sir:

This is to confirm our conversation in your office on this date. This local union represents a majority of your employees and respectfully requests that you negotiate a contract with us for their future employment. We are today filing with the National Labor Relations Board for Certification.

Please let me know when it will be possible for me to meet with representatives of your company to discuss the matter.

Very truly yours,

TEAMSTERS LOCAL UNION
NO. 175

/s/ R. D. Jackson

R. D. Jackson
Business Representative

RDJ/jh

CERTIFIED MAIL

TXD-171-67
Ashland, Ky.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS,
WASHINGTON, D. C.

Case No. 9-CA-3728

HECK'S, INC.[1]

and

FOOD STORE EMPLOYEES UNION, LOCAL #347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

Cassius B. Gravitt, Jr., Esq., and *James K. Lawrence, Esq.*, for the General Counsel.

Frederick Holroyd, Esq., Charleston, W. Va., for Respondent.

Messrs. Sherwood M. Spencer and *Woodrow R. Gunnoe*, Charleston, W. Va., for the Charging Party.

TRIAL EXAMINER'S DECISION

SIDNEY SHERMAN, Trial Examiner: The instant charge was served upon Respondent on October 22, 1965,[2] the complaint issued on December 16, and the case was heard on February 1, 1967. The issues litigated related to allegations of unlawful interrogation, threats of reprisal, creating the impression of surveillance, and unlawful refusal to bargain. After the hearing briefs were filed by Respondent and the General Counsel. On March 16, 1967, an order was issued proposing certain corrections in the record and the incorporation therein of certain exhibits, and disposing of certain other matters. No ob-

[1] Respondent's name appears as amended at the hearing.

[2] All events herein occurred in 1965, unless otherwise stated.

jection has been received to this order, and it is hereby affirmed.[2]

Upon the entire record, and my observation of the witnesses, I adopt the following findings of fact and conclusions:

I. The Business of Respondent

Heck's, Inc., herein called Respondent, is a West Virginia corporation, engaged in the operation of retail stores at various locations in the States of West Virginia and Kentucky. The Respondent annually has gross sales of more than $500,000, and annually purchases from out-of-State points goods valued in excess of $50,000. Respondent is engaged in commerce under the Act.

II. The Labor Organization Involved

Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, hereinafter called the Union, is a labor organization under the Act.

III. The Unfair Labor Practices

A. *Issues*

The pleadings, as amended at the hearing, raise the following issues:

1. Whether Respondent's president, Haddad, told employees on or about May 24, that he had discharged an employee when she admitted signing a union card?

2. Whether the interrogation of employees on October 8, by Respondent's operations manager, Darnell, violated Section 8(a)(1) of the Act or was privileged under the Board's *Blue Flash* doctrine?

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[2] In addition, it is now ordered (1) that Respondent's motions to strike appearing at pp. 24 and 28 of the transcript, as to which ruling was reserved at the hearing, are hereby granted, and (2) that Respondent's objection to evidence, which objection appears at page 100 of the transcript, and as to which ruling was reserved at the hearing, is hereby granted and the evidence objected to is hereby struck.

3. Whether Respondent's assistant store manager, Mitchell, unlawfully created the impression of surveillance?

4. Whether Mitchell told an employee that another supervisor had been discharged because of the Union, and invited the employee to resign?

5. Whether Respondent's admitted refusal to recognize the Union violated Section 8(a)(5) and (1) of the Act?

B. *Sequence of Events*.

Respondent operates a chain of discount stores in Kentucky and West Virginia. The instant case involves only its Ashland, Kentucky store.

The instant organizing campaign began early in 1965, and by October 8, the Union had obtained a number of signed cards from persons working in the Ashland store. On May 24, during the foregoing campaign, Respondent's president Haddad, addressed the assembled store employees, and, after telling them, in effect, that the signing of a union card would not immunize them from disciplinary action, cited an incident involving the discharge of an employee in another store who had volunteered to him the information that she had signed a union card. There was some conflict in the testimony at the hearing, which will be considered below, as to the precise reason given by Haddad for the discharge of that employee.

On October 8, Union Agent Spencer called Respondent's counsel, Holroyd, stated that he had obtained signed cards from a majority of Respondent's Ashland employees, and requested recognition. Holroyd suggested that Spencer write him a letter to that effect. On October 8, Respondent's operating manager, Darnell, asked virtually all the employees in the Ashland store, whether he (or she) wanted to be represented by the Union. In a letter of October 11, to Holroyd Spencer repeated the substance of the foregoing oral demand, offering to show Respondent the Union's cards. On October 13, Holroyd replied by letter, declining to recognize the Union because of an alleged ambiguity in the Union's definition of the unit, and because a poll taken by Respondent demonstrated that the majority of the Ashland employees did not wish to be

represented by the Union. On October 25, Spencer again wrote to Holroyd, renewing the Union's demand, but received no reply.

There was uncontradicted testimony by employee Clare that early in October, Assistant Store Manager Mitchell, an admitted supervisor,[4] told her that Respondent knew which employees had signed, and which had not signed, Union cards, and that the Union had attained majority status when Clare signed a Union card (on October 6).

C. *Discussion*

1. Union animus

Respondent's union animus is amply attested by the Board's findings in 150 NLRB 1565 (Ashland store), 156 NLRB No. 73 (Parkersburg store), 158 NLRB No. 21 (Parkersburg store), 159 NLRB No. 104 (Huntington store), and 159 NLRB No. 127 (Huntington store). Perusal of these cases shows that at the foregoing stores Respondent reacted to a union organizational campaign by mounting a counteroffensive of interrogation and threats, did not hesitate to resort to discriminatory discharges, and that it consistently rejected requests for recognition. Thus, in 150 NLRB 1565, involving a campaign in 1964 by a different union (Retail Clerks) to organize the instant store, it was found that Respondent, through its president, Haddad, and operations manager, Darnell, engaged in extensive interrogation, that a supervisor threatened employees with discharge for union activity, and that an active union adherent was, in fact, discriminatorily discharged.

2. The 8(a)(1) issues

a. *The Haddad speech*

Riffe testified that on May 24, President Haddad told the assembled employees at the Ashland store that they could sign all the union cards they wished, but they still

[4] The denial in the Respondent's answer of Mitchell's supervisory status was withdrawn at the hearing.

had to do their work, and that he then mentioned the case of a girl in Respondent's Parkersburg store who, after volunteering to him the information that she had signed a union card, had been "fired on the spot." Menshouse testified to the same effect, and Maynard corroborated this version with only the minor embellishment that Haddad asserted that the Parkersburg employee had "flaunted" the fact that she had signed a union card. While agreeing otherwise with Riffe, Clare testified that Haddad interpolated the explanation that the girl in Parkersburg had been discharged because she took the position, in effect, that, having signed a union card, she was free to neglect her work, and Carter testified to substantially the same effect.

All the foregoing employee witnesses were called by the General Counsel, and were apparently sincere. Their testimony may be reconciled on the assumption that Haddad, purposely or otherwise, cast his remarks in such a form that they were susceptible of different interpretations. Thus, if he stated, as Maynard testified, that the employees could sign all the Union cards they wanted, but still had to do their work, and, that he had discharged a Parkersburg empoyee for flaunting the fact that she had signed a union card, it was understandable that some of the employees, like Clare, would interpret the last remark, taken in context, as implying that the case of the Parkersburg employee was given as an illustration of Haddad's thesis that the signing of a union card did not relieve the employees of their obligation to do their job. However, if, as Menshouse, Riffe and Maynard testified, Haddad did not make it clear that the discharge of the Parkersburg employee was for any reason other than her avowal of union adherence, it was expectable that some, at least, of the employees would construe his remarks as implying, if not that all Union adherents would be summarily discharged, that Respondent, at the very least, would be quick to discharge Union adherents who gave it any offense. Moreover, in resolving the foregoing conflicting versions of Haddad's remarks, I deem it particularly significant, that Respondent, without offering any explanation at the time, failed to call Haddad to testify, not-

withstanding that it was pointed out to Respondent's counsel at the hearing that such failure would invite the inference that Haddad's testimony would not aid Respondent.[5]

In view of this, I am constrained to find that, as indicated by the testimony of Menshouse, Riffe and Maynard, Haddad's remarks were couched in such a way as to lead his listeners to believe that adherence to the Union would subject them to reprisals, and that Respondent thereby violated Section 8(a)(1) of the Act.

b. *Darnell's interrogation*

Admittedly, Darnell on October 8, systematically interrogated all the employees in the Ashland store about their desire for Union representation. According to Darnell, he approached the employees in the store and read the following from a sheet of paper which he held in his hands:

> You are probably aware that the Food Handlers Union are (sic) trying to organize the store. They have made a demand of the Co. stating that they have a majority of our employees who desire them (the Union) to represent them. Do you want the Union to represent you? This will in no way have any bearing on your job. You do not have to answer this.

The sheet also listed the names of the employees and opposite this list were three ruled columns captioned, respectively "Yes," "No," and "Neutral." According to Darnell he indicated in one or the other of these columns the nature of each employee's reply to his question re-

[5] In his brief Respondent's counsel asserts that he did not defend the allegation relating to Haddad's speech because of his understanding that it had been struck. However, at the close of the General Counsel's case I stated on the record that I was reserving ruling on Respondent's motion to strike that allegation, and in my order of March 16, 1967, that motion was finally overruled. On the same date I advised Respondent's counsel by letter that, if he deemed himself prejudiced by this ruling, I would entertain a motion to reopen the hearing to receive further evidence on the matter. No such motion was filed.

garding their desire for union representation.[6] He testified that the majority of the employees interrogated repudiated the Union, and the tally on the sheet, eliminating the answers of those found below to be supervisors, shows that only 12 favored the Union while 23 opposed it. The answers of three employees were not recorded.[7] While three of the employees (Clare, Smith, and Menshouse) testified that Darnell's remarks to them corresponded to the foregoing quoted matter, Riffe testified only that Darnell asked her if she wanted to be represented by the Union, and Carter and Gates were specific that, in interrogating them, Darnell gave no assurance that their answers would not affect their jobs.

As I was favorably impressed by the demeanor of the latter three witnesses, and by the circumstantiality of their version of the interrogation incident, I credit them as against Darnell, and find that he offered them no assurance against reprisals.

Respondent contends that the foregoing interrogation was permissible under the Board's *Blue Flash* rule,[8] which sanctions interrogation of employees about their desire for union representation, provided, *inter alia*, (1) that the purpose is to verify a union's contemporaneous claim to represent a majority of the employees, (2) that such interrogation is accompanied by an assurance against any reprisals for union activity, and (3) that such interrogation does not occur in a context of employer hostility to union organization.

I am satisfied that none of the foregoing conditions was met here. As to (1), it is clear from Clare's unde-

[6] The foregoing document was offered in evidence at the hearing as Respondent's Exhibit 1, but was received only for the purpose of showing what Darnell purportedly read to the employees. However, upon reconsideration, the document was by my order of March 16, 1967, received in evidence without any limitation, since the contents of the entire document were in effect, adopted by Darnell in his testimony.

[7] Darnell testified that he may have missed a few employees in making the round of the store.

[8] *Blue Flash Express, Inc.*, 109 NLRB 591; *Johnnie's Poultry Co.*, 146 NLRB 770.

nied testimony, related in more detail below, that Respondent already knew on October 6, which employees had signed cards and that when Clare signed a card on that date the Union had achieved majority status, and there is no evidence that Respondent believed that such majority had been obtained by improper means.[9] Accordingly, Darnell's polling of the employees was not necessary to verify the Union's claim, and it seems fair to infer that Respondent's only reason for taking the poll was the expectation that some of the Union adherents would be reluctant to admit their true sentiments to Darnell, even if they were given assurance against reprisals, and that the result of such a poll would, therefore (as proved to be the case here), be more favorable to Respondent than a count of the cards known by Respondent to have been actually signed. I do not believe that to permit such a "recount" by Respondent would conform to the letter or spirit of *Blue Flash*.[10]

As to the requirement of *Blue Flash* that the interrogation be accompanied by an assurance against reprisals, it has already been found that in the case of at least three employees Darnell neglected to convey that assurance.

As to the requirement of absence of union animus, it must be remembered that Darnell's interrogation occurred

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[9] In any event, since the record, including Darnell's own testimony, is devoid of any evidence that he asked any of the employees on October 8, about the methods used by solicitors for the Union to induce the employees to sign the cards, it is clear that Respondent had no concern on this point.

[10] Prior to *Blue Flash*, the Board had long held that systematic interrogation of employees about their union sentiments was unlawful as an invasion of their right to privacy and freedom from coercion. In *Blue Flash*, the Board balanced the mischief of such interrogation against the interest of the employees in verifying the accuracy of a union's claim to represent a majority of his employees, and struck a balance in favor of the employer. See *Johnnie's Poultry Co., supra.* However, where as here, there is ample basis for finding that the employer is already aware from other sources of the facts as to the Union's status, no legitimate purpose would be served by permitting him even the limited invasion of his employees' rights accorded by *Blue Flash*.

against the background of President Haddad's speech of May 24, in which, as found above, he cited the case of an employee whom he had discharged on the spot, when she announced that she had signed a union card. Although this speech had been delivered more than 4 months before the polling of the employees, such a dramatic threat to their job security by the top representative of management could not have failed to make a lasting impression on the assembled employees.

Moreover, it is relevant here to consider Respondent's union animus, as demonstrated by the Board's findings in the various cases cited above, particularly the Board's findings that in March 1964, at the instant store, both Haddad and Darnell engaged in unlawful interrogation, Respondent threatened discharge of all the union adherents, and did discriminatorily discharge, Menshouse, a prominent union protagonist;[11] and, so far as appears from the record, such unfair labor practices were still unremedied on October 8.[12] It is difficult to see how, under such circumstances, Darnell's poll could be deemed to meet the requirement of *Blue Flash* that such interrogation must not occur in a context of hostility to union organization.

It may be noted, finally, that, in finding interrogation of an employee to be coercive, the Board and the courts have frequently cited the fact that the employee falsely disclaimed any interest in union representation.[13] Here, according to Darnell's own testimony the vast majority of the 38 Ashland employees disclaimed any desire for Union representation even though, as found below, 21 of them had signed Union cards, and there is no evidence

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[11] 150 NLRB 1565, enfd. 63 LRRM 2527 (C.A. 6, Nov. 1966).

[12] While Menshouse had been rehired by October 8, there was no evidence as to the extent to which Respondent had otherwise complied with the Board's order by that date.

[13] See e.g., 159 NLRB No. 104, at page 7 of the Trial Examiner's Decision (involving Respondent's Huntington Store), which was affirmed on this point by the Board, where the variance between the result of an employee poll and the card count was cited as a reason for finding the poll coercive.

that any of them had prior to October 8, sought to revoke their cards.

For all the foregoing reasons, it is found that Darnell's interrogation violated Section 8(a)(1) of the Act.

c. *The Mitchell-Clare incidents*

Clare signed a Union card on October 6. She testified that early in October, she had discussions about the Union with Assistant Store Manager Mitchell, who told her that Respondent knew what employees had and had not signed Union cards, and that the Union had gotten "over the hump" and achieved majority status, when she signed a Union card. Mitchell did not testify. I credit Clare. A statement reflecting such precise knowledge of the number of Union adherents [14] could not fail to create an impression of close surveillance by management of Union activities, through employee informers or otherwise.[15] It is accordingly found that, by creating such an impression, Respondent violated Section 8(a)(1) of the Act.

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[14] Moreover, as found below, the Union did in fact get "over the hump" on October 6, when it obtained its 20th (and 21st) card. (Both Clare and Brown signed cards on that date.)

[15] While it is not clear from Clare's testimony whether this conversation took place before or shortly after the October 8 poll, it is evident that Mitchell was not referring to that poll as the source of Respondent's information regarding the Union sentiments of the employees. For one thing, that poll elicited repudiations of the Union from the vast majority of the employees, and it is not apparent, in any event, how Respondent could have determined from that poll the precise date on which the Union obtained the decisive card.

Respondent cites certain testimony by Clare to the effect that she and Mitchell were on friendly terms, that she "probably" initiated discussions of the Union with him, that she "might have" told him before the foregoing incident that she knew that most of the employees had signed Union cards; and that, on the occasion in question, she agreed with Mitchell's observation on this point. However, there is no evidence that Clare disclosed to Mitchell the identity of the Union adherents or that she herself had signed a card; and the fact that Mitchell and Clare were on friendly terms or that she initiated the discussions of the Union could not detract from the coercive effect of Mitchell's imputation to higher management of exact knowledge of the identity of the Union adherents.

Clare testified further that some time after Darnell's visit to the store on October 8, Mitchell referred to a rumor then circulating among the employees that Store Manager McCann had been "discharged" [16] because of "the union and the employees," and that, in this connection, on a particular Saturday evening Mitchell told the witness that the employees and the Union had "shafted" McCann, and that the employees were not going to "shaft" Mitchell. As Mitchell did not testify, I credit Clare. It is apparent from the foregoing that Mitchell attributed the actual or supposed downfall of McCann to the extent of the employees' Union activity. Such a statement to an employee, implying, as it did, that management could not hesitate to discharge a supervisor for tolerating union activity, could not fail to impress upon such employee that those engaging in such activity might share the supervisor's fate. Accordingly, I find that Respondent thereby violated Section 8(a)(1) of the Act.[17]

The General Counsel alleged a further violation based on Clare's testimony concerning an invitation to her by Mitchell to resign her job. However, the most that can be made of Clare's rather confused testimony on this point is that, while this remark was made by Mitchell on the same evening that he referred to the "shafting" of McCann, the occasion for the remark was not Clare's Union activity or sentiments but a disagreement over an entirely different matter, unrelated to the Union, and that the very next day Mitchell apologized to her therefor. Accordingly, I find no violation here.

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[16] As McCann apparently continued as store manager at Ashland until November 1966, the foregoing discussion either must have occurred after that date, or must have been based on misinformation as to McCann's status.

[17] Had McCann in fact been discharged because of a permissive attitude toward the Union, such discharge would clearly have been unlawful. *Talladega Cotton Factory, Inc.*, 106 NLRB 295, enf. 213 F.2d 208 (C.A. 5); *Jackson Tile Manufacturing Co.*, 122 NLRB 648. The rationale of these cases is that such a discharge tends to instill in employees the fear that they will suffer the same fate if they persist in their union activities. Such fear is nonetheless real, where, as here, the employees are told that their union activities caused the supervisor's discharge, whether or not that was actually the case.

3. The 8(a)(5) issue

a. *The appropriate unit*

It was agreed at the hearing, and I find, that the following unit is appropriate for purposes of collective bargaining:

All employees at Respondent's store in Ashland, Kentucky, excluding guards, professional employees, and supervisors as defined in the Act.[18]

It was also agreed at the hearing, in conformity with the Board's finding in the prior case involving the instant store,[19] that the six department heads at Ashland were supervisors, and that the night watchman at that store was a guard. They will accordingly be excluded.

b. *The Union's majority status*

At the hearing Respondent presented a document containing a list of 45 names, which were identified by McCann, the former manager of the Ashland store, as the names of all employees and department heads on the payroll for that store during the week beginning October 8.[20] Of the foregoing persons, it was stipulated at the hearing that six, who were listed as department heads, were su-

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[18] The original complaint provided for the exclusion of office clericals from the unit. The record shows that on October 8, Respondent had only one office clerical employee—Ruth Conley. (Cahal, who also worked in the office, was classified as a department head, and is found to be a supervisor.) Conley worked in a small enclosure in a corner of the store, where, among other things, she compiled records of cash receipts and processed employee timecards. Sometime after October 8, she was transferred to the cosmetic department. At the hearing, the General Counsel moved to amend the complaint to include office clerks and Respondent stipulated to their inclusion. Under all the circumstances, I find that such inclusion was proper (*Heck's, Inc.*, 159 NLRB No. 104; *Ohrbach's*, 118 NLRB 231; *Taunton Supply Corp.*, 137 NLRB 221), particularly as it was agreed to by Respondent at the hearing (Cf. *Heck's, Inc.*, 156 NLRB No. 73, fn. 17; *Heck's, Inc.*, 159 NLRB No. 104, fn. 1).

[19] 150 NLRB 1565.

[20] Trial Examiner's Exhibit 1.

pervisors and that one who was listed as the "night-watchman" was a guard. Of the remaining 38, there was a dispute at the hearing only as to Roger Davis, who was listed on the exhibit as a department head. The General Counsel also contended at the hearing that the list was incomplete. However, after the hearing, the General Counsel withdrew this contention,[21] and Respondent indicated that it was satisfied that, as contended by the General Counsel, Davis was not a supervisor on October 8, but an employee.[22] It follows that the parties are now in agreement, and it is found, that on October 8 and during the ensuing week the unit consisted of 38 employees.

At the hearing the General Counsel offered in evidence 30 signed Union authorization cards, which bore dates prior to October 8.[23] One of these cards, signed by McGuire, was later withdrawn, another was rejected because signed by France, a supervisor, and the card of Colm is hereby rejected for the same reason. Of the remaining 27 cards, the record shows that 6 purport to bear the signatures of individuals who were not in Respondent's employ on October 8. There remain 21 cards, most of which are challenged in Respondent's brief on various grounds, as follows:

1. Twelve cards are challenged on the ground that the signatory did not testify at the hearing. However, these

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[21] Trial Examiner's Exhibit 2.

[22] Trial Examiner's Exhibit 3.

[23] An additional card, that of Linda Fields, bore the date of November 27, which was subsequent to the Union's demands for bargaining in October.

At a later point in the hearing, the General Counsel offered in evidence 19 new cards, of which 17 were shown to have been signed by persons employed in Respondent's Ashland store on various dates in January 1967. The General Counsel would add these cards to those already in evidence, and contends that there was a continuing demand by the Union, in January 1967, at a time when, as allegedly shown by such cards, the Union enjoyed majority status, and that such demand was rejected by Respondent for invalid reasons. However, in view of my ultimate findings below, there is no need to pass on this issue.

cards were properly authenticated by witnesses at the hearing, who attested to the signing of the card.

2. Criswell's card is contested on the ground that he was a department head. However, the record does not support this contention.

3. Clare's card is attacked on the ground that France, her department head, talked to her about the Union. While Clare initially acknowledged that, before she signed the card, she discussed the Union at some length with France, who expressed the view that it "would be a good thing" if the Union organized the employees, at a later point in her testimony she professed to be unable to recall whether France talked to her about the Union before or after she signed the card, and averred that she had little contact with him other than in connection with her work, as they were not "very fond of each other." She insisted, moreover, that she signed the card at the request of a Union agent, after discussing the pros and cons of union representation, and she denied that France's endorsement of the Union had any bearing on her decision to sign the card, explaining that she signed it because she "didn't like how things were," and she did not like France and how he "ran things." It thus appears that it was her resentment of France's conduct as a supervisor, rather than his endorsement of the Union, that impelled her to sign the card.

Moreover, in *Aero Corporation*[24] in rejecting the contention that a card was invalid because solicited by a minor supervisor, the Board said:

> ". . . to permit Respondent now to rely on Johnson's activities to justify its refusal to recognize the Union designated by a majority of its employees, would encourage Respondent to have just such marginal supervisors join in the employees' organizing activity, secure in the knowledge that, if the Union should gain a majority, disclosure of the supervisor's real status would defeat that majority."

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[24] 149 NLRB 1283, 1287, enf. 363 F.2d 702, 708 (C.A.D.C.).

This rationale was specifically approved by the Court of Appeals in that case.

Under all the foregoing circumstances, it is found that Clare's card is valid.[25]

4. The cards of Wheeler and Morris were attacked on the ground that they were authenticated at the hearing only by specimens of their signatures taken from Respondent's payroll records.[26] However, after the hearing the parties submitted a stipulation to the effect that Wheeler's card was signed by him on the date shown thereon,[27] and, in view of this stipulation, no valid reason appears for rejecting his card.[28] As to Morris, it was stipulated only that his whereabouts were unknown and that he was unavailable to testify. However, I am satisfied from a comparison of his purported signature on the Union card with the specimen referred to above that the card was signed by him.[29] While there was no testimony at the hearing that such card was signed on the date shown thereon (October 2), it is proper to presume the accuracy of that date.[30]

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[25] *Radio Station KVEC*, 93 NLRB 618, 623.

[26] Tax withholding certificates.

[27] See Trial Examiner's Exhibit No. 4 and my order of March 16, 1967.

[28] At the hearing, ruling was reserved on the admission of this card. It is hereby ordered received in evidence.

[29] As to the propriety of proving the authenticity of a union authorization card through comparision of the signature thereon with a specimen signature, see *Aero Corporation*, 149 NLRB 1283, 1285-1286, and 28 USCA Sec. 1731, which authorizes such comparison by Federal courts, without any limitation as to the conditions under which such comparison may be made. For common law authorities to the same effect, see *Wigmore on Evidence*, 3rd ed., sec. 2016 (fn. 1).

[30] *Wigmore on Evidence*, 3rd ed., sec. 2520(b). While such presumption is rebuttable, there is no contrary evidence here; and, indeed, the only other evidence on the point is the notation made by Darnell on the sheet, on which he recorded the results of his October 8 poll (Respondent's Exhibit 1), indicating that Morris aligned himself on that date with the Union adherents. Such evidence is not only consistent with, but tends to confirm, the presumption that Morris signed a Union card on a date prior to October 8.

It is concluded therefore that on October 8, the Union had signed cards from 21 out of 38 employees in the unit, and that it represented a majority of such employees on that date.

c. *The Union's request*

Respondent contends that the Union did not make a proper request for bargaining. Union Agent Spencer testified that on October 8, he told Holroyd that the Union represented a majority of the "employees," whether or not department heads were included in the unit, and Spencer's letter of October 11 reaffirms the Union's claim to represent a majority of the "employees" in the Ashland store, regardless of the status of the department heads;[31] and he there prognosticates, on the basis of his experience with Respondent, that the issue of the appropriateness of the Ashland unit would probably reach the Board, but he asserts that, no matter how the Board should rule on the department heads, the Union would still have a majority.

In his reply of October 13, Holroyd acknowledges that in their October 8 conversation, Spencer claimed to represent a majority of the "employees" in the store, and the letter continues:

> Pursuant to my questioning you stated that such majority existed with or without the department heads and you were making a demand to include the department heads or to exclude them depending upon what the Board decided in their case. This answer resulted in a very confused demand and we must therefore conclude that you did not demand recognition in an appropriate unit.[31a]

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[31] In this letter and his subsequent letter of October 25, Spencer specifies the exclusion of the office employees. While the one such employee here involved has been included by me in the unit, it is well settled that such a slight variance is immaterial. See *Heck's, Inc.*, 156 NLRB No. 73.

[31a] I do not credit the foregoing self-serving, hearsay version of Spencer's demand, insofar as it conflicts with his testimony.

In his reply of October 25, to the foregoing letter, Spencer made it clear that he was presently defining the unit as either a store-wide unit including "non-supervisory department heads" or as one which excluded department heads. Spencer was thus, offering Respondent a clear, present choice between (1) a unit which included department heads, on the assumption that they were not supervisors, and (2) one which excluded them. Respondent contends that, because it was offered such a choice, Spencer's unit request was ambiguous. However, there was no ambiguity in Spencer's request in the sense that it was not clear what unit he was willing to bargain for. Each of the alternative units was precisely defined, and he made it abundantly clear that he was equally willing to bargain for either one. Essentially, the situation is the same as if Spencer had merely proposed the exclusion of supervisors, and indicated that he was willing to abide by Respondent's determination as to the supervisory status of the department heads.

Moreover, even if the Union had erroneously insisted on including the six department heads, it appears that the Board would not have deemed its bargaining request defective for that reason.[32] It is not clear why the Union should be in a worse position, because it indicated indifference to the unit placement of the department heads. Respondent had no greater burden here than it had in the case just cited, involving its Parkersburg store. Here, as there, Respondent was required only to indicate in what respect it deemed the requested unit to deviate from the one it considered proper. Moreover, here unlike there, Respondent was assured that the Union would adapt its unit request to Respondent's views.

Accordingly, I find no fatal defect in the Union's bargaining request of October 8 or any of its subsequent requests.

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[32] *Heck's Inc.*, 156 NLRB No. 78, involving the Parkersburg store. There the Board found that a request for inclusion of as many as 5 employees out of a unit of 37 was not defective, even though the 5 were found ineligible. Here, there were, as found above, 38 in the appropriate unit.

d. *The "good-faith" issue*

Respondent offered no oral testimony at the hearing concerning the reason for its decision not to recognize the Union. Darnell averred only that the authority to make that decision was delegated to Respondent's labor relations adviser, Holroyd, who was also its trial counsel, and, although the Union called upon Holroyd to take the stand, he refused to do so.[23] Accordingly, the only insight into Respondent's reason for refusing to recognize the Union is afforded by Holroyd's letter of October 13, which, after alleging that the Union's unit request was defective for the reasons noted above, continued as follows:

> Irrespective of this and in addition, we have caused a poll of all employees in that store to be conducted, the resulting answer produced an overwhelming statement that you did not represent the employees. Accordingly, recognition is declined until such time as you have been certified as the majority representative of the employees involved by the N.L.R.B.

It has already been found, on the basis of Darnell's uncontradicted testimony, that the result of this poll was in fact adverse to the Union. However, it has also been found that such poll did not conform to the requirements of the *Blue Flash* rule and was coercive. It is well settled that, in rejecting a union's recognition request, management may not, consistently with the requirements of good faith, rely on a count of union adherents obtained under coercive circumstances.[24] Such a poll has the twofold vice that it is patently not a reliable measure of employee sen-

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[23] As the Union did not press the matter further, I had no occasion to rule on the propriety of such refusal. It is clear, however, that, if, as Darnell insisted, Holroyd was vested with sole responsibility for making such a decision regarding Respondent's labor relations policy as was here involved, he was subject to examination regarding his motivation to the same extent as any other representative of management, provided only that he could not be required to disclose any communications with his client that

[24] *Preiser Scientific, Inc.*, 158 NLRB No. 133, and cases there entered into the matter.

cited. *Home Pride Provisions, Inc.*, 161 NLRB No. 47.

timent, and that it is calculated to deter the employees from remaining union adherents in the future. Accordingly, it is found that, by its resort to, as well as its reliance on, the foregoing poll, Respondent demonstrated its bad faith.

I am mindful of the Board's finding in 159 NLRB No. 104, involving Respondent's Huntington store, that in that case the polling of employees by management concerning their union sentiments, "while unlawful was not so flagrant that it must necessarily have had the object of destroying the Union's majority status * * * nor was Respondent's conduct of such a character as to support an inference that Respondent's refusal to bargain was made in bad faith in violation of Section 8(a)(5) and (1) of the Act."

However, here, unlike there, it was shown that Respondent was satisfied, even before taking the poll, that the Union had achieved majority status. Respondent, therefore, could have had no object in polling the employees on October 8, other than to coerce them into repudiating the Union. Thus, there is present here an essential element found to be lacking in the Huntington case—namely, coercive conduct which "necessarily . . . had the object of destroying the Union's majority status."

Moreover, even if this be viewed as a case where Respondent engaged in no unduly coercive conduct at the time of its refusal to honor the Union's request, it would still be found that such refusal was unlawful. Such a finding would be consistent with the Board's current policy as enunciated in *John P. Serpa, Inc.*, 155 NLRB 99, *Aaron Brothers Company*, 158 NLRB No. 108, and *H & W Construction Co.*, 161 NLRB No. 7. The net effect of these cases appears to be that, where there is no prior bargaining relationship, an employer, who is confronted with a request for recognition based on cards, need only refrain from any unfair labor practices "of such a character as to reflect a purpose to evade an obligation to bargain," and that, if this condition is met, the Board will not infer that his failure to recognize the union was in bad faith—i.e., because of rejection of the principle of collective bargaining. However, in the foregoing

cases the Board imposed a limitation on the foregoing rule, which is especially significant here—namely, that, even if the foregoing requirement is met, an employer's refusal to recognize a union will still be found unlawful, if it affirmatively appears that he in fact entertained no doubt of the Union's majority status.[35] Presumably, the rationale of this is that an employer cannot have a good faith doubt, if he had no doubt at all.

Here, there was affirmative evidence indicating that Respondent was aware on October 6, only 2 days before the Union's initial demand, that it had achieved majority status on that date.[36] No attempt was made to dispute this evidence,[37] and on the basis thereof it has been found that on October 6 Respondent was in fact aware of the Union's majority status. Accordingly, on that ground alone, it would be consistent with current Board policy to find that Respondent's refusal to recognize the Union was unlawful.

---

[35] See particularly the discussion of this point in *Aaron Brothers, supra*, and *H & W Construction Co., supra*. See, also, *Greyhound Terminal*, 137 NLRB 87, enfd. 314 F.2d 43 (C.A. 9); *Snow & Sons*, 134 NLRB 709, enfd. 308 F.2d 687 (C.A. 9). While the foregoing cases dealt with an inspection of cards tendered by a union, no logical reason suggests itself why a different result should apply where the employer has ascertained the union's majority status from other sources. See Member Jenkins' concurring opinion in *Aaron Brothers*, wherein he states that an unlawful refusal to bargain may be proved, *inter alia*, "by independent knowledge of the employer that a union has a majority."

[36] The last 2 of the Union's 21 valid cards were in fact signed on October 6. Thus, Mitchell's aforenoted statement to Clare that Respondent knew that the Union had obtained the decisive card when she signed one (on October 6) was factually correct on the assumption that she was the first to sign on that date. In any case, it suffices that Respondent knew by October 8 that the Union had a card majority.

[37] Respondent did not even call any representative of higher management to deny that Respondent had the knowledge of the Union's majority status imputed to it by Mitchell. This circumstance, in itself, warrants the inference that such imputation was correct.

Respondent contends, finally, in its brief that it was justified in refusing to bargain because of a letter dated October 1, received by Darnell, which read as follows:

> Mr. Fred Haddad, President
> Tri-State Distributors, Inc.
> 19th Street
> Nitro, West Virginia
>
> Dear Mr. Haddad:
>
> This is to notify you that Retail Clerks Union Local 1059 has interest in your Heck's, Inc. store located 3503 Winchester Avenue, Ashland, Kentucky, therefore, we hereby inform you that any agreements with any other Labor Organization would be in contradiction to the above stated interest and we will take all necessary legal action to protect such interest.
>
> Please contact the undersigned in the event you have any questions concerinng this matter.
>
> Sincerely,
>
> William E. Harvey, President
> Retail Clerks Union Local 1059
> 187 South High Street
> Columbus, Ohio 43125

Admittedly, Respondent did not reply. The foregoing letter was not authenticated as having been in fact sent by Retail Clerks. Moreover, there was no testimony that such letter motivated Respondent's refusal to recognize the Union, and, significantly, Holroyd's letter of October 13, although purporting to detail the reasons for Respondent's refusal to recognize the Union, makes no mention of Retail Clerk's alleged "interest."

In addition, although a number of employees had signed cards for Retail Clerks as late as March 1964,[38] Menshouse testified, without contradiction, that no representative of the Retail Clerks had appeared at the Ashland store since the latter part of 1964, which was several months before the Union began its organizing campaign,

[38] See the findings in *Heck's, Inc.*, 150 NLRB 1565.

and nearly a year before the Union's bargaining requests. While in the case last cited, Retail Clerks filed, *inter alia*, a refusal-to-bargain charge, that charge was either withdrawn or dismissed before the hearing held in that case on July 14, 1964; and, so far as appears from the record, the only basis for Retail Clerks' claim in the October 1 letter that it had an "interest" in the Ashland store were the cards dating back to March 1964, and the outstanding order of the Board issued in that case on February 5, 1965, requiring Respondent to refrain from discouraging, or interfering with, employee activities on behalf of Retail Clerks.[39]

While the Board has held that, when he is confronted with competing claims by two rival unions, which give

[39] That order was enforced by the Court of Appeals on November 29, 1966, 63 LRRM 2527 (C.A. 6).

Respondent cites *Blade-Tribune Publishing Co.*, 161 NLRB No. 137, apparently as authority for the continuing vitality of the Retail Clerks' 18-month old cards. However, that case is clearly distinguishable, as it holds merely that, when an organizing campaign is interrupted by the processing of unfair labor practice charges and thereafter resumed by the same union, culminating in a demand for recognition, cards signed before such interruption may be regarded as still valid, even though over a year old. Here, there was no resumption of the organizing campaign by Retail Clerks at any time after its apparent suspension or abandonment late in 1964, nor any subsequent demand by that union for recognition. This difference in the factual setting of the two cases is of prime significance. For, in *Blade-Tribune* the employer was in essence attempting to avoid its bargaining obligation by relying on the disruption of a union's organizing campaign through its own unfair labor practices. Policy considerations were clearly opposed to the employer's position and required that the otherwise stale cards be validated, so that the employer might not profit by his own wrong. Here, on the other hand, Respondent would profit by its own wrong if it were allowed to rely on Retail Clerk's 18-month old cards as a reason for not bargaining with the Union, since the only basis for validating such cards would be Respondent's own unfair labor practices in 1964. Whether the result here reached would be prejudicial to Retail Clerks is speculative, as there is no evidence that it intended to, or did, renew its campaign at any time. There can be no doubt, however, of the prejudicial effect on the employees' interest in self-organization, if Respondent's contention is sustained, as they will then be denied the right to representation by a union to which they adhered in the face of Respondent's unremedied unfair labor practices.

rise to a real question concerning representation, an employer need not, and, indeed, may not, recognize either one,[40] there was here no demand by Retail Clerks for recognition or any claim to represent the employees, but only a vague assertion of an "interest" in the employees, and a caveat against negotiating any contract with the Union, and Respondent admittedly made no effort to obtain clarification of the Retail Clerks' foregoing ambiguous position. In view of these circumstances, as well as the absence of any competent evidence that the foregoing letter was actually sent by Retail Clerks, that Respondent's refusal to recognize the Union was prompted to any extent by that letter, or that Retail Clerks had any valid authorization cards on October 1, it is found that Respondent's reliance on that letter is misplaced.[41]

It is therefore concluded that, by refusing to recognize the Union on and after October 8, Respondent violated Section 8(a)(5) and (1) of the Act.

IV. *The Remedy*

It having been found that the Respondent violated Section 8(a)(1) and (5) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent refused to bargain in good faith with the Union, which represented a majority of the employees in an appropriate unit. Accordingly, I shall recommend that the Respondent be ordered to bargain, upon request, in good faith with the Union as the exclusive representative of the employees in the appropriate unit.

---

[40] *The Boy's Market, Inc.*, 156 NLRB 105, 107.

[41] *Boy's Market, Inc., supra.* The Board there held that the refusal to recognize a union is not excused by a rival union's claim which is "clearly unsupportable or specious, or otherwise not a colorable claim." Here, not only was there no substantial basis for Retail Clerks' claim, but the fact that Holroyd's letter of October 13 does not even advert thereto is persuasive that Respondent recognized the speciousness of such claim. See, also, *Essex Wire Corp.*, 130 NLRB 450.

V. *Conclusions of Law*

1. All employees in Respondent's Ashland, Kentucky, store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times material the Union has been and still is the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

3. By refusing since October 8, to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. By interrogation of employees about their Union activities, threatening reprisals for such activities, and creating the impression of surveillance thereof, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

RECOMMENDED ORDER

Upon the entire record in the case, and the foregoing findings of fact and conclusions of law, it is recommended that Respondent, Heck's, Inc., Ashland, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain concerning rates of pay, wages, hours of employment, or other conditions of employment with Food Store Employees Union, Local # 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all employees in its Ashland, Kentucky, store, including office clerks, but excluding professional employees, guards, and supervisors as defined in the Act.

(b) Coercively interrogating employees about their union activities, threatening reprisals for such activities, and creating the impression of surveillance thereof.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos to Section 8(a)(3) of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with Food Store Employees Union, Local # 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all employees of the Respondent, in its Ashland, Kentucky store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its store in Ashland, Kentucky, copies of the notice attached hereto marked Appendix.[42] Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least 60 consecutive days thereafter

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[42] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Ninth Region, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith.[43]

Dated at Washington, D. C.

/s/ Sidney Sherman
Trial Examiner

[43] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

TXD-171-67

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL bargain in good faith, upon request, with FOOD STORE EMPLOYEES UNION, LOCAL #347 AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as the exclusive representative of all employees in the bargaining unit described below in respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

All employees at our Ashland, Kentucky store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT coercively interrogate our employees about their union activities, threaten reprisals for such activities or create the impression of surveillance thereof.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form, join or assist FOOD STORE EMPLOYEES UNION, LOCAL #347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their

own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos to Section 8(a)(3) of the Act.

HECK'S, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407, Federal Office Building, 550 Main St., Cincinnati, Ohio 45202 (Tel. No. 684-3663).

DECISION AND ORDER

On March 30, 1967, Trial Examiner Sidney Sherman issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial

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[1] The Respondent excepts to the Trial Examiner's finding that the Union authorization card of employee Morris was properly authenticated, and, by motion incorporated in its brief, moves that the record be reopened and a subpoena be issued, requiring the Trial Examiner to appear and testify concerning his qualifications as a handwriting expert. The Respondent contends that failure to grant its motion should result in the rejection of Morris' card, inasmuch as Morris did not testify at the hearing and no other witness testified that he saw Morris sign the card.

After the hearing, the parties stipulated that Morris was unavailable to testify, his whereabouts being unknown. The Trial Examiner (Section III, C, 3, b, 4 of his Decision), after comparing the purported signature of Morris on the Union authorization card with a specimen signature taken from the Respondent's payroll records, concluded that the card was signed by Morris, and found that such a comparison is a proper method of proving the authenticity of a signature (See footnote No. 29 of the Trial Examiner's Decision and the authorities cited therein). The Trial Examiner further found that it is proper to presume that the card was signed on the date shown thereon. (footnote No. 30 of the Trial Examiner's Decision).

We agree with the Trial Examiner's finding that Morris' card was properly authenticated. (See also, *Combined Metal Mfg. Corp.*, 123 NLRB 895; *Philamon Laboratories, Inc.*, 131 NLRB 80, enfd. 298 F.2d 176 (C.A. 2)). In any case, we note that even without Morris' card the Union had a majority of employees in the appropriate unit when it made its recognition demand. Accordingly, as we find the Respondent's motion to reopen the record lacking in merit, it is hereby denied.

error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations [2] of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Heck's, Inc., Ashland, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. June 28, 1967.

/s/ John H. Fanning, Member
/s/ Howard Jenkins, Jr., Member
/s/ Sam Zagoria, Member

NATIONAL LABOR
RELATIONS BOARD

[SEAL]

[2] We agree that the Respondent's polling of its employees was in the circumstances of this case violative of Section 8(a)(1) of the Act. Therefore, we find it unnecessary to rely on or about the Trial Examiner's additional or alternative grounds for that finding, as set forth in the last sentence of footnote No. 10 of his Decision.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,671

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

HECK'S INC., RESPONDENT

On Petition for Enforcement of Orders of the National Labor Relations Board

(Argued January 11, 1968. Decided June 28, 1968.)

Before HAYNSWORTH, Chief Judge, and BOREMAN and WINTER, Circuit Judges.

PER CURIAM:

We decline enforcement of orders of the National Labor Relations Board [1] requiring Heck's, Inc. to bargain with Meat Cutters Local 347 in its Ashland, Kentucky store and Teamsters Local 175 in its warehouses in the Charleston, West Virginia area. Insofar as the orders proscribe other unfair labor practices and require the reinstatement of employee Goins, they will be enforced.

The Board's findings that Heck's, Inc. violated § 8(a)(1) of the National Labor Relations Act [2] by interrogating employees with regard to their union sympathies, threatening reprisals against employees for their union support, creating the impression of surveillance of its employees'

[1] 166 NLRB Nos. 32 and 38.

[2] 29 U.S.C. § 151, *et seq.*

union activities and offering employees benefits in exchange for their union opposition, are supported by substantial evidence. There is also substantial evidence to support the finding that employee Goins was discharged for his union activities, his dismissal being a violation of §§ 8(a) (3) and (1) of the Act.

However, the Board's findings that the refusal of Heck's, Inc. to bargain with the unions was a violation of §§ 8(a) (5) and (1) of the Act cannot stand. The Teamsters and the Meat Cutters based their demands for recognition and bargaining on union authorization cards. In the Charleston area warehouses, the union had obtained 13 signed authorization cards from the employees in the requested unit of 26 members when the first demand for recognition was made. An additional card was procured the next day when a second demand was made. The Ashland store union fared a little better, obtaining 21 signed authorization cards from 38 employees in the unit, although there was some ambiguity as to the precise size of the bargaining unit requested. Heck's, Inc. refused to recognize and bargain with the unions under a claim of belief that they had not yet attained majority status in the respective bargaining units.

We have recently discussed the unreliability of the cards, in the usual case, in determining whether or not a union has attained a majority status and have concluded that an employer is justified in entertaining a good faith doubt of the union's claims when confronted with a demand for recognition based solely upon union authorization cards. We have also noted that the National Labor Relations Act after Taft-Hartley amendments provides for an election as the sole basis of a certification and restricts the Board to the use of secret ballots for the resolution of representation questions.[3] This is not one of those extraordi-

[3] Even the Board has agreed with our construction of the Act.

"Section 9(c) of the Act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed—but rarely exercised—to utilize other 'suitable means' of ascertaining representatives." Annual Report of the NLRB for 1948 at p. 82.

nary cases in which a bargaining order might be an appropriate remedy for pervasive violations of § 8(a)(1). It is controlled by our recent decisions and their reasoning. See *NLRB* v. *S.S. Logan Packing Co.*, 4 Cir., 386 F.2d 562; *NLRB* v. *Sehon Stevenson and Co.*, 4 Cir., 386 F.2d 551; *Crawford Mfg. Co.* v. *NLRB*, 4 Cir., 386 F.2d 367, cert. denied ____ U.S. ____, 36 LW 3403. There was not substantial evidence to support the findings of the Board that Heck's, Inc. had no good faith doubt of the unions' claims of majorities.

Enforcement granted in part and denied in part.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,671

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

HECK'S INC., RESPONDENT

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of certain orders issued by it against Respondent, Hecks, Inc., its officers, agents, successors, and assigns on June 28, 1967, and June 30, 1967, in proceedings before the said Board known upon its records as Cases Nos. 9-CA-3356, 9-CA-3477, and 9-CA-3728; upon the answer of the Respondent, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals

for the Fourth Circuit, that the said orders of the National Labor Relations Board be, and they are hereby, enforced as to those portions dealing with the violations of §§ 8(a) (3) and (1) of the National Labor Relations Act and requiring the reinstatement of employee Goins, and that enforcement with regard to that portion of the orders dealing with the violations of §§ 8(a) (5) and (1) of the Act is denied; and that the said Respondent, Hecks, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said orders as so enforced contained, in accordance with the opinion of the Court filed herein.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

A True Copy, Teste:

Samuel W. Phillips, Clerk
By /s/ Margaret L. Davis
Deputy Clerk

Filed June 28, 1968, Samuel W. Phillips, Clerk

Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

GISSEL PACKING CO., INC., *et al*

and

No. 691

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Petitioner,

—v.—

GISSEL PACKING CO., INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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10.23.64	Motion for More definite statement
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6.28.68	Opinion issued by the U. S. Court of Appeals for the Fourth Circuit
6.28.68	Decree entered by the U. S. Court of Appeals for the Fourth Circuit
9.26.68	Board's petition for certiorari filed
12.16.68	Order issued by the U. S. Supreme Court granting the Board's petition for certiorari

157 NLRB No. 59

D-8690
High Point, N. C.

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases Nos. 11-CA-2491
11-CA-2613
11-RC-2022

GENERAL STEEL PRODUCTS, INC., and
CROWN FLEX OF NORTH CAROLINA, INC.

and

UPHOLSTERERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

DECISION AND ORDER

On November 12, 1965, Trial Examiner David London issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found merit in certain objections filed by the Union to the election conducted in Case No. 11-RC-2022 and recommended that the election be set aside. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision,

the exceptions, brief, and the entire record in these cases,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modifications noted below.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that General Steel Products, Inc., and Crown Flex of North Carolina, Inc., High Point, North Carolina, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

IT IS FURTHER ORDERED that the petition in Case No. 11-RC-2022 be, and it hereby is, dismissed, and all proceedings held in connection therewith be, and they hereby are, vacated.

JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
SAM ZAGORIA, *Member*
NATIONAL LABOR
RELATIONS BOARD

[SEAL]

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[1] Respondent's exceptions directed to the credibility resolutions of the Trial Examiner are without merit. The Board will not overrule the Trial Examiner's resolutions as to credibility, unless a clear preponderance of all relevant evidence convinces us that they are incorrect. Upon the entire record, such conclusion is not warranted herein. *Standard Dry Wall Products*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3).

[2] In adopting the Trial Examiner's finding that the Union Obtained authorization cards from a majority of the Respondent's employees, we need not rely upon the cards of Billy Don Brown and Terry Roberson.

TXD-590-65
High Point, N. C.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Cases Nos. 11-CA-2491
11-CA-2613
11-RC-2022

GENERAL STEEL PRODUCTS, INC., and
CROWN FLEX OF NORTH CAROLINA, INC.

and

UPHOLSTERERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

Before: *David London*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a twice amended charge in Case No. 11-CA-2491 [1] filed by Upholsterers' International Union of North America, AFL-CIO, hereinafter referred to as the Union, the Board's General Counsel, on October 21, 1964, issued a complaint against General Steel Products, Inc. ("General Steel"), and Crown Flex of North Carolina ("Crown Flex"), hereafter collectively referred to as Respondent. That complaint, as amended on December 15, 1964, alleges that on specified dates between July 3 and November 6, 1964, Respondent, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended ("the Act"), interrogated its employees concerning their union

[1] The original charge was filed July 29, 1964; the amendments theerof on September 16, 1964, and October 15, 1964.

activities, and threatened them with reprisals for engaging in or supporting union activities. Respondent, by separate answers, denied the commission of any alleged unfair practice.

Upon a charge filed by the Union on January 7, 1965, in Case No. 11-CA-2613, the Board's General Counsel, on March 31, 1965, issued a second complaint against Respondent, alleging that since on or about August 14, 1964, in violation of Section 8(a) (1) and (5) of the Act, Respondent has refused to bargain collectively with the Union, the duly designated representative of its employees, in an appropriate unit with respect to rates of pay, wages, and other terms and conditions of employment. By separate answers filed in this proceeding, Respondent, though admitting a refusal to bargain, denied the commission of any unfair labor practice and pleaded several specific defenses which are considered in later portions of this Decision.

On August 14, 1964,[2] the Union filed a petition with the Board in Case No. 11-RC-2022 seeking certification as collective-bargaining representative of the production and maintenance employees of General Steel. Following a hearing on that petition on September 10, the Board's Regional Director for the Eleventh Region, on October 6, issued his Decision and Direction of Election finding that General Steel and Crown Flex constitute a single employer for purposes of collective bargaining, and directing that an election be conducted among the employees of both corporations in an appropriate unit to determine whether they desired representation by the Union. On October 13, General Steel filed with the Board at Washington, D.C., its Request for Review of the aforementioned Regional Director's Decision and Direction of Election contending that, contrary to the finding of the Regional Director in that proceeding, the record therein does not establish that General Steel and Crown Flex constitute "a single employer for purposes of the Act." On October 28, the Board issued its Order denying the aforesaid Request on the

[2] Unless otherwise noted all references to dates herein are to the year 1964.

ground that "it raises no substantial issues warranting review."

At the election conducted on November 6, 83 votes were cast for the Union, 94 against that organization, and 13 ballots were challenged. On November 10, the Union filed timely Objections to that election based on Respondent's alleged illegal conduct which, it was claimed, affected the results of that election. On December 23, following an investigation of the issues raised by the Objection aforementioned, the Regional Director issued his Supplemental Decision and Direction in Case No. 11-RC-2022 overruling four of said Objections. With respect to the remainder, he found the testimony with respect thereto to be in conflict and involving questions of credibility as to substantial and material issues. Accordingly, he directed that a hearing to resolve these issues be held before a Trial Examiner to be designated by the Chief Trial Examiner.[3] Because some of the said unresolved issues raised by the Objections in Case No. 11-RC-2022 are related to the issues posed by the amended complaint in Case No. 11-CA-2491 and the complaint in Case No. 11-CA-2613, the Regional Director, deeming it necessary in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay, by Orders dated December 28, 1964 and March 31, 1965, ordered that all three of said proceedings aforementioned be consolidated for hearing.

That hearing was held, pursuant to due notice, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner, at High Point, North Carolina, on various dates between May 24 and June 18, 1965, inclusive. All parties to the proceedings appeared and were given full opportunity to offer relevant and competent evidence. On or about August 30, 1965, briefs were received from the General Counsel and Respondent, both of which have been duly considered.

Upon the entire record in this consolidated proceeding,

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[3] With respect to the 13 challenged ballots, the Regional Director sustained two of such challenges. The remainder were not conconsidered by him, as a determination with respect thereto would not affect the ultimate result of the election.

and my observation of the witnesses as they testified, I make the following:

FINDINGS OF FACT

I. The business of General Steel and Crown Flex, and their single employer status

The two complaints herein allege, the separate answers of General Steel and Crown Flex admit, and I find, that (1) General Steel and Crown Flex are North Carolina corporations engaged in the same premises at High Point, North Carolina, General Steel being engaged in the manufacture of metal components of dual-purpose furniture, and Crown Flex in the manufacture of insulator pads; (2) during the 12 months preceding the filing of the two complaints herein, each of said corporations purchased and caused to be shipped materials valued in excess of $50,000 to its High Point, North Carolina, plant from points outside the State of North Carolina; (3) during the same period, both General Steel and Crown Flex sold and shipped finished products of a value in excess of $50,000 to points outside the State of North Carolina. The separate answer of each corporation admits, and I find, that each of said corporations is engaged in commerce within the meaning of the Act. For the reasons heretofore detailed in Statement of the Case, *supra*, with special emphasis on the Board's Order of October 28 in Case No. 11-RC-2022, denying General Steel's Request for Review, I also find that General Steel and Crown Flex constitute a single employer for purposes, and within the meaning, of the Act. *Pittsburgh Plate Glass Co.*, 313 U.S. 146; *Tennessee Packers, Inc.*, 154 NLRB No. 73, fn. 1; *N.L.R.B.* v. *Quaker City Life Insurance Co.*, 138 NLRB 61.

II. The labor organization involved

Upholsterers International Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. *Interference, restraint and coercion*

Frank D. Hoffman, Jr.[4] executive vice president of both General Steel and Crown Flex, and "operating head" of both companies during all times relevant herein, testified that in 1962 and 1963 he "heard some talk" that a union organizing campaign was taking place among Respondent's employees, and that since June 1964 he was aware of a "real effort" to bring that campaign to a successful conclusion, a campaign which Respondent admittedly sought to defeat. In its effort to avoid the designation of the Union as collective-bargaining representative of its employees, Respondent engaged in the following conduct interfering with, coercing, and restraining its employees in the exercise of their right guaranteed by Section 7 of the Act:

(1) On or about July 1, 1964, approximately six weeks before the Union made its demand for recognition on the following August 14 as is hereafter found, Foreman E. L. Curry of Crown Flex, came to employee H. T. Slate while the latter was engaged at his machine and asked him whether a union representative had called on him. Curry admitted that he made the inquiry.

(2) About July 23, 1964, Curry came to the machine of William Moss and asked him if he had heard anything about the Union. Moss testified that when he replied in the negative, Curry told him that if Hoffman "found out that anyone was for it or anything like that, that [Hoffman] would fire them." Curry admitted that he "may have" asked Moss in July whether he heard anything about the Union, he just "didn't remember whether [he] did or not, . . . [he] went around to *all of them*." He did not deny that he told Moss that if Hoffman found out that anyone was for the Union he would fire them.

(3) Moss further testified, credibly, that on the following day, R. H. Lewis, admitted by Respondent Crown

[4] Frequently referred to in the Transcript of Testimony as "Huffman."

Flex's answer to be a supervisor, came to Moss' machine and told him that he "heard the Union was back out there again and if anyone tried to get [Moss] to join, or anything like that, for [him] not to have anything to do with it, [that] if Frank Hoffman found out that anybody was for it that he would probably fire them." When Lewis was asked by Respondent's counsel whether he told Moss what the latter had attributed to him, Lewis admitted he "had a conversation like that but [didn't] remember it being with Mr. Moss *in particular*."

(4) On or about August 8, Foreman James Rigsbee came to the machine being operated by employee Samuel Snow and asked him whether he had signed a union card. Snow replied that it was none of his business.

(5) About August 19, Rigsbee approached employee Haywood Peterson and summoned four or five other employees together as a group. Rigsbee told the assembled employees *that he had just come from the office where Hoffman* had told him that the union was coming in, "and if it did come in, that a nigger would be the head of it, and he was putting in 10 new machines on that line, and that if the Union did come in, the niggers would be operators of them." Rigsbee admitted that he told the group that "they're going to get 10 new machines and 10 new niggers to run them" but that "it was all a joke." He testified, however, that he knew of only one Negro employed in the entire plant at that time, "there might have been one in the shipping department."

(6) About four or five weeks before the election, Bobby Simpson, then the foreman of the shipping department, called James Hutchins and other employees in that department to the shipping office. He there told the group that it would be their privilege to vote as they pleased and that he could not tell them which way to vote. He added, however, that "if the Union came in . . . maybe a lot of people wouldn't buy [Respondent's] products" because they were union made; that "in case [they] left and went to work some place else that it might be had for [them] to find a job because [they] had been working for a union outfit." Simpson admitted he "might" have made a statement to the effect that if the employees "left and went

somewhere else that it would be hard to find a job because of working for a union outfit . . . that people in this area did not recognize the Union, . . . there was a possibility of some of them holding against hiring people that were associated with the Union."

(7) Two or three weeks before the November 6 election, Foreman Richard Davis came to the worktable of Eugene Heaton and Walter Lewis and asked them how they were going to vote. Upon receiving a reply that they would vote "yes," Davis said: "If you do I will fire you," laughed, and walked off. Davis admitted that he "probably" made the statements attributed to him but sought to minimize its effect by asserting that he and the employees "kidded around all he time." Heaton, however, testified that while he had no fear that he would be terminated *before* the election because of its proximity, he believed that once the election was out of the way and Respondent knew that [he] had voted for the Union, . . . they would have fired [him]."

(8) During the morning of the election, Foreman Davis came to the worktable of employee James Byrd and asked him how he intended to vote. Byrd replied that he had not made up his mind. Tiny Micheaux (Mishoe), who was working nearby, told Davis that another employee, Jack Ledford, might vote for the Union if he did not get transferred to another job to which Davis replied: "If I find out that he voted for the Union, I will fire him," and then added: "I will fire him for not doing his work."

(9) On the morning of the election, Foreman Parish told employee William Poore that the employees did not need a union and that it would do them more harm than good. Parish admitted that he said something "like that" to Poore, not on election day, but "maybe the day before that, or so."

The findings pertaining to these nine violations are based on the testimony of the employees who were the subject of the cited interrogation and to whom the described threats were addressed. Some of the accusations were admitted, expressly or impliedly, and others remained undenied. Where conflict exists and where resort must be had to all the existing circumstances and the demeanor

of the respective witnesses as they testified in order to resolve that conflict, I have no hesitation in crediting the version thereof offered by the employees against the denials of Respondent's supervisors. While many of the employees were illiterate, some of them pitifully so, I was impressed by their sincerity. The supervisors, on the other hand, impressed me as being obsessed with the desire to vindicate their employer regardless of the truthfulness of their testimony.

At this stage in the administration of the Act, I deem it unnecessary to cite authorities establishing the illegality of the threats directed to employees by Respondent's supervisors concerning their union membership or sympathies as found above. Interrogation of the employees during the Union's campaign, of which campaign Respondent was well aware, and which interrogation took place *before* August 14, the date of the Union's demand for recognition, can certainly not be deemed, as Respondent contends, to be "questioning which the employer was entitled to carry on for the purpose of assessing the Union's claim of majority." Nor was there any legal justification for the subsequent interrogation of employees as to *how they intended to vote* at the approaching election which the Board had ordered to be a secret election. "The most relevant factor" in determining whether interrogation is coercive is "whether the questions seem to seek information which the employer in good faith needs—as when individuals are asked whether they belong to the Union so that the employer can check the Union's claim to represent a majority, or to the contrary seem to seek information most useful for discrimination." *N.L.R.B.* v. *Firedoor Corporation*, 291 F. 2d 328 (C.A. 2), cert. denied 368 U.S. 921. Here, the interrogation found to be violated immediately above was conducted under such circumstances as to disclose on its face that it was a kind which reasonably may be expected to impede and coerce employees in the free exercise of their statutory rights. *Mallory Plastics Company*, 149 NLRB No. 138; *Heinrich Motors, Inc.*, 153 NLRB No. 139.

I also find coercive Rigbee's statement to Peterson made immediately after he left Hoffman's office as described in

III A (5) *supra*, that if the Union came in, a "nigger" would be the head of that organization.[5] I regard this statement "as a threat that working conditions would not be as pleasant after the advent of a union. There are large areas and many localities in this country, [fortunately diminishing in size and number], where those of Anglo-Saxon stock regard themselves as an elite segment of society with the same arrogance and as little reason as Hitler so regarded Nordics. I cannot read into [Rigsbee's] statement . . . an expression of dedication to principles of democracy or fair employment practices. It was, rather, a direct threat that . . . if they accepted the Union, . . . the employees would suffer enforced association with [and be subjected to working conditions negotiated by], persons of supposedly inferior origins." *Petroleum Carrier Corporation of Tampa, Inc.*, 126 NLRB 1031, 1038-9. By that threat, Respondent violated Section 8(a)(1) of the Act.[6]

B. *The posted notice*

About September 1, Respondent posted on its premises a large notice "TO ALL EMPLOYEES" reading, in part, as follows:

> Because of the campaign which the union is putting on to get into the plant, several questions have come up on which you will want to know how the Company stands. We have decided to state the Company's position clearly for the benefit of everyone.
>
> (1) This is a matter of concern to the Company, of course, and it is also a matter of serious concern to you. It is our firm belief that if this union were to get into this Company it would not benefit you but would work to your serious harm.

---

[5] Ted Davis, the Union's International representative most active in the campaign to organize Respondent's employees, appeared to be of the Negro race.

[6] See also *Atkins Saw Division, Borg-Warner Corporation*, 148 NLRB No. 98.

(2) It is our positive intention to oppose the union and by every proper means to prevent it from coming in here.

The Board has on several prior occasions found and concluded, as I do herein, that this identical notice to employees predicting that the advent of a union "would not benefit you but would work to your serious harm" is violative of Section 8(a)(1) of the Act. *Overnite Transportation Company*, 154 NLRB No. 98; *Burlington Industries, Inc.*, 144 NLRB 245; *Owens-Corning Fiberglas Corporation*, 146 NLRB 1492, 1503; *White Oaks Acres*, 134 NLRB 1145, 1149-1150.

C. *The preelection speech*

A day or two before the November 6 election, Hoffman assembled all the employees and delivered a speech designed to influence them to vote against the Union at the coming election. Employee Roy Edmonds testified that Hoffman "started off bringing up the Right To Work law; he said that if we went out on strike, when we hit the door we had no more job," and that while the "government said he had to negotiate in good faith, he said he would negotiate, negotiate, and keep on negotiating." Employee John Edmonds testified to the same effect but added that Hoffman said "he did not have to sign a thing," that "strikes were the only weapon the union had [which weapon, he said], was no good in North Carolina with [its] Right to Work law."

James Hutchins testified that Hoffman reminded the assembled employees of the Bottoms-Fiske strike which he said lasted two years, at the end of which the employees "lost their homes and their cars and everything they had"; that he recalled a strike at Finch Furniture nearby in Thomasville where, he said, they "lost their homes and cars and haven't gone back to work yet"; that if the Union came in Respondent's plant and went out on strike, when they "walked through that door [they] were finished, . . . [they] couldn't get back in." Hutchins also testified that Hoffman stated that although the "National Labor Board said that he would have to negotiate in good

faith, he would negotiate, negotiate, negotiate, and negotiate."

Employee Wayne McCall testified that during the speech Hoffman said "he couldn't . . . and was not going to work with a union in the plant"; that in connection with a strike in Thomasville which lasted "maybe two years, . . . the men were out walking picket lines in the cold, they lost their cars, their homes, they were still out of work, they couldn't get a job for participating with a union . . .; that one weapon that the Union has is a threat of a strike, and that in North Carolina a strike is no good to nobody (sic) because you have the Right to Work law and when you walk out the door you are *fired and finished*, and we can hire new men in your place to take your job." With reference to the duty to negotiate, McCall testified that Hoffman said "the Government requires me to negotiate a contract, and I will negotiate, and negotiate, and negotiate, but no union will get a damn thing from me." He further testified that in discussing the strike at Bottoms-Fiske "he said that they voted in the Union and had bombings and dynamitings and men were out of a job."

With respect to that speech, Hoffman testified that he read from two lengthy letters written to all the employees on Ocober 28 and November 3 but admitted that there was "*some added speech . . . Side* comments . . . that came about from comments and questions from the employees." With respect to the duty to bargain, he denied that he said he would "negotiate, negotiate, and negotiate" and testified that he told he employees that if the parties agreed, they would "have a contract or something to that extent." Concerning strikes, he testified that he told the employees that it was his "understanding . . . of the North Carolina Right to Work law . . . that if any employee went on strike [Respondent] had the right to replace him.

I find Hoffman's reference to North Carolina's so-called Right to Work law to be a complete non sequitur. There is nothing in that law (General Statutes of North Carolina, Ch. 95, Sec. 78-84) which has anything to do with the right of employees to engage in a strike, or a loss of employee status for engaging a strike. Judging by the

various stages of illiteracy possessed by most of the more than approximately 100 employees who testified before me,[7] I am convinced that Hoffman's reference to the Right to Work law was intended, and undoubtedly did create the false impression that this law limited their right to strike beyond that possessed by employees in States where there was no such law.

Hoffman admitted that during his talk there was reference to the neighborhood strikes at Bottoms-Fiske and Finch Furniture, that employees "went greatly in debt because of the strikes," and that there had been violence in connection therewith. Though he denied that *he* made these statements and sought to attribute the warnings to some of the employees, he admitted that he "concurred" in those views when they were expressed and that in agreement and approval thereof "motioned [his] head [in affirmation] as they were talking."

On the entire record, and my appraisal of the trustworthiness of the testimony of the employees who testified that he made the statements attributed to him, I find that Hoffman made the threats so ascribed, thereby violating Section 8(a)(1) of the Act. *Bernardin, Inc.*, 153 NLRB No. 91. While much of his speech and most of the contents of the two letters aforementioned which Hoffman testified he repeated, *verbatim* or in sustance, during the course of his speech, consisted of legitimate argument against the entry of the Union, the effect of the threats heretofore found compel the conclusion that the overall effect of the speech was "to restrain employees in the exercise of their right to vote freely by instilling in them a foreboding of damage through loss of employment if the Union were selected" by the employees as their collective-bargaining representative. *Daniel Construction Co., Inc.* v. *N.L.R.B.*, 341 F. 2d 805 (C.A. 4); *Louisiana Manufacturing Co.*, VEB NLRB No. 131; *Rice Lake Creamery Co.*, 131 NLRB 1270, 1292; *Reed & Prince Manufacturing Co.*, 96 NLRB 850, 860, enfd. 205 F. 2d 131 (C.A. 1); *Russell-Newman Mfg. Co.*, 153 NLRB No. 105.

[7] Respondent, in its brief also took note of the "astonishing prevalence of illiteracy among these employees."

D. *The refusal to bargain*

Following a vigorous campaign to organize Respondent's employees in the spring and summer of 1964, the Union, on August 13, sent a letter to Hoffman, as president of General Steel, received by him on August 14, advising "that a majority of your employees of the High Point, N. C. plant have signed written authorizations designating [the Union] as their collective-bargaining agent for the purpose of representing them on all matters pertaining to wages, hours of work and conditions of employment." The letter further requested voluntary recognition of the Union and that a meeting be arranged for the purpose of negotiating a collective-bargaining agreement. On August 26, counsel for General Steel, by letter, advised the Union that his client did not believe that the Union represented a majority of the employees and would not, therefore, recognize the Union "until or unless it is certified by proper authority." Since that time, Respondent has continued to refuse recognition of, or bargain with, the Union.

In the meantime, on August 14, the Union filed its petition with the Board in Case No. 11-RC-2022 seeking certification as collective-bargaining representative of "all production and maintenance employees at [General Steel's] factory at High Point, N. C." Following a hearing on that petition, conducted on September 10 by a duly designated Hearing Officer, at which Hoffman, executive vice president of both General Steel and Crown Flex, testified, the Board's Regional Director, on October 6, issued his Decision and Direction of Election finding that General Steel and Crown Flex constitute a single employer within the meaning of the Act. He further directed that an election be conducted among the following employees of both corporations which he found and concluded to be an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: "All production and maintenance employees at [Respondent's] High Point, North Carolina, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act."

As noted in the Statement of Case, *supra*, General Steel filed with the Board at Washington, D. C., its Request for Review of the aforesaid Decision and Direction of Election urging *only* that the Regional Director "had no authority to enter any order affecting its employees or grouping the employees of General Steel Products, Inc. with those of any other employer not [previously made] a party to the proceeding." On October 28, the Board issued its Order denying the aforesaid Request for Review on the ground that "it raises no substantial issues warranting review."

At the election conducted on November 6, 83 votes were cast for the Union, 94 against that organization, and 13 ballots were challenged. Being of the view that it lost the election because of Respondent's illegal conduct and seeking to set aside its results, the Union filed its Objections to that election which culminated in the Regional Director's Supplemental Decision and Direction of December 23, further described in Statement of Case, *supra*. The General Counsel now seeks to establish the Union's majority status in the instant proceedings by cards executed by a majority of the employees in the appropriate unit designating the Union as their collective-bargaining representative, and to have Respondent adjudged guilty of an unlawful refusal to bargain as permitted by the Board's rationale in *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, approved by the courts in *International Union of Electrical, Radio and Machine Workers, AFL-CIO*, v. *N.L.R.B.*, —— F. 2d —— (C.A.D.C., May 13, 1965, 59 LRRM 2232); *Colson Corporation* v. *N.L.R.B.*, 347 F. 2d 128 (C.A. 8).

Respondent, in its brief, correctly contends that in order to prevail on this theory the General Counsel must prove "all of the following necessary elements: There must be (1) an unequivocal demand for recognition and bargaining (2) in an appropriate unit (3) by a union actually representing a majority of employees in the unit demanded and (4) the employer must have declined in bad faith to extend recognition, having no good-faith doubt of the Union's majority."

With respect to (1) immediately above, Respondent contends that "there was no unequivocal demand for recognition and bargaining." I find nothing equivocal in the Union's demand of August 13 expressly demanding both recognition and the designation of a time and place to begin collective bargaining. Nor is there merit to Respondent's argument that this demand lost its effect by the filing of the Union's petition with the Board on the following day.[8] Equally devoid of merit is the contention that there has been no proper demand because the Union's letter of August 13 was addressed only to Hoffman, as president of General Steel, and that no demand has ever been made on Crown Flex. By reason of the Board's Order of October 28 denying Respondent's Request for Review more fully described above, it is now "the law of the case," insofar as I am concerned, that General Steel and Crown Flex constitute a single employer. In that state of the record, the demand of August 13 must be deemed sufficient as to both corporations.

Nor is it fatal to the General Counsel's case that the Union's demand for recognition failed to "define any unit," but merely claimed the right to represent "a majority of your employees of the High Point, N. C. plant." *Within a day or two thereafter,* Respondent received a copy of the Union's petition in Case No. 11-RC-2022 describing the unit for which representation was claimed as follows: "All production and maintenance employees employed at the Employer's factory at High Point, N. C., excluding office clerical employees, guards, profesional employees and supervisors as defined in the Act." At the hearing on that petition, *no issue was raised* concerning the description or appropriateness of that unit and it was so found to be by the Regional Director's Decision and Direction of Election. Furthermore, *no question about the unit was raised* by Respondent in its letter of August 26 refusing the Union's request for recognition and bargaining, or in its Request for Review by the Board of the Regional Director's Decision and Direction of Election. On

[8] *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62; *N.L.R.B.* v. *Overnite Transportation Co.*, 308 F.2d 272 (C.A. 4).

the entire record in this proceeding, as well as the *entire record* in Case No. 11-RC-2022 of which I have taken official notice as requested, I find that the variance between the description of the unit as set forth in the Union's letter of August 13 and that found by the Regional Director in his Decision of October 6 to be without fatal effect. *Sabine Vending Co., Inc.*, 147 NLRB 1010; *Gotham Shoe Manufacturing Co., Inc.*, 149 NLRB No. 80.

To establish the third necessary element, that the Union actually represented a majority of the employees in the unit, there were received in evidence General Counsel's Exhibit 4 A-B, being lists prepared by Respondent showing the names and "occupations" of 229 persons employed by Crown Flex and General Steel, respectively, during the week ending August 15, 1964.[9] An analysis of these two lists discloses that they contain the names of 22 persons classified as foremen, clericals, and watchmen, employees not within the unit. I therefore find that on the critical date herein, August 14, the day of the Union's demand for recognition, there were 207 employees in the unit and that 104 would constitute the majority necessary to establish the Union as the collective-bargaining representative of all the employees in the unit.

To establish that majority status, the General Counsel called more than 100 witnesses and offered into evidence 133 cards purporting to bear the signature of that number of employees in the unit, all of the cards being dated prior to or on August 13, and reading as follows:

[9] These two lists were submitted to the Board's Regional Director by Respondent pursuant to an Order of the United States District Court for the Middle District of North Carolina, requiring Respondent's obedience theretofore withheld, to the Board's subpoena for "a list of persons employed by it during the week ending August 15, 1964 . . . together with *job classification* of each employee."

Upholsterers International Union
of North America
AFL-CIO

I do hereby designate and authorize the Upholsterers International Union of North America, AFL-CIO, and its representatives to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

Signed.....
Name Date

At the hearing, Respondent objected to the introduction into the record of practically all of the 133 cards,[10] principally on the ground that the signers thereof were *either* allegedly told, believed, or led to believe that the cards would be used *only* to get an election. Though I received all of the cards in evidence, I announced that this did not necessarily mean that I thereby deemed them to be valid designation cards for the purpose claimed by the General Counsel, and that my determination of that ultimate issue would be made in this Decision after a careful review of the entire record. Accordingly, and because I did not, during the hearing, fully explicate my reasons for overruling most of Respondent's objections to the receipt in evidence of the cards in question, objections which are again urged upon me by Respondent's brief, I deem it appropriate to here summarize the reasons for those rulings and the rationale for the conclusions that follow with respect to the cards as valid designations of the Union as collective-bargaining representative.

Any analysis of the problem under consideration must begin with due regard for the *unequivocal* nature of the cards. Notwithstanding the clearly stated exclusive purpose of the card as so designated thereon, I am in full agreement with Respondent's contention "that if a man

[10] In its brief, Respondent modified its position but still contended that 114 of such cards may not be considered valid designations of the Union by the employees whose signatures appear thereon.

is told in *haec verba* that his card is 'only' for an election or 'just' for an election, then the card cannot be used to obtain recognition in any other manner." *Englewood Lumber Company*, 130 NLRB 394. Where, however cards are solicited "for the *dual* purpose of (a) petitioning the Board for an election, *and* (b) authorizing the Union to represent the employees as their collective bargaining agent, . . . [the cards are] valid designations of the Union as bargaining representative of the employees." *The Shelby Manufacturing Company*, 155 NLRB No. 39 (November 1, 1965); *Lenz Company*, 153 NLRB No. 120; *S. N. C. Manufacturing Co., Inc.*, 147 NLRB No. 92, enfd. —— F. 2d —— (C.A.D.C., May 13, 1965); *N.L.R.B.* v. *Hyde*, 339 F. 2d 568 (C.A. 9); *N.L.R.B.* v. *Geigy Co.*, 211 F. 2d 553, 556 (C.A. 9); *Winn-Dixie Stores, Inc.*, 143 NLRB 848, enfd. 341 F. 2d 750 (C.A. 6); *Gotham Shoe Manufacturing Co., Inc.*, 149 NLRB No. 80; *N.L.R.B.* v. *Cumberland Shoe Corporation* —— F. 2d —— (C.A. 6, Oct. 26, 1965).

Oral statements that the union intends to seek an election and intends to use the cards in support of its petition for such election, as disinguished from statements that they will be used *only* or *just* for an election, are not misrepresentations when the union in fact intends to do so. The union solicits signatures on authorization cards such as those here, *either* to request recognition when a majority of employees within the unit have signed, or to obtain a sufficient number of signatures to petition for a Board-conducted election,[11] or to do both. Cf. *N.L.R.B.* v. *Wheland Co.*, 271 F. 2d 122 (C.A. 6); *N.L.R.B.* v. *Geigy Co.*, 211 F. 2d 553, 556 (C.A. 9). It is by no means unusual for a union to seek a Board election, even after a majority of the employees have designated it as collective-bargaining representative. The union may seek such

[11] In order to free itself from the necessity of conducting elections in which the petitioning union has no substantial likelihood of success, the Board has long held that a union seeking a representation election must demonstrate a showing of interest in union representation by at least 30 percent of the employees involved. See the Board's Rules and Regulations, Section 101.17-101.18; also *N.L.R.B.* v. *J. I. Case Co.*, 201 F.2d 597, 598-600 (C.A. 9).

an election, rather than press for recognition, so as to obtain the special statutory benefits conferred upon certified unions. For example, a Board certification normally protects the representative status of the certified union for a minimum of one year, despite actual loss of its majority. See *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96. Such certification also accords protection to the Union, under Section 8(b)(4)(C) of the Act against raiding by rival unions. Indeed, that the Union herein intended to use the cards for the dual purpose of requesting recognition based on the cards designating it as representative and, if necessary, to secure an election, is amply demonstrated by the fact that on the *very next day* after the Union wrote the Company requesting recognition, it also filed a petition for an election with the Board's Regional Office.

Although solicitors in many cases may have mentioned a use of the cards in order to secure an election, all the cards signed are explicit and unambiguous. Each plainly states that the employee authorizes the Union "to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment." The language clearly designates the Union as collective-bargaining representative, empowering it to sign a contract with the Employer. The card is devoid of any reference to a Board-conducted election; the word "election" does not even appear on the card. Cf. *Morris and Associates, Inc.*, 138 NLRB 1160, 1164, 1176.

As the court emphasized in *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732, 743 (C.A.D.C.), cert. denied 341 U.S. 914, it has long been held that "[a]n employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent." Accord: *N.L.R.B.* v. *Greenfield Components Corp.*, 317 F. 2d 85, 89 (C.A. 1); *N.L.R.B.* v. *Gorbea, Perez & Morell*, CJJ F. 2d 886 (C.A. 1); *Whitelight Products Co.* v. *N.L.R.B.*, 298 F. 2d 12 (C.A. 1) cert. denied 348 U.S. 821; *N.L.R.B.* v. *Stow Mfg. Co.*, 217 F. 2d 900 (C.A. 2) cert denied 348 U.S. 964; *Dan River Mills, Inc.*, 121 NLRB 648, enforcement

denied on other grounds, 274 F. 2d 381 (C.A. 5). This rule is but another application of the principle expressed in *Allied Steel & Conveyers, Inc.* v. *Ford Motor Company*, 277 F. 2d 907, 913 that "[i]n the absence of fraud or wilful deceit, one who signs a contract which he has had an opportunity to read and understand, is bound by its provisions." Such a rule is particularly applicable here, since almost all the employees who were asked, testified that they read the authorization card or that it was read to them before they signed it or authorized it to be signed in their behalf. Sound policy supports the application of the rule to union authorization cards. It has long been settled that such cards are an acceptable means of proving a union's majority (*United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72), and they could hardly serve that office if they were subject to repudiation by testimony as to mental reservations.

At first glance, the distinction between representations that an election is the *sole* purpose of the cards, and representations that an election is *a* purpose may seem a fine one, but the distinction goes to the very basis for the rule. Thus, by stating that the card may or will be used to secure an election, the solicitor neither contradicts the plain statement on the card nor misstates the Union's actual intention. As the Board observed in *Cumberland Shoe Corporation*, 144 NLRB 1268, "[t]he failure of the union solicitors to affirmatively restate [the authorization contained in the card] does not indicate that it was abandoned or ignored."

Seeking to completely vitiate the unequivocal effect of the cards, counsel for Respondent, on cross-examination of most of the card-signers, sought to ascertain *only* whether they were told that their card would be kept secret, confidential, or shown only to the Board. Being of the view that a line of inquiry, so *limited*, has no relevance in the determination of the *purpose* for which the card was signed, I sustained the General Counsel's objection thereto.[12] Accordingly, I reject Respondent's contention

[12] This is not to say that such a line of inquiry would be irrelevant if the employee was *also expressly* told that the card would be used *only* or *just* for an election.

"that if a man is told that his card will be secret, or will be shown only to the Labor Board for the purpose of obtaining election, that *this* is the *absolute equivalent* of telling him that it will be used *'only'* for purposes of obtaining an election." (Emphasis supplied.)

With the foregoing principles in mind, we turn next to a consideration of the entire record to determine whether the cards upon which the General Counsel relies are valid designations of the Union as collective-bargaining representative. Respondent, in its brief, now concedes that cards of the 19 employees named in the attached Appendix A may be used and relied on for that purpose. With respect to the remainder of the cards, Respondent's exhaustive brief succinctly summarizes the testimony pertaining to each card and which testimony, it contends, bars or forecloses use of that card as a valid designation of the Union by the person whose signature appears thereon.

With respect to the 97 employees named in the attached Appendix B Respondent in its brief contends, in substance, that their cards should be rejected because each of these employees was told *one or more* of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face. *Lenz Company, supra; S. N. C. Manufacturing Co., Inc., supra; N.L.R.B.* v. *Hyde, supra; N.L.R.B.* v. *Geigy Co., supra; Winn-Dixie Stores, supra; Gotham Shoe Manufacturing Co., Inc., supra; N.L.R.B.* v. *Cumberland Shoe Corporation, supra.* All of these cards were read by or to each signer thereof, and were signed by or in behalf of each person whose signature appears thereon.

In arriving at my ultimate conclusion with respect to these cards, I have not been unmindful of an additional factor upon which Respondent relies with respect to at least 17 card signers as being either "a complete illiterate," "semiliterate," or that it "was not shown . . . that

this man had sufficient understanding of what he was doing." While the varying stages of illiteracy of all the employees has been considered by me in appraising its impact on the representations described in (1), (2), and (3) of the preceding paragraph, consideration of *all* the testimony pertaining to the circumstances under which the signatures were obtained convinces me that by affixing or authorizing their signature to the card all of these employees not only intended, but were fully aware that they were thereby designating the Union as their representative. Based on their testimony and that of the witnesses who procured their signature, concerning which more will be said later, I find and conclude that the cards of the 97 employees named in Appendix B are valid designations of the Union as their collective-bargaining representative.

An additional ground relied on by Respondent for rejection of the cards of at least two employees named in Appendix B, Edward Laws 6(a) (42) and Charlie Oakley 6(a) (66), is that these employees were told, in substance that if they waited to join the Union until after its election, they would be required to pay an initiation fee. I find no merit to this contention. "Waiving of fees during the organizational period does not smack of coercion but rather of promotional persuasion." *N.L.R.B.* v. *I. Taitel & Son*, BFV F. 2d 1 (C.A. 7), enfg. 119 NLRB 910, cert. denied 368 U.S. 938; see also *Amalgamated Clothing Workers* v. *N.L.R.B.*, 345 F. 2d 264 (C.A. 2); *N.L.R.B.* v. *Gorbea, Perez & Morell, supra; Peoples Service Drug Stores, Inc.*, 154 NLRB No. 118 (Sept. 24, 1965).

During the hearing, and throughout its brief, Respondent also repeatedly objected to reliance upon the cards for the purpose expressed therein on the ground that the testimony pertaining to the date of execution thereof was not sufficiently established. While it is true that a number of employees, testifying approximately nine months or more after the event, were uncertain as to the exact date their signatures were subscribed or affixed to their cards, the testimony is undisputed that all of the cards offered in evidence and relied on by the General Counsel,

except that of Wilma Bryant 6(a)(12),[13] were filed by the Union with the Board's Regional Office at about 10:30 a.m. of August 14, 1964, and bear the Regional Office stamp of that time and date. I therefore find that all of these cards were executed prior to that date. *Combined Metal Manufacturing Co.*, 123 NLRB 895; *Cameo Lingerie, Inc.*, 148 NLRB No. 60; *I. Taitel & Son, supra.*

Respondent also urges that the card of John W. McCarter 6(a)(79) be rejected because it is dated July 6, 1964, whereas "he did not go to work for the employer until July 8, 1964." No contention is made, however, that he was not employed by Respondent on August 14, the date of the Union's demand for recognition. It seems reasonable to infer and conclude that on or before July 6, McCarter had already made arrangements for employment by Respondent and signed the card in anticipation of that employment. On the record made here, and there being no contention that McCarter revoked his designation either prior to or after July 8, I see no reason to reject his appointment of the Union.

The card of Jack Rozier 6(a)(76) is also attacked by Respondent, apparently on the ground that it was not delivered by Rozier to anyone for use as his designation of the Union. His card, dated July 29, 1964, was first received in evidence on the testimony of Bobby Lloyd, who testified that while sitting next to Rozier at a Union meeting, he not only saw him sign this card but also "saw him when he turned it in." Rozier later testified that he signed and "filled out" the card in question but claimed that he did so in his car in the parking lot at the mill, following which he drove to his home and left the card on the car seat. He further testified that he never saw the card again until "just now," at the hearing, that he left the signed card on the car seat because he "wanted

[13] Though Bryant could not recall the date she signed her card; it is dated Sunday, August 9, 1964, and there is no evidence that this was not the date of execution. Brown testified that on August 10, he was advised by Ethel Jenkins (Jennings) that she had Bryant's signed card in her possesion. Because he knew that the Union already had a majority of the Employees signed up, he did not pick up Bryant's card until later.

to think about it more before [he] turned it in, or before [he] authorized them to represent [him]." I credit the testimony of Bobby Lloyd that Rozier signed his card at the Union meeting and "turned it in" at that time, not only because Lloyd impressed me as a trustworthy witness, but because of the fantastic tale offered by Rozier to explain the presence of the card in the hearing room—that he "could have knocked it out and somebody could have gotten it out of the car, . . . I just left it laying on the seat." Not only is this explanation so highly improbable, but Rozier's demeanor while testifying inspired no confidence in the trustworthiness of his testimony and leaves me no alternative other than to reject that testimony.

There remain for consideration the cards of the six employees named in Appendix C who were told, *inter alia*, that the cards would be used only, or just, for an election. In his endeavor to establish that this was represented to be the only purpose of the cards, counsel for Respondent, on *voir dire* examination of a number of card signers, elicited testimony to that effect by means of leading questions. Though I am mindful that leading questions are generally permitted in the cross-examination of witnesses, I am not here persuaded that an affirmative answer so induced, by *itself* and without regard for the remainder of the record, has sufficient probative weight "to controvert the statement of the purpose and effect of [the] cards contained on the face thereof." *Cumberland Shoe Corporation*, 144 NLRB 1268, fn. 3, as amended by the Board's Order issued January 13, 1964, of which I have taken official notice, and which Order was enforced, —— F. 2d —— (C.A. 6, October 26, 1965). In evaluating such suggested testimony, consideration must be given to the testimony of that witness *as a whole*. Here too, however, as in the case of the employees described in Appendix B, appraisal of such testimony cannot ignore the varying stage of illiteracy of the witnesses involved and the degree of their sophistication or lack thereof. Though entitled to consideration, I do not deem the affirmative answer of employees given in response to such leading questions as decisive or conclusive where such answers are in

conflict or irreconcilable with either the rest of the testimony of such employees and/or of credible evidence negating the testimony so adduced.

Among the instances illustrative of the unreliability of testimony so elicited, is the testimony of Curtis Benson 6(a)(89). One of the first questions asked of him by Respondent's counsel, on *voir dire* examination, was whether Larry Robinson, who gave him the card, told him "that the purpose of the card was just to get an election in the plant." Benson replied: "Yes, he did." When he was then asked by the General Counsel to tell "exactly" what Robinson said when he gave him the card, Benson testified: "I couldn't tell you exactly what was said; it has been quite a while back; he mentioned the union to me before he gave me the card." Upon being urged by me to do the "best" he could to relate "*everything* that was said at that time," he testified as follows: "Well, he brought the subject up and he asked me was I interested in it; and I asked him to tell me more about it; and he said to sign the card *that I would be signing that I wanted the union to represent me with the Company;* and it sounded right good to me; and so I signed it." He was next asked, specifically, whether he could "remember anything else that was said" and he replied that he could not. Robinson, who appeared as a witness a day earlier, testified that he gave Benson the card and "told him that it was a union authorization card for the union to represent him, . . . gave him this card for him to read, and he read it aloud, and filled out the card, and signed his name," and gave it back to Robinson.

Wilma Bryant 6(a)(12), who testified that she read and signed the card, was then asked on *voir dire* examination by Respondent's counsel not what she was told by Mrs. Jennings (Jenkins) who solicited the signature, but whether she was told "that these cards were being signed up just for the purpose of getting an election" and her answer was: "Yes, sir." The General Counsel then asked Bryant to relate "exactly" what she was told and she testified as follows: "She said it would be better to have a union where we worked at," that this was "all that was said [and that she could not] remember anything else

about the conversation." Respondent's counsel then asked Bryant whether it was Jennings (Jenkins) "or someone else that told [her] that these cards were just to get an election," to which Bryant replied: "She is the one." Expressing confusion concerning her testimony and its apparent inconsistency, I asked Bryant to "tell me again what was said" and she testified as follows: "Well, she handed me the card, and I said 'well, I don't know,' and she said, 'if you sign, it would be better to have a union where we work,' and I said 'I will think about it' and then I said 'I will sign a card.'" I next asked her whether there "was anything said at that time about an election" and she testified that Jennings (Jenkins) "said it was better to have a union where we worked at, *that is all she said.*" When I then inquired whether "nothing was said about an election at that time," she testified: "No, that is all that was said." Counsel for Respondent again asked whether it was "then or at some other time that [she was] told that these cards were just for the purpose of getting an election" and she replied: "She handed me the card and told me that it would be better to have a union where we worked and I told her I didn't know, and she said 'Think about it,' and I did. I signed the card."

Of a similar nature was the testimony of Jerry L. Furr 6(a)(103), who acted as Respondent's observer at the election. After testifying that he read, signed, and filled out the remainder of his card at the request of Ted Davis, the Union's International Representative, Furr was suggestively asked by Respondent's counsel whether Davis told him "that the purpose of getting the card signed was just to get an election in the plant," and he replied: "Yes." When pressed by the General Counsel to tell *all* that he remembered of the conversation with Davis, he testified: "Well, we sat there at the kitchen table; and anyway he asked me did I think would a union help; or something like that, I don't know how it went; I don't even remember; but I know he just asked me would I sign a card, did I want to sign a card; and at that time I said I would; he said they were getting cards to get *an* election at the plant."

James Benson 6(a)(9) also testified that at the request of Davis and Napolean Brown, another International Representative of the Union, he signed the card designating the Union as his bargaining representative. On *voir dire* examination by Respondent's counsel, Benson was asked to repeat the conversation he then had with Davis and Brown and testified as follows: "They said that they were going to represent the Union, they wished us to sign a card so that they could have an election." Respondent's counsel next asked whether the two men told him "that the cards were just to get an election" and Benson replied: "Yes, sir." Upon further examination by the General Counsel, however, Benson admitted that in an affidavit previously given to the General Counsel he swore that he "was *not* told that [he] was signing a card *just* to get an election." He further testified that this affidavit "is correct . . . and true." Respondent's counsel again asked whether the two representatives told him "that signing this card was just to get an election" and Benson again replied affirmatively. I then asked him to tell "in [his] own words what was said" and he testified: "Well, they came to the house, and said that they were representing the Union, and if I wanted to sign a card, I don't know what else, because they said they would have an election." And that they did not "say anything else" in the 3-5 minutes they were there.

Though H. C. McMurray 6(c) and Samuel Snow 6(k) were not allowed to answer Respondent Counsel's question whether they were told that the only purpose of the card was to get an election, both testified they "signed the card to get the Union in."[14]

In appraising the effect to be given to the suggestive testimony described above, consideration must also be

[14] Though on several occasions I sustained the General Counsel's objections to leading questions suggesting that other employees were told that the only purpose of the cards was to secure an election, for purpose of decision herein, I will assume that these other employees, if permitted to testify, would have responded affirmatively. I have not, however, relied on the cards of any of these other employees in my determination of the Union's majority status. My ultimate conclusion that the Union *otherwise* achieved that status remains the same.

given to the testimony of Davis and Brown who were accused of making practically all of the alleged fatal misrepresentations. Though Davis admitted that in the solicitation of signed cards mention was made to some of the employees of *a* possible use of the cards to secure an election, and/or that their cards would be kept confidential and not shown to their *foremen*, both men unequivocally denied that they ever told any employee that the card would be used *only* or *just* for an election. Davis and Brown, by their testimony and demeanor, impressed me as being most worthy of belief and I credit their denials of the alleged misrepresentation. By doing so, I do not accuse the employees who testified contrariwise of having offered false testimony wilfully. Consideration of all their testimony, their degree of illiteracy and lack of sophistication, convinces me that their affirmative answers to the leading questions under consideration were unwittingly uttered, and constitute their own erroneous conclusions derived from the statements of the Union representatives. However, such conclusions, "thoughts (or afterthoughts) as to why [they] signed a union card and what [they] thought the card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent." *Joy Silk Mills, Inc.* v. *N.L.R.B.*, *supra; Colson Corporation* v. *N.L.R.B.*, 347 F. 2d 128, 135 (C.A. 8). By reason of all the foregoing, I find and conclude that the cards of the above-mentioned six employees, named in Appendix C, are valid designations of the Union as their collective-bargaining representative.

Having found that there were 207 employees in the bargaining unit on August 14, when the Union made its demand to bargain, and that the 122 employees named in Appendixes A, B, and C, had prior thereto validly designated the Union as their collective-bargaining representative, I further find and conclude that on the day aforementioned the Union was the duly selected bargaining representative of all the employees in the unit described in the Regional Director's Decision and Direction of Election of October 6.[15]

[15] The Union's status having been established by a substantial number exceeding the necessary majority of 104, I find it unneces-

Turning now to the question of whether Respondent's refusal to bargain with the Union on and after August 14 was occasioned by its alleged good-faith doubt that the Union in fact represented a majority of the employees, Respondent concedes that as was its legal right, it was opposed to the entry of the Union in its plants as collective-bargaining representative of its employees.

Following receipt of the Union's demand on August 14, Hoffman called a meeting of his foremen on Monday, August 17, at which he informed them of the Union's letter. He testified that he asked them "how they felt about the employees as to whether they wanted a union to represent them or not and . . . they said they didn't know." He then asked them to "try to find out in their department [whether] the majority wanted the Union to represent them," but *not to "interrogate the people* or in any way to threaten them." Foreman Rigsbee, testifying in behalf of Respondent, testified Hoffman *specifically* told the foremen "not to ask [the employees] if they had signed a union card."

Between that day and August 26, at meetings with his foremen, Hoffman received their "*opinions* as to how *they felt* their department stood" which, coupled with his own personal interviews or conversations with 8-10 employees, brought him to the conclusion that about 30 percent of the employees wanted the Union to represent them and about 70 percent did not. He then instructed his attorney to write the letter of August 26 declining recognition of the Union.

"By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case. But among such circumstances, two factors would seem to be essential prerequisites to any finding that the employer raised the majority issue in good faith . . . There must, first of all, have

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sary to extend this Decision by a consideration of the remaining cards in the record, none of which have been relied on by me in finding the Union's majority status.

been some reasonable grounds for believing that the union had [never achieved majority status]. And, secondly, the majority issue must *not* have been raised by the employer in a context of illegal anti-union activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." *Celanese Corporation of America*, 95 NLRB 664, 673; *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd. as modified on other grounds, 185 F. 2d 752 (C.A.D.C.), cert. denied 341 U.S. 914.

Because the record herein abundantly establishes that Respondent has raised the majority issue "in a context of illegal anti-union activities," I find it unnecessary to engage in any lengthy analysis of the testimony of Respondent's foremen upon which Hoffman allegedly relied in arriving at his conclusion that 70 percent of the employees were opposed to the Union. Were I required to do so, I would unhesitatingly find that the reports of the six foremen who testified that they reported to Hoffman, *and especially their testimony relating to the basis for their reports*, are so lacking in probative weight that neither they, nor Hoffman, had "*reasonable* grounds for believing" that the Union had not been designated by a majority of the employees.[16] "A showing of such doubt . . . requires more than an employer's mere assertion of it and more than proof of the employer's subjective state of mind. The assertion must be supported by objective considerations. The applicable test, as defined in the *Celanese* case, is whether or not the objective facts furnish a 'reasonable basis' for the asserted doubt." *Laystrom Mfg. Co.*, 151 NLRB No. 144.

Here, "there is . . . affirmative evidence showing Respondent to have engaged in the unfair labor practices detailed above after the Union's request to bargain, whose foreseeable consequence was the destruction of the Union's majority status. It is, therefore, not surprising that the majority which the Union clearly possessed on [Au-

[16] Six other foremen employed during the week ending August 15 did not testify. These six foremen had charge of 93 employees.

gust 14] when it first demanded recognition, should have been subsequently lost. That such loss was attributable to the Respondent's unfair labor practice is clear." *Master Transmission Rebuilding Corporation & Master Parts, Inc.*, 155 NLRB No. 35 (October 28, 1965). By thus destroying the Union's majority, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby violating Section 8(a)(1) thereof. By refusing the Union's demand to bargain on and after August 14, Respondent also violated Section 8(a)(5) of the Act. Under either section of the Act, effectuation of the policies and purposes of the Act requires the issuance of a bargaining order as part of the remedy necessary to remedy the violations found herein.

Report and Recommendations in Case No. 11-RC-2022

In accordance with the Regional Director's Supplemental Decision and Direction, and the Board's Rules and Regulations, Series 8, as amended, I find no substantial, credible evidence in the record to sustain the following Union Objections to conduct affecting the results of the election: Objections Nos. 1, 8, and 9. With respect to Objections 4, 6, "and other acts and conduct," I find that Respondent was guilty of the conduct complained of therein to the extent set forth in Section III A, (6), (7), (8), and (9), *supra*. Concerning Objections Nos. 5 and 6, I find, as set forth in Section III B, and III C, *supra*, that the posted notice referred to in Objection No. 5 and the speech referred to in Objection No. 6 were violative of Section 8(a)(1) of the Act. Accordingly, I recommend that Objections Nos. 4, 5, and 6 be sustained to the extent indicated above and that the election of November 6, 1964, be set aside.

Upon the entire record in this consolidated proceeding, I make the following:

Conclusions of Law

1. By interrogating and threatening employees concerning their union membership or activities, Respondent

engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. All production and maintenance employees employed by General Steel Products, Inc., and Crown Flex of North Carolina, Inc., at their High Point, North Carolina, location, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act, constitute an appropriate bargaining unit.

3. By refusing to recognize and bargain with the Union, the duly designated collective-bargaining representative of its employees, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

The Remedy

I recommend the issuance of an Order directing Respondent to cease and desist from engaging in the conduct herein found to be violative of the Act and affirmatively, upon request, to bargain with the Union as the exclusive representative of all employees in the above-described appropriate unit, and to post appropriate notices.

Accordingly, upon the foregoing findings of fact and conclusions of law, and on the entire record herein, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

Respondents General Steel Products, Inc., and Crown Flex of North Carolina, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with Upholsterers International Union of North America, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

All production and maintenance employees employed by General Steel Products, Inc., and Crown

Flex of North Carolina, Inc., at High Point, North Carolina, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Interrogating employees with respect to their union membership or activities in a manner violative of Section 8(a)(1) of the Act.

(c) Threatening employees with reprisals if they designate the Union as their collective-bargaining representative.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find to be necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the above-described appropriate unit, and embody in a signed agreement any understanding reached.

(b) Post at their plants at High Point, North Carolina, copies of the notice hereto attached and marked "Appendix D."[17] Copies of such notice to be furnished by the Regional Director for the Eleventh Region, shall, after being signed by the authorized representative of Respondent, be posted immediately upon receipt thereof, and be maintained by them for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

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[17] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

(c) Notify the said Regional Director in writing within 20 days from the date of the receipt of this Decision what steps the Respondent has taken to comply herewith.[18]

Dated at Washington, D. C., Nov. 12, 1965.

DAVID LONDON
Trial Examiner

APPENDIX A

Name and General Counsel's Exhibit Number

Mary Jo Simmons	6(w)
James B. Taylor	6(a) (2)
Jean Bodiford	6(a) (10)
Bobby Aleshire	6(a) (23)
Carrie G. Proctor	6(a) (27)
Clarence J. Jones	6(a) (34)
Robert C. Howell, Jr.	6(a) (35)
John Loftis	6(a) (38)
Walter Lucas	6(a) (39)
Ralph William Mabe	6(a) (41)
A. T. Ragen	6(a) (52)
Brady Rosse	6(a) (56)
David Wayne Williams	6(a) (63)
Robert Pritchard	6(a) (69)
Bobby Lloyd	6(a) (75)
Johnny Gibson	6(a) (78)
George Harold Orr	6(a) (81)
Larry W. Robinson	6(a) (86)
George W. O'Ham	6(a) (90)

[18] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Eleventh Region, in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX B

Name and General Counsel's Exhibit Number

Haywood Earl Peterson	6(a)
Douglas Ray Beeson	6(b)
Billy Hooker	6(d)
James R. Hutchins	6(e)
Wayne McCall	6(g)
James Morgan	6(h)
James Howard Byrd	6(i)
W. Donald Jacobs	6(j)
Thomas M. Slate	6(l)
Billy Don Brown	6(m)
W. L. Chrisley	6(n)
Jonah C. Gates	6(p)
Norman Smith	6(q)
John LeRoy Jacobs	6(s)
Roy Gilliland	6(t)
Emanuel J. Mashburn	6(u)
Albert J. Taylor	6(v)
William D. Moss	6(x)
Eugene Heaton	6(z)
James Bodiford	6(a) (3)
Dale Jacobs	6(a) (4)
Walter Aleshire	6(a) (5)
Joseph Allen	6(a) (6)
Dwight Barlow	6(a) (8)
Murray Brim	6(a) (11)
Teddy Bullard	6(a) (13)
James R. Carlyle	6(a) (14)
Nathan Carter	6(a) (15)
Helen Causey	6(a) (16)
Lowell T. Caruthers	6(a) (17)
Roger Dale Deece	6(a) (18)
Gurney Heywood Diamond	6(a) (19)
Joe Dills	6(a) (20)
C. J. Edwards	6(a) (21)
Ralph Black	6(a) (22)
Rex Hugh Fitch	6(a) (24)
Bobby Fulp	6(a) (25)

Name and General Counsel's Exhibit Number

Joe Hedrick	6(a) (26)
Walter J. Holder	6(a) (28)
John H. Holmes	6(a) (29)
Jesse F. Gibbs	6(a) (30)
Cecil Taylor	6(a) (31)
J. P. Shannahan	6(a) (32)
Richard Walker	6(a) (33)
Howard Thomas Hunt	6(a) (36)
Paul Livingstone	6(a) (37)
Alton B. Maness	6(a) (40)
Edward Earl Laws	6(a) (42)
Custer Franklin Laws	6(a) (43)
Charles Eugene Laws	6(a) (44)
Zeb Laws, Jr.	6(a) (45)
J. E. Mishoe	6(a) (46)
Lloyd D. Mishoe	6(a) (47)
James D. Moncus	6(a) (48)
Carson W. Norris	6(a) (49)
James L. Randall	6(a) (50)
Billy J. Searcy	6(a) (51)
Irvin Reagan	6(a) (53)
Larry Leon Robinson	6(a) (54)
Terry Roberson	6(a) (55)
Douglas J. Shipp	6(a) (57)
Odell Strickland	6(a) (58)
Lonnie Teal	6(a) (59)
Henry Thompson	6(a) (60)
Rosier Watts	6(a) (61)
Rabon Wolford	6(a) (64)
James Richard Smith	6(a) (65)
Charlie Oakley	6(a) (66)
Theron B. Williamson	6(a) (67)
William W. Duggins	6(a) (68)
Raymond Clark	6(a) (70)
Roy Junior Scearce	6(a) (71)
Franklin Small	6(a) (72)
Jimmy Parker	6(a) (73)
Tony Parker	6(a) (74)
Jack Rozier	6(a) (76)

Name and General Counsel's Exhibit Number

Paul Widner	6(a) (77)
John Wesley McCarter	6(a) (79)
Jimmy Monroe	6(a) (83)
Claude Mitchem	6(a) (84)
Floyd Douglas Coe	6(a) (87)
Dan T. Coe	6(a) (88)
Kelly Smith	6(a) (91)
William Ward	6(a) (92)
Thomas Ray Haire	6(a) (93)
Billy Jack Fowler	6(a) (95)
Curtis White	6(a) (96)
Willie Shores	6(a) (97)
James Robinson	6(a) (98)
Charles Robinson	6(a) (99)
Gordon Shuffler	6(a) (100)
John Lee Swaney	6(a) (101)
Frank Swink	6(a) (102)
Lenora Bryant	6(a) (104)
Lynch Whitmire	6(a) (105)
Elmer Cornett	6(a) (106)
William Billings	6(a) (107)

APPENDIX C

Name and General Counsel's Exhibit Number

Curtis Benson	6(a) (89)
Wilma Bryant	6(a) (12)
Jerry L. Furr	6(a) (103)
James A. Benson	6(a) (9)
H. C. McMurray	6(c)
Samuel Snow	6(k)

APPENDIX D

NOTICE TO ALL EMPLOYEES

PURSUANT TO

The Recommendations of a Trial Examiner of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL upon request, bargain with UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, as the exclusive representative of our production and maintenance employees.

WE WILL NOT interrogate our employees as to their union membership or activity in a manner violative of Section 8(a)(1) of the Act.

WE WILL NOT threaten our employees with economic reprisals for union activity or for designating the above-named union as their collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to join or assist a union, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for mutual aid or protection.

GENERAL STEEL PRODUCTS, INC., AND
CROWN FLEX OF NORTH CAROLINA, INC.
(Employer)

Dated _____

By _____
(Representative) *(Title)*

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate with the Board's Regional Office, 1831 Nisson Building, 310 West Fourth Street, Winston-Salem, North Carolina 27101 (Tel. No. 723-2302).

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GENERAL COUNSEL EXHIBIT 1-(V)-1

PETITION FOR ELECTION

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Case No. 11-RC-2022

Date Filed 8-14-64

PETITION

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition—RC—Certification of Representatives (Individual, Group, Labor Organization).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to section 9 (a) and (c) of the act.

* * * *

2. Name of Employer—General Steel Products, Inc. Employer Representative to contact—Mr. Frank D. Hoffman, Jr.

Phone No.—883-9101.

3. Address(es) of Establishment(s) involved—Blanwood Circle, Box 429.

4a. Type of Establishment—Factory, High Point, N. C.

4b. Identify Principal Product or Service—Furniture Accessories.

5. Description of Unit Involved—Included: All production and maintenance employees employed at the Employers factory at High Point, N. C. Excluded: Office clerical employees, guards, professional employees and supervisors as defined in the Act.

6a. Number of Employees in Unit—200.

6b. Is this Petition supported by 30% or more of the employees in the Unit?—Yes.

7a. Request for recognition as Bargaining Representative was made on August 14, 1964 and Employer declined recognition on or about—no response.

* * * *

8. Recognized or Certified Bargaining Agent—None.

* * * *

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Upholsterers' International Union
of North America, AFL-CIO

/s/ NAPOLEON BROWN
International Representative
Box 509½ South Main Street
High Point, N. C.
Phone 882-4216

GENERAL COUNSEL EXHIBIT 1-(W)-1

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 11-RC-2022

GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC.,[1] EMPLOYER

and

UPHOLSTERERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a

[1] The title of the Employer has been corrected to conform with the finding herein that both corporations constitute a single employer within the meaning of Section 2(2) of the Act.

hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

2. The labor organization involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[3]

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[2] The Employer, opposing the unit comprising employees of both companies, argues that the Board cannot, as a matter of jurisdiction, enter an order affecting employees of Crown Flex of North Carolina, Inc., since there has been no demand for representation made on such company and no showing in the record that Crown Flex is engaged in commerce within the meaning of the Act. It has been found herein (see below) that both corporations constitute a single employer. The Board has held that where, as here, the Employer is engaged in diversified operations, it will consider the totality of operations to determine whether any portion thereof meets the Board's standards for asserting jurisdiction. *Carol Management Corporation*, 133 NLRB 1126. It is stipulated that General Steel Products, Inc. is a nonretail enterprise which annually ships finished products across state lines valued in excess of $50,000 and that Crown Flex of North Carolina, Inc. is also engaged in the shipment of manufactured products across state lines in undetermined, but presumably substantial, amounts to the furniture and automotive industries. It is found that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein. *Siemons Mailing Service*, 122 NLRB 81, 85.

[3(a)] The petition seeks a unit of the production and maintenance employees, estimated at about 200, of General Steel Products, Inc. (herein called General Steel) at its High Point, North Carolina,

All production and maintenance employees at the Employer's High Point, North Carolina, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

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plant. At the hearing it developed that approximately 55-60 of these employees are employed by another corporation, Crown Flex of North Carolina, Inc. (herein called Crown Flex) which is also engaged in manufacturing operations within the same plant premises. General Steel manufactures, for the furniture industry, metal components of dual-purpose furniture, such as hide-a-bed constructions, sofa bed hinges and reclining chair fixtures. Crown Flex makes insulator pads used with various types of springs to prevent filler material from sagging into springs; it sells to both the automobile and furniture industries; shipments for the automotive industry are to assembly plants in Georgia, Virginia and Texas, and for the furniture industry to plants in North Carolina, South Carolina and Virginia. The two corporations have a common president and executive vice-president. The latter, testifying for the Employer at the hearing, was unfamiliar with other levels of the corporate structures of the two companies. At the High Point plant there are separate plant managers and superintendents in charge of operations of the two corporations. There is a single comptroller for both companies and a single office force under a common office manager, who perform clerical services for both companies. Screening of applicants and hiring for both companies is performed by a common personnel officer. Purchasing for both companies is made by a single purchasing agent (although some purchases for Crown Flex are made otherwise). The two companies generally use the same sales personnel for both lines (although some salesmen carry only the Crown Flex line). There is a shipping clerk for Crown Flex who prepares bills of lading and makes shipping arrangements for its products; he is assisted by employees of General Steel in handling Crown Flex shipments. General Steel's products are shipped in its own trucks; the products of Crown Flex, which are smaller in bulk, are generally sent by common carrier; but Crown Flex has used General Steel trucks and drivers for its shipments. There is, otherwise, no interchange of employees between the two companies, but employees of both companies use common lunch room, rest room and other facilities at the plant. Foremen of both companies attend the same supervisory meetings. The record shows that both corporations have the same president and executive vice-president; they occupy the same plant and there is common control over labor relations through a single personnel officer; the two companies share common clerical, purchasing, sales and shipping facilities and services. I find, in the circumstances, that both companies constitute a single employer for purposes of collective bargaining and that a single unit of em-

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereto, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by Upholsterers International Union of North America, AFL-CIO.

Dated October 6, 1964 at Winston-Salem, N. C.

/s/ REED JOHNSON
Regional Director for the
Eleventh Region

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ployees of both companies is appropriate. The Employer's motion to dismiss the petition is denied. See *Jones Sausage Company*, 118 NLRB 1403, 1408; enforced 257 F. 2nd 878 (CA4), 42 LRRM 2467.

(b) The parties are otherwise in agreement as to the composition of the unit. By stipulation at the hearing they agreed to exclusions of various categories of managerial, sales, clerical and supervisory personnel.

GENERAL COUNSEL EXHIBIT 1-(X)-1

REQUEST FOR REVIEW

The employer, General Steel Products, Inc. requests that the National Labor Relations Board review the Decision and Direction of Election issued October 6, 1964, by the Regional Director for the Eleventh Region.

This proceeding began with a Petition by the union for certification as representative of the production and maintenance employees of General Steel Products, Inc., employed at its factory in High Point, North Carolina. At the representation hearing it was brought out for the first time that another corporation by the name of Crown Flex of North Carolina, Inc. also operates in the same building which houses General Steel Products, Inc. The union thereupon declared that it wished to represent employees of both corporations.

The Regional Director's Decision has now purported to "correct the title" to the proceeding by adding Crown Flex of North Carolina, Inc. as an employer and to direct an election among the employees of both corporations, treating them as a single employer for purposes of the Act.

This has been done *without any petition* having been filed with respect to Crown Flex of North Carolina, Inc. *without any demand for recognition* ever having been directed to Crown Flex and *without any hearing ever having been held upon due notice* to Crown Flex of North Carolina, Inc. In so doing the Regional Director exceeded his authority under Board Rule 101.17 and exceeded the jurisdiction of the Board under Section 9 (c) of the Act.

It is no answer to say as the Regional Director has said in this Decision that the two corporations may be treated as one employer for the purposes of Sec. 2 (2) of the Act. Doubtless this is a determination which can be made in a proper case, but it cannot be made without due notice to the parties concerned and an opportunity to be heard.

The case of *Jones Sausage Company* and *Jones Abbatoir Company*, 118 NLRB 1403; enforced 257 F. 2nd. 878 (CA4), 42 LRRM 2467, is no authority for what has been done here. In the *Jones* case there was no challenge to the jurisdiction or procedural due process under which both corporations had been made parties to the proceeding.

Similarly in *Boire* v. *Greyhound Corporation*, 84 S. Ct. 894, 55 LRRM 2694 (1964) both Greyhound and Floors, Inc. had been designated as employers in an amended petition before the Board. In the present case Crown Flex has never been properly made a party, has never had notice, and has never been given a hearing. The fact that a witness has testified who holds an executive position in both corporations does not cure this defect. He came to the hearing and testified in the interest of General Steel Products, Inc. and with no advance notice that the other corporation would be drawn into the matter and no opportunity to prepare or to consult counsel in its behalf.

Whatever might be the merit of the Regional Director's holding upon a proper record and with proper parties before him, there has been no such record made, nor have the proper parties been joined. Although these corporations share certain facilities (and control at the executive level only), there is not and cannot be any doubt that they are operated as separate legal entities. Below the executive level, the management and supervision of both corporations is kept entirely separate. The two corporations have the same President, who is in Chicago. (R. p. 42-3) Mr. Frank Hoffman, the Executive Vice-President, stationed at High Point, occupies that position in both corporations. (R. p. 14) Below the level of Executive Vice-President, there is no supervisor who holds a position in both corporations and no employee within the proposed unit who is employed by both corporations, and no interchange of employees. (R. p. 16, 43, 45, 18-46) The products manufactured by the two corporations are different (R. p. 14) and they occupy separate space (R. p. 43) although within the same building. (Crown Flex rents from General Steel Products, Inc.) They share shipping facilities, but they have separate shipping personnel. On rare occasions Crown Flex goods may be shipped in a General Steel truck, but ordinarily they go separately by common carrier. (R. p. 41) Mr. Hoffman, the Executive Vice-President, who is the lowest echelon of management holding a position in both corporations, does not have anything to do with handling personnel policy of Crown Flex of North Carolina, Inc. (R. p. 42) He is a director on the

executive level only, looking after sales and that sort of thing, and Crown Flex has an active manager of its own who has nothing to do with General Steel Products, Inc. (R. p. 43).

We submit that Crown Flex of North Carolina, Inc. has never been properly made a party to this proceeding or given an opportunity to be heard and that the Board has no jurisdiction over it and the Regional Director had no authority to enter any order affecting its employees or grouping the employees of General Steel Products, Inc. with those of any other employer not a party to the proceeding. We submit that, on this record, the employees of the two corporations should not appropriately be grouped together, and in no event can such a decision be made without a new hearing at which Crown Flex is properly joined as a party and given a chance to be heard.

This 13th day of October, 1964.

/s/ ROBERT M. MARTIN
Robert M. Martin
of Martin, Whitley and Washington
North Carolina National
Bank Building
High Point, North Carolina

/s/ LEWIS P. HAMLIN, JR.
Lewis P. Hamlin, Jr.
of Kluttz and Hamlin
131 North Main Street
Salisbury, North Carolina

Attorneys for Employer

GENERAL COUNSEL EXHIBIT 1-(Y)-1

WESTERN UNION

558P Est Oct 28 64 RA375
R RGA429 Govt Pd-Tdrg Pus Washington DC 28 547P Est
Reed Johnson Dir NLRB
Winston Salem NCar

Re: General Steel Products, Inc. and Crown Flex of North Carolina, Inc. 11-RC-2022. It is hereby ordered that the Employers request for review of the Regional Directors decision and direction of election be, and it hereby is, denied as it raises no substantial issues warranting review. By direction of the Board:

George A. Leet, Assoc. Exec. Secy.

11-RC-2022

#0).

GENERAL COUNSEL EXHIBIT 2

August 13, 1964

Mr. Frank H. Hoffman, Jr.
President
General Steel Products, Inc.
P. O. Box 429
High Point, N. C.

Dear Sir:

Please be advised that a majority of your employees of the High Point, N. C. plant have signed written authorizations designating Upholsterers International Union of North America, AFL-CIO, as their collective bargaining Agent for the purpose of representing them on all matters pertaining to wages, hours of work and other conditions of employment.

We are herein requesting voluntary recognition as such collective bargaining Agent and further requesting a meeting with representatives of your Company for the purpose of negotiating a collective bargaining agreement containing conditions of wages, hours of work and other conditions of employment.

Please notify the undersigned of the date, time and place representatives of the Union may meet and confer with representatives of your Company for the purpose as stated above.

Yours very truly,

D. H. WOODALL, *District Director*
Upholsterers' International Union

CC:
National Labor Relations Board
Winston-Salem, N. C.
UIU District Office
Charlotte, N. C.

TRIAL EXAMINER'S EXHIBIT 1

Petition to Intervene

IN RE: TROY McGHEE an EMPLOYEE of GENERAL STEEL PRODUCTS, Inc., and other UNDISCLOSED EMPLOYEES of said Corporation whose names are hereto attached in a sealed envelope.

Now come the aforesaid employees of GENERAL STEEL PRODUCTS, Inc., through their Counsel, SCHOCH, SCHOCH and SCHOCH, ARCH K. SCHOCH, Sr., appearing, and respectfully move that they be permitted to intervene in this matter, and as cause therefor they do individually show:

1

Prior to the union election, each of them was contacted by representatives of The UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, with the request that they sign a card authorizing said UNION to represent them.

2

Each of said employees was informed by said representatives that the fact that they signed this card never would be disclosed; and said representatives referred to said card as "secret cards" in order to secure their signatures.

3

Each of said employees now understands that The UPHOLSTERERS' INTERNATIONAL UNION of NORTH AMERICA AFL-CIO intends to make a disclosure of their signatures to said cards; and each and every one of them petitions and prays that such cards be suppressed as having been procured on said UNION'S pledge that such disclosure never would be made. Each of said employees alleges that a disclosure of his name as signed to said "secret cards" would be an invasion of their privacy and a disclosure of confidential information.

Each of said employees, after signing said "secret cards" gave consideration to the advantages and disadvantages of joining the union and each determined for himself that he wanted no part of said UNION. Each of them at the election voted against said UNION and each will continue so to vote.

Employee TROY McGHEE states that when he signed the so-called "secret card" he did so only because he was informed by the UNION representatives that all of the other employees in his department had signed such cards; that the UNION was certainly going to win the election; that they had signatures from almost ninety per cent of all of the empoyees of the entire company and that if the UNION did win the election and he had not signed the card, there would be no job for him at GENERAL STEEL PRODUCTS, Inc.

Wherefore these employees, and each of them, pray that:

1) They and each of them be permitted to intervene in this matter;

2) The secret cards which they signed be suppressed and not be permitted to be offered in evidence as such would constitute a violation of their privacy and a disclosure of confidential information;

3) That the UPHOLSTERERS' INTERNATIONAL UNION of NORTH AMERICA, AFL-CIO be directed not to use the "secret cards" signed by these employees in any manner whatever; and

4) That the subpoena directing them to appear be quashed, for that the only purpose of said subpoena is to force the revelation of information given in confidence.

Respectfully submitted,

SCHOCH, SCHOCH and SCHOCH

By: ARCH K. SCHOCH (SR.)

Attorneys for Intervening Employees

LIST of UNDISCLOSED EMPLOYEES of GENERAL STEEL PRODUCTS, Inc., ATTACHED to PETITION to INTERVENE

Billy Hooker
Toby Cunningham
Theron Williams
Roshier C. Watts
Carson W. Norris
Robert Howell
James R. Carlyle
Henry Thompson
Zeb Laws

TRIAL EXAMINER'S EXHIBIT 2

Upholsterers' International Union of North America

August 13, 1964

To All Employees of
General Steel Products
High Point, North Carolina

Dear Friends:

Your Petition for a Secret Ballot Election has been filed. Your Secret Cards have been turned over to the Federal Government and we will soon be notified as to the Agent the Labor Board will assign to your case.

Remember, too, that we have filed Official Charges with the U.S. Government against your Boss because he discharged 1 of your fellow workers. We'll keep you posted on the progress of this case.

During the next few weeks while you are awaiting your Secret Vote Election, you can expect the Boss to use many tricks in an attempt to stop you from forming a strong Local Union at General Steel Products.

In order for you to know what to expect from the Boss, we're sending you the enclosed booklet which spells out the usual tricks a Boss will use against workers. Study this booklet very carefully.

If the Boss starts using any of these tricks, we'll appreciate it if you you'll let us know right away so that we can report it to an Agent of the Federal Government.

Remember, the Federal Government protects your right to form a Union and the Federal Government backs up your right to bargain for improvements in wages, hours, and working conditions.

Now the term "Wages, Hours, and Working conditions" covers a lot of ground, including holidays, coffee breaks, vacations, bonuses, life and health group insurance, pensions, lunch periods, etc.

Now, when the Federal Law states that you have a right to bargain with the Boss on these matters, it means that any and all changes in wages, hours, and working conditions have to be discussed with the Union (you) by the Company—even where there is no contract in effect.

So you can easily see why certain companies do not want their employees to organize a Union. But, the U.S. Supreme Court ruled long ago that since companies have the right to organize into corporations and associations, employees shall also have the right to join together for their own mutual aid and protection . . . without interference from the Boss or anyone else.

This federal law simply means that you will not only have an equal voice in setting up your wages, hours, and working conditions, the law also says that it will be unlawful for the Boss to make any spiteful changes because his workers decide to form a union.

Your signed, secret card and your *"X" Yes* on a Government Secret Ballot is your democratic way of saying to the Boss that you want an EQUAL VOICE in everything that affects your wages, hours, and the many conditions under which you work.

We congratulate each and every one of you on the wise decision you have made. A very great majority of General Steel Products employees have now authorized the Upholsterers' Union as their bargaining agent.

An overwhelming majority has already signed Secret Authorization Cards. An overwhelming majority vote "YES" on election day means you should be on the road to higher pay, better working conditions protected by federal law under a good union contract. Keep up the good work.

Fraternally yours,

TED DAVIS, UIU Rep.
GEORGE KISER, AFL-CIO Rep.
NAPOLEAN BROWN, UIU Rep.

• • • •

SUBPENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Hon. Reed Johnston, Regional Director of the Eleventh Regional Office of the National Labor Relations Board, or his Acting Regional Director in his absence

Request therefor having been duly made by Robert M. Martin, Esq. and Lewis P. Hamlin, Jr., Attorneys, whose address is N. C. National Bank Bldg., High Point, North Carolina. You are hereby required and directed to appear before David London, Trial Examiner of the National Labor Relations Board, at Hearing Room, City and County Building, in the City of High Point, North Carolina on the 15th day of June, 1965, at 9 o'clock a.m. of that day, to testify in the Matter of General Steel Products, Inc. and Crown Flex of North Carolina, Inc. and Upholsterers' International Union of North America, AFL-CIO Cases Nos. 11-CA-2491, 11-RC-2022, 11-CA-2613.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

All Union authorization cards deposited with the Regional Director by Upholsterers' International Union of North America, AFL-CIO on or about August 14, 1964, in connection with Petition for Election in the above entitled case.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance thereof.

Issued at Washington, D. C. this 10th day of June, 1965.

/s/ JOHN H. FANNING

Service accepted June 14, 1965 at 9:24 a.m.

B-55676

CHARLES M. WILLIAMSON
Attorney, NLRB

• • • •

GENERAL COUNSEL EXHIBIT 10

STATE OF NORTH CAROLINA)
GUILFORD COUNTY)

AFFIDAVIT

I James H. Benson of 502 Wets Ray St., High Point, N. C. being duly sworn do hereby depose and state:

I was employed at General Steel Products, Inc. and Crown Flex of North Carolina, Inc. on August 14, 1964, when the Union petitioned for an election. My job was Punch Press Operator.

The Board Agent has shown me an authorization card of the Upholsterers' International Union of North America, AFL-CIO, which I signed on August 5, 1964 of my own free will. I was not told that I was signing the card just so the Union could have an election.

I have read this statement of one (1) page and swear it is true to the best of my knowledge and belief. I have been sworn.

/s/ JAMES H. BENSON

Sworn to and subscribed to before me this 4 day of May, 1965.

/s/ CHARLES M. WILLIAMSON
Attorney, N.L.R.B.

GENERAL COUNSEL EXHIBIT 6(z)1

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Eleventh Region

Case No. 11-RC-2022

GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC. EMPLOYER

and

UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

SUPPLEMENTAL DECISION AND DIRECTION

Pursuant to a Decision and Direction of Election issued by the Regional Director of the Eleventh Region on October 6,[1] an election by secret ballot was held among certain employees of the Employer,[2] under the supervision of the undersigned Regional Director on November 6, with the following results:

Appropriate number of eligible voters	207
Void ballots	0
Votes cast for Petitioner	83
Votes cast against participating labor organiation	94
Valid votes counted	177
Challenged ballots	13
Valid votes counted plus challenged ballots	190

Copies of the Tally of Ballots were duly served on the authorized representatives of the parties.

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[1] Unless otherwise indicated, all dates are 1964.

[2] The unit found to be appropriate is: "All production and maintenance employees, at the Employer's High Point, North Carolina, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act."

Challenges were sufficient in number to be determinative.

On November 10, the Petitioner filed timely objections to conduct affecting the results of the election. A copy of the objections was duly served on the Employer.

The text of the objections is as follows:

"1. The Employer, on the day of the election and during the election had its foremen campaign against the Union.

"2. The Employer gave out wage increases and other promises of benefit to its employees, including 5 paid holidays, after the petition was filed.

"3. The Employer inserted the race issue into the campaign in a letter to the employees and in speeches made to the employees on November 3 and 5, prejudicing the Union in the election.

"4. On or about the day of the election, threats of discharge or other reprisals if the employees voted for the Union or engaged in union activity were made to the employees by the Employer.

"5. The Employer, prior to the election, posted inflammatory, misleading, and untruthful, statements about the Union in conspicuous places in the plant.

"6. The Employer, in a speech to the employees, indicated that it would not sign a contract with the Union, and that all struck employees would be finished at the Company.

"7. The Employer sent several letters to its employees informing them that they stood to lose if the Union came in the plant. These letters also contained other inflammatory and prejudicial statements.

"8. The Employer allowed its employees to have and partake of intoxicating beverages on the day of the election in order to influence them to vote against the Union.

"9. The Employer did not present the eligibility list to the Union until such a late hour that it did not have adequate time for its inspections, even though the scheduled presentation was at a much earlier time.

"10. The Employer placed the names of two supervisors on the eligibility list in order to place them in the voting area during the election to influence the choice of the voters."

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8 as amended, an investigation of the issues raised by the objections has been conducted under the direction and supervision of the undersigned, who having afforded the parties full opportunity to submit and present evidence bearing on the issues and having carefully considered the resuts of the investigation, makes the following decision:[3]

OBJECTIONS 4, 6, AND OTHER ACTS AND CONDUCT:

Petitioner witnesses supplied evidence that the Employer, by its following-named supervisors and/or agents, on or about the dates set opposite their respective names, engaged in the following acts and conduct:

(a) Interrogated employees concerning their union activities and sympathies:

James Rigsbee—November 6;
Tommy Parish—August 20 and November 3;
Richard Davis—November 6 and other dates.

(b) Threatened employees with changed working conditions if the Union was voted in:

James Rigsbee—August 19.

(c) Threatened employees with discharge because of their union activity:

Bobby Sparks—August 17;
Frank D. Hoffman, Jr.—November 5;
Richard Davis—November 6.

(d) Made speeches to employees which conveyed to them the message that a union victory would be futile because it would only result in extended negotiations followed by a strike and loss of jobs:

Frank D. Hoffman, Jr.—November 5.

(e) Told the employees that if the Union won the election other employers would not hire employees who worked for the Employer:

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[3] Considered herein are only those incidents which occurred between August 14 (the filing date of the petition) and November 6 (the date of the election). *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275.

Robert Simpson—September 30;
Frank D. Hoffman, Jr.—November 5.

(f) Told employees to vote the Union out because it would do them more harm than good:

Tommy Parish—November 6.

OBJECTION 5:

The evidence is undisputed that during the critical period, August 14, to November 6, inclusive, the Employer posted copies of a notice[8] on bulletin boards throughout the plant.

The Board, in a number of instances,[9] has found that the posting and/or distribution of a notice containing substantially similar language, especially when such notice is viewed in the context of other Section 8(a)(1) violations, is a violation of the Act. As the evidence adduced during the investigation, if credited, constitutes a violation of Section 8(a)(1), the trial examiner is directed to consider the effects, if any, of the posting of the aforementioned notice in conjunction with his findings on the other objections.

THE CHALLENGES

The Petitioner challenged the ballots of *Raymond Lee Clark*, *Lester Hawks*, *Charles Pack*, *Robert Pritchard*, *Lola Vanover* and *Kenneth Von Cannon* on the ground that they were hired after the payroll eligibility date and *Wayne Farrington* and *Jerry Furr* on the ground that they were supervisors. The Board agent challenged the ballots of *Victor Allen*, *Sharon Ettinger*, *Floyd Harris*, *Walter J. Holder* and *Arnold Laws* because their names did not appear on the eligibility list.

As noted in Objection 10, above, Allen, was a supervisor until October 26, and Farrington was a supervisor on the date of the election. As Allen was not in the unit on the payroll eligibility date and as Farrington was not in

[8] The text of the notice is attached hereto as Appendix C.

[9] *White Oak Acres, Inc.*, 134 NLRB 1145; *Morris & Associates, Inc.*, 138 NLRB 1160.

the unit on the date of the election the challenges to their ballots are sustained.[13]

Having sustained the challenges to the ballots of Allen and Farrington, the undersigned deems it unnecessary to make further findings as the remaining challenges are not determinative.

CONCLUSIONS AND DIRECTION

The challenges to the ballots of Victor Allen and Wayne Farrington are sustained.

Objections 2, 3, 7 and 10 are overruled.

The evidence relating to Objections 1, 4, 6, including *Other Acts and Conduct*, 8, and 9 is in conflict and thus involves questions of credibility as to substantial and material issues. Accordingly,

IT IS HEREBY DIRECTED that a hearing be held to resolve the issues raised by Objections 1, 4, 6, including *Other Acts and Conduct*, 8 and 9. As the undersigned has issued a Complaint and Amendment to Complaint in Case No. 11-CA-2491, involving the same parties, and as the allegations in the Complaint and Amendment to Complaint will also relate to a number of issues raised herein an order will issue consolidating these cases for hearing. Such hearing will be held before a trial examiner to be designated by the Chief Trial Examiner.

IT IS FURTHER DIRECTED that the trial examiner consider the impact of Objections 1, 8 and 9 and 5, if any, in conjunction with his findings on the other objections.

Dated at Winston-Salem, North Carolina this 23rd day of December 1964.

/s/ REED JOHNSTON
Reed Johnston, Regional Director
National Labor Relations Board
Eleventh Region
1831 Nissen Building
Winston-Salem, North Carolina

* * * *

[13] *Miller & Miller, Inc.*, 106 NLRB 1228, 1229; *National Container Corporation of Wisconsin*, 99 NLRB 1492, 1495.

APPENDIX C

TO ALL EMPLOYEES

Because of the campaigns which the union is putting on to get into the plant, several questions have come up on which you will want to know how the Company stands. We have decided to state the Company's position clearly for the benefit of everyone.

(1) *This is a matter of concern to the Company, of course, and it is also a matter of serious concern to you. It is our firm belief that if this union were to get into this Company it would not benefit you but would work to your serious harm.*

(2) *It is our positive intention to oppose the union and by every proper means to prevent it from coming here.*

(3) *We would like to make it clear that it is not necessary, and it is not ever going to be necessary, for anybody to belong to any union in order to work for this plant.*

(4) *People who might join or belong to a union will not get any advantages or any preferred treatment of any sort over those who do not join or belong to any union.*

(5) *If anybody causes you any trouble at your work or puts you under any sort of pressure to join the union, you should let the company know, and we will undertake to see that this is stopped.*

(6) *No person will be allowed to carry on union organizing activities during working time or distribute union literature in working areas. Anybody who does so and who thereby neglects his own work or interferes with the work of others will be subject to discharge.*

Anybody who tells you something contrary to the above is not telling you the truth.

GENERAL STEEL PRODUCTS, INC.

GENERAL COUNSEL EXHIBIT 6(a)

Upholsterers' International Union of North America AFL-CIO

I do hereby designate and authorize the Upholsterers' International Union of North America, AFL-CIO, and its representatives to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

Signed HEYWOOD PETERSON 7-16-64

Name Date

Rt. 4 Thomasville, N. C.

Address City State

Company General Steel Plant ____ Department ____ Job ____

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PROCEEDINGS

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Eleventh Region

Case Nos. 11-CA-2491, 11-CA-2613, 11-RC-2022

In the Matter of:

GENERAL STEEL PRODUCTS, INC., AND
CROWN FLEX OF NORTH CAROLINA, INC.

and

UPHOLSTERERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO

Room 200, Second Floor, City-County Building,
High Point, North Carolina, Monday, May 24, 1965

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

DAVID LONDON, Esq., *Trial Examiner*

APPEARANCES:

YELVERTON COWHERD, JR., Esq.
1831 Nissen Building,
Winston-Salem, North Carolina,
appearing as Counsel for General Counsel.

CHARLES M. WILLIAMSON, Esq.
1831 Nissen Building,
Winston-Salem, North Carolina,
appearing as Counsel for General Counsel

ROBERT L. MARTIN, Esq.
Martin, Whitley, and Washington,
Post Office Box 569,
High Point, North Carolina,
appearing on behalf of General Steel Products, Inc.,
and Crown Flex of North Carolina, Inc.

LEWIS P. HAMLIN, Esq.
Kluttz and Hamlin,
131 North Main Street,
Salisbury, North Carolina,
appearing on behalf of General Steel Products, Inc., and Crown Flex of North Carolina, Inc.

RICHARD S. HOFFMAN, Esq.
1500 North Broad Street,
Philadelphia, Pennsylvania 19211,
appearing on behalf of the Upholsterers' International Union of North America, AFL-CIO.

ARCH K. SCHOCH, SR., Esq.
Schoch, Schoch and Schoch,
Professional Building,
High Point, North Carolina,
appearing as intervener on behalf of certain employees.

[fol. 3] PROCEEDINGS

* * * *

[fol. 7] MR. COWHERD: Do you desire an opening statement?

TRIAL EXAMINER: Yes, I think I would like an opening statement from you at this time.

MR. COWHERD: I will make it as brief as possible. It is the contention of General Counsel that the case law precedent in this case would be the Bernel Foam Joy Silk Mills type. This campaign began by the Upholsterers' International Union, AFL-CIO approximately April, 1964. They filed a petition on August 14, 1964, and it is contention of General Counsel that at that time and shortly before that the Respondent in the case began a series of unfair labor practices, which will be brought out later; and the original charge in the "C" case was filed on July 29, and has been successively amended until a complaint was issued in October, 1964.

[fol. 8] During the course of the "C" case, the Regional Director issued his decision and direction of election on October 6, 1964. The basic issue there was the issue of whether or not there was an appropriate, and whether or not there was an issue of single employer.

The Respondent's counsel requested a review of that decision. The Board rendered a denial of that request on October 28; and I might add at this point that the General Counsel anticipates that Respondent will attempt to relitigate the single employer issue, and I will state for the record now that our position will be that the issue was fully litigated in the "R" case proceedings, and we stand on the record as presented there, and we would oppose any introduction of new evidence unless it is completely and fully, newly-discovered evidence.

The election was held on November 6, 1964. The union lost it; as a matter of record in the formal papers, the result was 94-83, with 13 challenged ballots; two of which have been resolved.

Upon the completion of the election, the Union filed timely objections, and subsequent to that by a few days, they filed a charge of refusal to bargain under the *Joy Silk Mills, Bernel Foam theory.*

* * * *

[fol. 9] MR. HAMLIN: I would say this, the single employer issue, to which he refers, we say was not litigated in the "R" case as far as Crown Flex is concerned because Crown Flex was never given a notice, and an opportunity to be heard. The Eleventh Regional Office simply amended the title of the proceedings after hearing nobody but the General Steel witnesses as to the relationship between the parties.

* * * *

[fol. 11] MR. HAMLIN: There was never *any petition* filed for Crown Flex.

* * * *

TRIAL EXAMINER: This is the only petition that was filed in the "R" case, 1-V-1?

MR. COWHERD: That is correct.

TRIAL EXAMINER: It appears, righly or wrongly, it appears on the record that the Regional Director did pass on this question. He makes a finding.

* * * *

[fol. 25] HAYWOOD EARL PETERSON

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your name and address and speak up loud, please.

THE WITNESS: Haywood Earl Peterson, Clinton, Route 4.

DIRECT EXAMINATION

Q (By Mr. Cowherd) What is your address? A Clinton, Route 4.

Q Have you ever worked for General Steel Products, Inc. in High Point? A Yes ,sir.

Q Are you now working there? A No, sir.

Q Did you work there during the year 1964? A Yes, sir.

Q When did you leave the company? A About Christmas.

Q Around Christmas of 1964? A Yes, sir.

Q Mr. Peterson, I show you General Counsel's Exhibit marked for identification Number 6(a) being an authorization card of the Upholsterers' International Union of North America, AFL-CIO, and ask you,—

[fol. 26] MR. HAMLIN: I object to his characterizing the card as the witness can tell what it is.

TRIAL EXAMINER: Yes.

(The doucument above-referred to was marked General Counsel's Exhibit Number 6(a) for identification.)

Q (By Mr. Cowherd) Mr. Peterson, I show you General Counsel's Exhibit 6(a) and ask you is that your signature on that card. A Yes, sir.

* * * *

[fol. 28] TRIAL EXAMINER: When did you go to work for this company?

THE WITNESS: In July, I think.

TRIAL EXAMINER: 1964?

THE WITNESS: Yes. That was the last time.

TRIAL EXAMINER: Have you got any idea how long after you went back to work that you signed that card?

THE WITNESS: About three weeks.

TRIAL EXAMINER: After you went to work?

THE WITNESS: Yes.

* * * *

Q (By Mr. Cowherd) Now, Mr. Peterson, what department did you work in? A I worked in Johnson Hinge, Jim Riggsbee.

Q And who was your foreman? A Jim Riggsbee.

Q Now, Mr. Peterson, at any time while you were employed there, did any foreman or supervisor talk to you about union matters? A Yes, sir, Jim Riggsbee came out of the office one morning around 10:30 or 11:00 o'clock, and said that he had just come from the office, and he said Frank said the union was coming in and they were going to put ten new machines on the line; he said that Nellie, he was talking to Nellie, and he called four or five of us fellows over and asked—

* * * *

[fol. 31] Q (By Mr. Cowherd) Now Mr. Peterson, if you would, please, sir, would you recite to the Trial Examiner what Mr. Riggsbee told you on that morning.

* * * *

[fol. 32] A (continuing) It was between 10:30 and 11:00 o'clock on Wednesday morning, Jim Riggsbee come out of the office, and come out on the line and was talking to one of the girls, Nellie; and he called four or five of us fellows over and told us that he had just come from the office, and Frank said that the union was coming in, and if it did come in, that a nigger would be the head of it, and he was putting in ten new machines on that line, and that if the union did come in, the niggers would be operators of them.

Q (By Mr. Cowherd) Now is that all that was said? A That's all I can remember of it.

Q Now you are certain of the conversation? A Yes, sir.

Q But you are not sure of the date? A No, sir.

Q Did you give an affidavit to a Board agent? A Yes, sir.

Q I show you this. Is this your signature? A Yes, sir.

Q Is this the affidavit you gave to the Board agent? A Yes, sir.

* * * *

[fol. 33] Q (By Mr. Cowherd) I want you to listen to me as I read from your affidavit, and tell me if this brings your memory back on the date. On or about Wednesday morning, August 19, sometime between 10:30 and 11:00 o'clock.

MR. HAMLIN: Pardon me, sir, are you reading from a document which he signed?

MR. COWHERD: I am reading from the typed version of it. I find it a little easier to read.

TRIAL EXAMINER: Well, hand counsel the original.

Q (By Mr. Cowherd) Do you want me to read that again?

TRIAL EXAMINER: Go ahead. Start over again.

Q (By Mr. Cowherd) "On or about Wednesday morning, August 19, sometime between 10:30 and 11:00 o'clock."

MR. COWHERD: The rest is what he has already testified to.

Q (By Mr. Cowherd) Now does that refresh your memory as to the date of the event? A Yes, sir.

Q Now do you recall what date? A Would you read that over again, please?

Q "On or about Wednesday morning, August 19, sometime between 10:30 and 11:00 o'clock." A Yes, sir.

Q Is that a correct statement? A Yes, sir.

* * * *

[fol. 35] CROSS EXAMINATION

(BY MR. HAMLIN)

* * * *

[fol. 37] Q Did the people who came to you to ask you to sign this card tell you what it was for? A Yes, sir.
[fol. 38] Q Did they tell you that it was to secure a Labor Board election? A I knew it was for my own benefit.

Q Did they tell you that it would be used to secure a Labor Board election? A No, sir.

Q Did they tell you that if the union won the vote that it would be in and otherwise it would not? A Yes, sir.

Q Did they tell you that you would have a right to vote either way even though you signed the card? A Yes, sir.

Q Did they show you a ballot? A Yes, sir.

Q Did they show you which box was which? A Yes, sir.

Q Did it look like the ballot used in the election? A Which ballot?

Q The one they showed you? A Yes.

Q Showed you that you could vote either way? A Yes, sir.

Q Did they tell you that this card would be kept secret and would never be shown to anybody except the Labor Board in order to get an election? A Yes, sir.

* * * *

[fol. 39] REDIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Peterson, were you also working in General Steel Products when you signed your card? A All of us combined so far as I know.

TRIAL EXAMINER: I didn't hear you. What did you say?

THE WITNESS: I said all of us combined, supposed to be combined, Johnson Hinge, Crown Flex and all, so far as I know.

Q (By Mr. Cowherd) Were you working inside the General Steel plant at the time you signed your card? A Yes, sir.

Q Now who was your foreman when you signed this union card? A Jim Riggsbee.

Q When you saw this ballot that you testified about, when was this? A When I saw it?

Q Yes. A At the union hall.

Q At the union hall? A Yes, sir.

Q Was it after you signed your union card? A Well—.

Q That you saw it? A Yes, sir, it was after I signed my union card.

* * * *

[fol. 41] DOUGLAS RAY BEESON

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Take the stand and give us your full name and address.

THE WITNESS: 224 Willowood Drive.

DIRECT EXAMINATION

(BY MR. COWHERD) Mr. Beeson, where are you employed? A General Steel Products Company.

Q About how long have you worked there? A About eleven and a half years.

MR. COWHERD: I would like to have this marked for identification.

(The document above-referred to was marked General Counsel's Exhibit No. 6(b) for identification.)

Q (By Mr. Cowherd) Mr. Beeson, I show you General Counsel's Exhibit marked for identification Number 6(b) and ask you if you have seen this document before. A Yes, sir.

Q Is that your signature on that? A Yes, sir.

[fol. 47] Q (By Mr. Cowherd) Mr. Beeson, referring to General Counsel's Exhibit 6(b), does the date on this card represent the approximate date which you signed it? A Yes, sir.

* * * *

CROSS EXAMINATION

(BY MR. HAMLIN)

* * * *

Q Were you told that by signing this card that you were naming the union to represent you regardless of any election? A Yes, sir.

* * * *

[fol. 50] Q (By Mr. Hamlin) Were you told that this card would be secret and would not be disclosed to anyone except the Labor Board in securing an election?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: I will sustain the objection.

* * * *

[fol. 51] MR. SCHOCH: Mr. Examiner, I would like at this time on behalf of certain employees of General Steel Products, Inc. to file this petition to intervene in this matter. We have given counsel for the government and counsel for General Steel Products a copy of our petition to intervene, and the basis of this is, Mr. Examiner, that—

TRIAL EXAMINER: Excuse me, have you served the Union with a copy of that?

MR. SCHOCH: No, I have another copy here if the union would like one.

TRIAL EXAMINER: Well, I think that they are entitled to it.

MR. SCHOCH: All right. The purpose of this is this, that certain of these employees whom we represent do not wish to make, do not wish to have their names made public in any proceedings, and they have alleged—

MR. WILLIAMSON: Excuse me, Mr. Examiner, may I interrupt just a moment? Attached to his petition is an envelope labeled "List of Undisclosed Employees of General Steel Products, Inc." attached to the petition to intervene. Now does General Counsel at this time have the right to open this envelope?

MR. SCHOCH: Certainly you have, certainly. In other words, there are certain employees out there who

prior to the election had signed these authorization cards and through me they tell you and through this petition that at the time that they signed these cards they were assured that their names would remain secret; that they would not be disclosed; now they understand and are quite apprehensive of the fact that their names now become public; they claim the right of privacy by virtue of what has been said, and the remarks made to them in securing their signatures to these cards.

Now in support of that, we can offer to you a letter signed by Ted Davis of the UIU, George Kaiser of the AFL-CIO, and Napoleon Brown, UIU representative, in which they refer in here, in this letter, to these employees, and to the other employees that your "secret cards have been turned over to the federal government."

And the second page, third paragraph, in the—third paragraph from the end, they say, "Your signed, secret cards and your X on the governmental secret ballot is your democratic way" and so forth; and in the last paragraph, they say "an overwhelming majority have already signed secret authorization."

TRIAL EXAMINER: What is the date of that?

MR. SCHOCH: The date of that letter is August 1, 1964. We offer this in evidence.

* * * *

[fol. 56] MR. SCHOCH: No, sir, it is admitted in the petition that they signed them, but they say now that the conditions under which they were signed is a secret condition, and we have backed it up by this letter; we will be glad to put on evidence to that effect, but we do not want a public disclosure; we would like to ask the Examiner if hearing these matters, that he hear them out of the presence of the public because that is their right. They are not to be forced to make a public disclosure that they have done this under the conditions under which the Union secured their names, and that is our petition.

TRIAL EXAMINER: The petition to intervene is denied. I will mark your petition as Trial Examiner's Exhibit 1.

(The document above-referred to was marked Trial Examiner's Exhibit No. 1 for identification.)

[fol. 57] MR. SCHOCH: We take an exception.

TRIAL EXAMINER: I will make your petition as part of the record, Trial Examiner's Exhibit 1.

(The document above-referred to, heretofore marked Trial Examiner's Exhibit No. 1, was received.)

TRIAL EXAMINER: All right, you may proceed.

MR. WILLIAMSON: Mr. Examiner, I believe that Mr. Schoch also offered a document purporting to be a letter from—

TRIAL EXAMINER: Yes.

MR. WILLIAMSON: We, of course, object to the admission of the letter.

MR. SCHOCH: We would like to have that letter made part of the record so that we could refer to it.

TRIAL EXAMINER: All right, I will make that Trial Examiner's 2.

(The document above-referred to was marked Trial Examiner's Exhibit Number 2 for identification and was received.)

MR. SCHOCH: Thank you very much.

FURTHER DIRECT EXAMINATION
(REDIRECT BEESON)

* * * *

[fol. 58] Q (By Mr. Cowherd) Now were you specifically told in these words, or very similar, to sign the card only for the purposes of an election? A No, sir.

* * * *

[fol. 60] Q (By Mr. Cowherd) Did any company official talk to you about the union? A Yes, sir.

Q And who was that? A Mr. Hoffman.

Q And approximately when did this conversation take place?

TRIAL EXAMINER: Is there more than one Mr. Hoffman?

MR. COWHERD: Not to my knowledge.

TRIAL EXAMINER: I see, well, I don't know.

MR. COWHERD: I will identify him.

Q (By Mr. Cowherd) Do you know what Mr. Hoffman's title is? A I think he was general manager or vice-president.

* * * *

[fol. 61] Q (By Mr. Cowherd) Mr. Beeson, would you tell us what was said in this conversation and how it came about. A Well, Mr. Hoffman asked me, he said he heard, he said that word got to him that I asked a fellow employee to sign a union card.

Q Excuse me, I don't know whether we have established this, but when did this happen? A In August of last year.

Q Okay, proceed. A Well.

Q How did the conversation come up? A Well, Mr. Hoffman asked me, he said word got to him that I asked a fellow employee to sign a union card.

Q And what did you say? A I said, "No, sir."

Q And did Mr. Hoffman say anything further? A He said that he didn't think that I would.

* * * *

[fol. 65] HENRY CLAY McMURRAY

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Take a chair, and give us your full name and address, please.

THE WITNESS: Henry Clay McMurray, 423 South Elm, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. McMurray, where are you employed? A I were employed at General Steel.

Q You are not any longer? A No.

Q How long did you work for General Steel? A About 16 months.

Q And when did you leave the company? A Three weeks ago.

Q Mr. McMurray, what depatment did you work in over there? A Department 35.

Q Who was your foreman? A Tommy Parish.

MR. COWHERD: I would like to have this marked for identification.

(The document above-referred to was marked General Counsel's Exhibit No. 6(c) for identification.)

Q (By Mr. Cowherd) Mr. McMurray, I show you General Counsel's Exhibit marked for identification 6(c) and ask you if you can identify that, is that your signa-
[fol. 67] ture? A Yes, sir.

Q Does the date appearing on here, is that the correct date on which you signed the card? A Yes, sir.

MR. HAMLIN: Would you read the date, please.

MR. COWHERD: 5-28-64.

MR. HAMLIN: May I examine it?

TRIAL EXAMINER: Yes.

MR. COWHERD: I offer General Counsel's Exhibit Number GC-6(c) into evidence.

CROSS EXAMINATION

Q (By Mr. Hamlin) Mr. McMurray, is all of the writting on this card on the face of this card yours? A My signature is.

Q The signature is yours? A Yes.

Q What else was on it at the time you signed it?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: You may answer.

A There wasn't anything on it.

TRIAL EXAMINER: I didn't hear your answer.

THE WITNESS: I say, there wasn't anything on it.

Q (By Mr. Hamlin) Whatever else is on the card has been filled in since that time? A Just the address.

Q Just the address. How about the date? A And the date.

Q And you don't know who put that on? A I think Bobby Floyd filled it out.

Q Did you see that information put on? A Yes, sir.

Q At the time you signed? A Yes, sir.

* * * *

[fol. 68] EXAMINATION

Q (By the Trial Examiner) Can you read? A Yes, sir.

Q Did you read this card before you signed it? A I knew what it was for, I signed the card to get the union in.

Q Did you read the card before you signed it? A Yes, sir, I looked at it.

Q Did you understand it? A Yes, sir.

* * * *

[fol. 69] Q (By Mr. Hamlin) Did you understand or were you told that—

MR. WILLIAMSON: Object to the double question.

TRIAL EXAMINER: Just a minute. Let him finish the question, please.

Q (By Mr. Hamlin) Did you understand or were you told that this card would be used to secure an election?

MR. WILLIAMSON: Object to the double question.

TRIAL EXAMINER: Objection sustained. I think that I might tell you that I going to reserve my ruling in connection with the first card that was offered. I think—and so that you may be guided in your future examination and cross-examination and voir dire, I am going to rule throughout this proceeding, you are apparently going to go through this procedure with every card, I take it; my ruling will be, so that you may understand it, will be that with respect to any witness who read this card and can understand English, and signed it freely without coercion at least, I will sustain any objection to the cross-examination of a witness as to what he was told with respect to

the possibility of an election, and as to its possible use only for an election; in other words, my ruling will be that if the witness read this card, understood it, and signed it, I think that is enough; or rather, I will not permit you to cross-examine the witness as to anything, any inquiry as to whether or not he was told that it was only for the purpose of an election, or similar line of questioning; and so with respect to your last question, the objection will be sustained.

* * * *

[fol. 71] MR. HAMLIN: May I inquire whether it is necessary for the purposes of review to have the witness' answer in the record.

TRIAL EXAMINER: No, I don't think so. I think the Board will rule if I am in error.

* * * *

[fol. 82] BILLY HOOKER

was called as a witness by and on behalf of the General Counsel, and, after having been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Take the chair, please, and give us your full name and address, please.

THE WITNESS: Billy Hooker, Box 127, Trinity, North Carolina.

* * * *

[fol. 83] DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Hooker, where do you work, please? A General Steel.

Q And what is your job, sir? A Press setup man.

Q And who is your foreman? A Bob Sparks.

Q Bob Sparks? A Yes.

MR. COWHERD: I would like to have this marked for identification.

(The document above-referred to was marked General Counsel's Exhibit No. 6(d) for identification.)

Q (By Mr. Cowherd) I show you General Counsel's Exhibit marked for identification as Number 6(d) for identification.

Could you tell me if that is your signature on there. A Yes, sir, it is.

* * * * *

[fol. 86] Q (By Mr. Cowherd) Mr. Hooker, did you read this card before you signed it? A I did.

Q I show you a card; does that date represent the approximate time you signed the card? A I suppose so.

Q All right.

TRIAL EXAMINER: Well, does it?

THE WITNESS: Well, it looks like it is on the same ink, and everything, and so I imagine it is the date.

TRIAL EXAMINER: Well, do you remember about when you signed it, do you remember the date when you signed it?

THE WITNESS: Well, it was about that time, the middle of August, the exact date, no, sir, I don't know.

Q (By Mr. Cowherd) You mean, you say the middle of August; the seventh or eighth month? A That is the seventh, that is July.

Q Is your testimony about the middle of July? A Well, yes.

* * * * *

[fol. 90] Q (By Mr. Hamlin) Mr. Hooker, at or before the time you said you signed this card, what were you told as to the purpose for which the card was to be used or the purpose for what it was to be signed? A I wasn't told anything. I just read it, and I knew what it was, and I wanted the Labor Board to represent me as I needed.

[fol. 91] Q (By Mr. Hamlin) Were you told anything in regard to whether the card would be kept secret or not? A Yes, sir, I was.

Q What was that? A I was told that no one would ever know anything about the card, that it would remain a secret, and never be revealed under any circumstances.

Q Who told you that? A George Oldham, or George Oham.

Q Is he one of the persons who enlisted you to sign a card? A Yes, sir.

* * * *

[fol. 105] MR. WILLIAMSON: Mr. Examiner, General Counsel stayed late last night reading cases, and so forth, and so on; he has come to this conclusion; that the point, which as he understands it, is parole testimony admissible to alter the effect of a card which is unambiguous on its face, feels that the point has not been ruled on precisely. He does, however, feel that the general practice of both the Board and the Circuit Courts of Appeal has been even where the card is unambiguous on its face that these various side circumstances and statements are brought into it, and he stands prepared at this time to withdraw his objection to the Respondents going into the circumstances of what the witness was told.

* * * *

[fol. 109] ROY LEE EDMONDS

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Take a chair and give us your name and address and speak up loud, please.

THE WITNESS: Roy Lee Edmonds, Taswell, Virginia.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Edmonds, have you ever worked at the General Steel Products Plant? A Yes sir, I have.

Q At High Point? A Yes, sir.

Q When did you work there? A I started in September, I believe, I am not sure.

Q Of what year? A 1964.

Q Were you working there during part of the union campaign? A Yes, I was.

Q Have you ever attended any meetings called by the employees out there? A Yes, I have.

Q Will you tell us when that was? A A day or two before the election.

Q And who called the meeting? A Frank Hoffman.

Q And who is Frank Hoffman? A General manager of something, I don't know; he is over the plant.

Q Would you tell us, was this a meeting of all the [fol. 111] employees? A Yes, it was.

Q Would you tell us now what the meeting was about? A He started off bringing up the right to work law. He said that if we went on strike, when we hit the door, we had no more job.

Q Did he have notes, was this a prepared speech? A He seemed to have.

Q Did he have notes or prepared speech? A It seemed to be prepared.

Q Did he read from the notes? A I couldn't say. I was pretty far back. I could hear, it was over the loudspeaker.

Q All right, now, can you recall any of the other things that he mentioned in his speech? A He brought up where the government said he had to negotiate in good faith; he said he would negotiate, negotiate, and keep on negotiating; he didn't say that he wouldn't sign a contract; he just kept saying he would negotiate, negotiate, and keep on negotiating.

Q Did he tell you anything about strike? A He told us on the strike that the Boss would be Napolean Brown; he could draw us out on strike any time he got ready.

* * * *

[fol. 113] CROSS EXAMINATION

Q (By Mr. Hamlin) You are no longer working at the plant? A No, sir.

Q You live in Taswell, Virginia? A Right.

Q When did you leave? A January.

Q Under what circumstances? A Well, I was snowbound in Virginia when I went up to my wife's grand-

mother's funeral; I was snowbound for about two weeks. I decided to stay.

Q So you quit voluntarily? A Right.

* * * *

[fol. 123] JOHN HENRY EDMONDS

was called as a witness by and on behalf of General Counsel and, after having been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a seat, and state your name and address for the record.

THE WITNESS: John Henry Edmonds, Route 3, Taswell, Virginia.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Have you ever been employed by General Products, General Steel Products, Inc? A Yes, sir.

[fol. 124] Q When did you work there? A I quit about two weeks ago.

Q Were you working back in 1964 when the Union campaign was going on? A Yes, sir.

Q Who was your foreman? A Bob Bethea.

Q Did you attend any meetings called by company officials for employees? A Yes, sir.

Q When was this? A A day or two before the election.

Q Was this the same speech that your brother talked about? A Yes, sir.

Q Tell us what you recall from the speech. A He talked about the right to work laws.

Q Who? A Frank Hoffman.

Q All right. A He talked about the right to work law, and that anyone going out on strike would lose their job, and be replaced by another man; and he talked about negotiating; that the government said that they had to negotiate in good faith, but that they, he could negotiate, and negotiate, and negotiate, and he did not have to sign a thing.

Q Is that all you recall? A He said strikes were the only union wapon; it was no good in North Carolina with the right to work law; and he talked a good bit about, General Motors was on strike at that time; and he said they didn't have a right to work law; he said that about the only weapon the union had was the strike.

Q Now did he appear to be reading from notes? A He appeared to be.

Q Did you see him reading them and looking down at them? A You could see him look down every now and then.

Q How often? A Every ten or fifteen seconds.

* * * *

[fol. 130] JAMES R. HUTCHINS

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a seat, please, and state your name and address for the record.

THE WITNESS: James R. Hutchins, 1705 Baker Road, High Point.

MR. COWHERD: I would like to have this document marked for identification, please.

(The document above-referred to was marked General Counsel's Exhibit No. 6(e) for identification.)

DIRECT EXAMINATION

Q (By Mr. Cowherd) Where are you employed? A General Steel Products.

Q And how long have you worked there? A About 22 months.

Q Mr. Hutchine, I show you General Counsel's Exhibit marked for identification as Number 6(e) and ask you if that is your signature. A No, sir, it is not. That is my wife's. I give her permission to sign it for me.

Q Now, Mr. Hutchine, did you read this card before you signed or before your wife signed it? A Yes, sir.

* * * *

[fol. 132] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Were you told before you signed this card that it would be used to obtain a union election? A Yes, sir, to get the union in the plant to represent me, yes, sir.

* * * *

[fol. 134] Q And you were told, were you not, that this card would be secret, confidential? A Yes, sir.

MR. WILLIAMSON: Objection.

Q (By Mr. Hamlin) That it would be used, that it would be shown only to the Labor Board? A Well.

Q For the purpose of getting an election?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: I will sustain the objection to that.

MR. HAMLIN: I take it I don't need an exception but I am still troubled about making the record.

TRIAL EXAMINER: Well.

MR. HAMLIN: Can I have the answer for the record?

TRIAL EXAMINER: No. You have your exception.

* * * *

[fol. 135] Q (By Mr. Cowherd) Mr. Hutchins, when you signed the card, were you told that it was only for the purpose of an election? A No, sir, I thought it was to get an election to have a union representative.

Q Mr. Hutchins, you testified that you had been working at General Steel. Who was your foreman? A Well, right now it is Jerry Furr or Charlie Pack; I don't understand which one it is.

Q Were you working during the time that the union campaign was going on? A Yes, sir, I was.

Q All right, did you attend the employees meeting called by Mr. Hoffman? A Yes, sir, both of them.

Q All right, could you tell us what was said in the second one? A Yes, sir, the day before the election he called us all in, out in the middle of the floor, and he was talking to us about the union; he said he didn't think that we needed a union in our plant; that he could do more for us than any union could; and he got to naming over some of

the places that tried to get unions in; he named off Bottoms-Fiske over there; he said, "I guess all you guys remember that." He said that they were on strike for almost two years, or maybe two years, and out walking the picket lines, and out in the cold; and he said then when the strike was over, that a lot of the guys didn't go back to work; he said that they lost their homes and their cars, and everything they had.

And then he mentioned the one in Thomasville, Finch Furniture I believe it was; he said that they were out on strike for a long time; and a lot of those guys lost their home and cars; and he says, "They haven't gone back to work yet."

Q Did he say anything about what would happen to you if you went on strike? A Yes, sir, he said that if we got a union in and went out on strike, he said when we walked through that door, we were finished; he said that we could walk the picket line until we got through with it, and our jobs would be replaced by somebody else; that he could hire and replace somebody else for our jobs and we would be through; we couldn't get back in.

[fol. 137] Q All right, now, did he say anything about negotiating a contract with the union? A Yes, sir, he said the National Labor Board says that I have to go, have to negotiate in good faith, which "I will do"; he said, "I will negotiate, and negotiate, and negotiate, and negotiate."

Q Now where were you when you heard the speech? A I was setting on top of a bunch of cases.

Q Were you close to the front or close to the back? A Well, I was about middleways, I suppose.

Q Now did he appear to be reading from notes or did he talk, just talk freely? A He had a paper in his left hand; he glanced down once in a while; as though he were reading something off; but he didn't use them all the time; he glanced down once in a while.

Q All right, now has any foreman talked to you about the union? A Yes, sir, Bobby Simpson was our foreman at that time.

Q When did he talk to you? A Oh, maybe four or five weeks before the election.

Q How did the conversation come up? A He called us all into the little shipping office there; I worked out of the shipping department; and he said he wanted to talk to us about this union; that there was a vote coming up pretty soon; of course, it would be our privilege to vote the way we wanted to; he couldn't tell us which way to vote; but he said he didn't think that we needed one on the plant; he said business was pretty good; he said if the union come in; he said maybe a lot of people wouldn't buy our products on account of it was union made; and he said in case we left and went to work someplace else that it might be hard for us to find a job because we had been working for a union outfit;

* * * * *

[fol. 147] WILLIAM F. POORE, JR.

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Will you have a seat, and state your name and address for the record.

THE WITNESS: William F. Poore, Jr., Route 5, Box 516, Finch Avenue, High Point.

* * * *

Q (By Mr. Cowherd) Mr. Poore, where do you work? A General Steel Products.

Q And how long have you worked there? A Approximately three years.

* * * *

[fol. 154] MR. HAMLIN: As I understand it, sir, where a question is asked and an objection is sustained in this proceeding, the person putting the question has an automatic exception.

TRIAL EXAMINER: I believe I so announced at the beginning of the hearing.

MR. HAMLIN: I wasn't sure.

TRIAL EXAMINER: Yes.

Q (By Mr. Hamlin) Were you told that cards would be, that the cards would be disclosed to the Labor Board?

MR. WILLIAMSON: Objection.
TRIAL EXAMINER: Sustained.
Q (By Mr. Hamlin) Were you told that the cards would be disclosed only to the Labor Board for the purpose of obtaining an election?
MR. WILLIAMSON: Objection.
TRIAL EXAMINER: Would you restate that question.
Q (By Mr. Hamlin) Were you told that the cards would be disclosed only to the Labor Board for the purpose of obtaining an election?
MR. WILLIAMSON: Objection.
TRIAL EXAMINER: Sustained.
Q (By Mr. Hamlin) Were you told that you could vote either way notwithstanding that you had signed the card?
MR. WILLIAMSON: Objection.
TRIAL EXAMINER: Sustained.

* * * *

[fol. 161] Q (By Mr. Cowherd) Mr. Poore, who is your foreman over there? A Walter T. Parish.
Q In what department is that? A 35.

* * * *

[fol. 163] Q Now, Mr. Poore, has your foreman or any other supervisor talked to you about the union? A Yes, sir.
Q Who was the person that talked to you? A My foreman, Mr. Parish.
Q And when was this that he talked to you? A On the morning of the day of the election.
Q And how did this conversation come about, where were you? A Standing at my place working, he come up to me.
Q What did he say? A He said, "Well, Poore, we are going to vote this thing out here today." He said, "I don't think that you boys need a union." He said, "I believe that it will do you more harm than it will good."

* * * *

[fol. 164] WAYNE McCALL

was called as a witness by and on behalf of the General Counsel and, after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a seat, please, and give use your name and address.

THE WITNESS: Wayne McCall, 223 Landsdown, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Have you ever worked for General Steel Products, Inc., High Point? A Yes, sir.

Q When did you work there? A From October, 1963, until the 24th through last month '65.

Q Now, Mr. McCall, did you ever sign a union card? A Yes, sir.

Q For the Upholsterers' International Union of North America? A Yes, sir.

Q Did you read your card before you signed it? A Yes, sir.

Q I show you General Counsel's Exhibit marked for identification Number 6(g) and ask you if that is your signature. A Yes, sir.

Q What date was it signed on? A 8-1-64.

Q 8-1-64? A Yes.

Q The eighth month, the first day? A Yes.

Q Is that right? A Yes.

[fol. 166] MR. COWHERD: I offer General Counsel's Exhibit Number 6(g) into evidence.

(The document above-referred to was marked General Counsel's Exhibit No. 6(g) for identification.)

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. McCall, is all of the writing on this card in your handwriting? A All except GC 6(g).

Q All except the— A Except this right here at the top.

Q Exhibit Number—the top card? A Yes, sir.
Q I call your attention to the date which appears on that card. A Yes, sir, that is mine.
Q Is that your handwriting? A Yes, sir.
Q When did you put it on there? A The same day.
Q Did you put it on the same time that you signed the card? A Yes, sir, I wrote it with a different pen.
Q You wrote everything on the card with one pen and wrote the date with another? A Yes, sir.
[fol. 167] Q Can you read what it says on this card? A Yes.
Q Read it to me. A "I do hereby designate and authorize the Upholsterers' International Union of North America, AFL-CIO and its representatives to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours, employment, and other conditions of employment."
Q Where were you at the time that you signed this card? A At home.
Q In whose presence? A Myself, and my wife, and two kids and Mr. Ted Davis.
Q Would you concede that Mr. Ted Davis was an official of the union? A Yes, sir.
MR. WILLIAMSON: I don't think that he can answer that, Mr. Examiner. We will concede that.
Q (By Mr. Hamlin) What did Mr. Davis tell you about the reason for obtaining union cards? A He gave me the card and asked me if I knew what it was, and I told him, yes, and he asked me if I wanted to sign it to get a union in General Steel and I told him, "Yes."
TRIAL EXAMINER: Speak up a little louder, please.
Q (By Mr. Hamlin) Did he tell you what use would [fol. 168] be made of this card? A To get a union in at General Steel.
Q Did he tell you that the card would be used to obtain an election? A The words I understood him to say was that the card would be used to get a union in at General Steel.
Q No talk about an election at that time? A Well, I didn't ask him about any.
Q Did he say anything about that? A Not to my recollection.

Q Did he tell you that your card would be secret?
MR. WILLIAMSON: Objection.
Q (By Mr. Hamlin) Or anything to that effect?
TRIAL EXAMINER: Sustained.

* * * *

[fol. 169] Q (By Mr. Cowherd) Do you know an employee by the name of James Morgan? A Yes, sir.
Q Does he work at General Steel or did he work at General Steel Products? A He did.
Q He is no longer employed there? A I don't think so.
Q Did he work there during the summer of 1964? A Yes, sir.
Q Did you give him a union card to sign? A Yes, sir.
Q Were you present when he signed it? A I was not looking at him.
Q You were not looking at him? A No.
Q Where were you when he signed the card? A I was sitting in the front seat of my car and he was in the back seat.
Q And you handed him the card? A Yes, sir.
Q Did he give it back to you? A He gave it back to me signed.
Q Signed? A Yes, sir.
Q At the same time? A Yes, sir.
Q While you were in the car? A Yes, sir.
Q Do you recall approximately when it was? A No, sir, I don't.
Q I show you General Counsel's Exhibit marked for identification Number 6(h).

(The document above-referred to was marked General Counsel's Exhibit Number 6(h) for identification.)

[fol. 171] Q (By Mr. Cowherd) And I ask you if that is the card that you received from James Morgan? A Yes.
Q Now refreshing your recollection, is this date on

this card, does it represent the date that he signed the card? A Yes.

Q All right.

Q Is that the condition that the card was in when you received it back from him? A Yes.

MR. COWHERD: I offer General Counsel's Exhibit Number 6(h) into evidence.

TRIAL EXAMINER: When you handed him the card in the first place was there any signature on the card?

THE WITNESS: His signature wasn't on it.

TRIAL EXAMINER: Pardon me?

THE WITNESS: His signature wasn't on it.

TRIAL EXAMINER: Was or was not?

THE WITNESS: Was not.

TRIAL EXAMINER: When you handed him the card?

THE WITNESS: No, sir. I had filled in the date and the address, and he told me that he wanted it filled in before he signed it because he couldn't write nothing except his name.

* * * *

[fol. 173] Q (By Mr. Hamlin) Did you see him read this card, do you know whether he could read it or not?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Hamlin) I believe you testified that you were not looking at him when he signed it? A No, sir.

Q So you don't know whether he read it or not? A That's right.

Q What did you tell Mr. Morgan about the purpose of the card? A I gave him the card and he said he had read it and he wanted me to fill it out.

* * * *

Q (By Mr. Hamlin) The question was, what did you tell him at that time. A I gave him the card and told him that I was giving the card out; I didn't tell him what for; I just gave them to him and told them that I was giving them out.

Q Did you tell him that the cards would be used to secure an election? A No, sir.

* * * *

[fol. 179] DIRECT EXAMINATION

(BY MR. COWHERD)

* * * *

[fol. 181] Q Now, Mr. McCall, did you attend the company speech made on November 5, the day before the election, a couple of days before the election? A November 4, two days before the election.

Q All right, was this the same speech that we have heard testimony on today? A It was one of them.

Q This is the second speech? A The second that Mr. Hoffman gave.

Q All right, now, could you tell us what you recall of that speech? A Well, he started off first, the best I recall that he wouldn't hold us but five or ten minutes, that the company couldn't afford to pay us for sitting down; and then he went on to say, "We all know the reason for being there, the union trying to get into the plant; we didn't need a union; he couldn't work with a union in the plant; and he was not going to work with a union in the plant."

[fol. 182] Q Did he say anything about a contract? A His contract came on up in the speech.

Q Continue. A When he first got up, he was reading some notes, he went on talking about the union, that companies had voted in unions, tried to vote in unions; he brought out Bottoms-Fiske; he said that they voted in a union and had bombings and dynamitings, and men were out of a job.

Q Did he mention any other company? A He brought out a company, I didn't understand the name over here in Thomasville; he said that they were on a strike a year, maybe two years, he didn't know for sure; but said he passed there mornings and nights, and men was out walking picket lines in the cold; they lost their cars; their homes; and they were still out of work; they couldn't ge a job for participating with a union.

And he said a good example was National Springs, that they had bought a new plant across the street, that they had had a union for over a year, and there is still no contract signed.

Q Did he say anything about what would happen if the union came in to General Steel? A He said one weapon that the union has is a threat of a strike and that in North Carolina a strike is no good to nobody because you have the right to work law, when you are, when you walk out the door, you are fired and finished; and "we can hire new men in your place to take your job."

He said, "The Government requires me to negotiate a contract, and I will negotiate, and negotiate, and negotiate, but no union will get a damn thing from me."

Q Now, Mr. McCall, where were you during the speech? A I was sitting approximately five feet from his platform.

Q Approximately five feet? A Yes.

* * * *

[fol. 191] JAMES HOWARD BYRD

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a seat, and state your name and address for the record, please.

THE WITNESS: James Howard Byrd, 311 Liberty Road, High Point, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Byrd, are you employed at General Steel Products? A Yes, sir, I am.

Q Are you now working there? A Yes, sir.

Q Did you work there during the year 1964? A Yes, sir, I did.

Q Mr. Byrd, did you sign a union card for the Upholsterers' International Union of North America? A Yes, sir, I did.

Q Did you read the card before you signed it? A Yes, sir.

Q I show you General Counsel's Exhibit marked for identification Number 6(i).

(The document above-referred to was marked General Counsel's Exhibit No. 6(i) for identification.)

Q (By Mr. Cowherd) And I ask you if you recognize that document. A Yes, sir.

Q Is that your signature on the card? A Yes, sir, it is.

Q Does that date on the card represent the approximate time at which you signed the card? A Yes, sir.

* * * *

[fol. 193] Q (By Mr. Hamlin) Who were these people? A Rabon Wilford, Bill Poore, and Wayne—I don't know what his last name is.

Q Who are they? A At that time they were employees of General Steel.

Q And were they securing the signing of union cards among the people in the plant? A Well, I don't know how many more they asked to sign a card, but they had the card that I signed.

Q Did they or any of them tell you with regard, did they tell you anything with regard to the secrecy of the card? A They said that they were working to get a union in out there.

Q All right. A And asked me if I would sign a union card and I told them, yes, I would.

Q Did they tell you that the purpose of the card was to obtain—

MR. COWHERD: Objection. Who is they?

Q (By Mr. Hamlin) Did any of them tell you the purpose of the card, any of these people that you have mentioned? Did any of them tell you that the purpose of the card was to obtain an election? A No, sir.

* * * *

[fol. 196] Q Did he tell you that the card would be kept secret?

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Hamlin) Did he tell you that the card would be kept secret except for submitting it to the Labor Board to secure an election, did he say anything to that effect?

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

I might say, counsel, that insofar as I am concerned, the record may show that you either have, that you either will, that you either have or will ask the same question of every witness who is called upon to identify his card, and that I would make the same ruling, and you may have an exception to cover all those cases.

* * * *

[fol. 197] Q (By Mr. Hamlin) Did this man tell you that you were naming the union to represent you? A At this time they just said that they were working trying to get a union in and asked me if I would sign a card to help get it in, and I told them I would sign a card, and they gave it to me, and asked me to read it, and I read it, and then I signed it.

* * * *

Q (By Mr. Cowherd) Mr. Byrd, who was your foreman? A At the present time it is hard to say, sir.

Q Who was your foreman last year? A Richard Dick Davis, sir.

Q Was he your foreman during the time the union was trying to organize out there? A Yes, sir, he was.

Q Now did any foreman or supervisor or company official talk to you about the union during this period of time? A Yes, sir, they did.

Q And when did this take place, do you remember the date? A The morning of the election, sir.

Q And who was the individual that talked to you? A Richard Davis.

Q Your foreman? A Yes. sir.

Q Where did the conversation take place? A At the table that I worked on, sir.

Q While you were working? A Yes, sir.

Q Did he come to you? A Yes, sir.

Q Or did you go to him? A He came to my table.

Q All right, sir, would you tell us what the conversation was about. A Well, he said, we were standing there talking about the union and getting, telling me why he didn't think that we needed a union, and he asked me

when—or he asked me how I intended to vote, and I told him that I hadn't made up my mind; and during this conversation, Tiny Micheau, the best I can remember, asked—

Q Who is Tiny Micheau? A He is an employee of General Steel.

Q Was he working there at the time with you? A Yes, sir.

Q All right. A He said something to Dick about one of the employees, Jackie Ledford, may vote for the union if he doesn't get on spring up table.

Q All right.

TRIAL EXAMINER: If he didn't what?

THE WITNESS: Get up on spring up table; at that time, he was taking beds off of the conveyor line, sir, and Richard Davis, said, well, if I find out he did, I will fire him.

Q (By Mr. Cowherd) Find out if he did what? A He says, if I find out that he voted for the union, I will fire him, and then he said, I will fire him for not doing his work.

* * * *

[fol. 204] Q You heard Mr. Hoffman's speech? A Yes, sir, I heard Mr. Hoffman's speech.

MR. COWHERD: Objection. It wasn't brought out on direct.

TRIAL EXAMINER: Sustained.

MR. HAMLIN: Very briefly, sir, that is not a rule in force in federal courts in this jurisdiction; you may cross-examine as to any relevant matter, and I feel that I should be allowed to inquire about that.

TRIAL EXAMINER: Objection sustained.

MR. HAMLIN: Exception.

* * * *

[fol. 205] W. DONALD JACOBS

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn as a witness, was examined and testified as follows:

TRIAL EXAMINER: Be seated, and give us your name and address.

THE WITNESS: W. Donald Jacobs, 538 Roy Avenue, High Point.

MR. COWHERD: I would like to have this marked for identification.

TRIAL EXAMINER: General Counsel's Exhibit 6(j).

(The document above-referred to was marked General Counsel's Exhibit No. 6(j) for identification.)

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Jacobs, would you speak up loud so that the court reporter can get everything. A All right.

Q Are you employed at General Steel Products in High Point? A Yes, sir.

Q Are you now working there? A Yes, sir.

Q Did you work there during the year 1964? A Yes, sir.

Q What was your—did you sign a union authorization card for the Upholsterers' International Union of North America? A Yes, sir.

Q And did you read the card before you signed it? A Yes, sir.

Q Mr. Jacobs, I show you General Counsel's Exhibit marked for identification as 6(j) and ask you if you can identify that. A Yes, sir, that is my handwriting.

Q Did you sign that card? A Yes, sir.

Q Does the date on that card represent the approximate time at which you signed it? A Yes, sir.

* * * *

[fol. 207] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Jacobs, what parts of that card were written by you? A Every bit of it, sir.

Q You didn't write this exhibit number at the top? [fol. 208] A No, sir.

Q Did you write the figures 8-1-64? A Yes, sir.

Q Are those in the same handwriting as the rest of the card? A Yes, sir.

MR. WILLIAMSON: Objection.

MR. COWHERD: Objection.

TRIAL EXAMINER: Well, he has answered.

Q (By Mr. Hamlin) Can you read, Mr. Jacobs? A Yes, sir.

Q Who came to you and asked you to sign the cards? A Mr. Ted.

Q And where did he talk to you? A At my girl friend's house.

Q By "Mr. Ted", do you mean Mr. Ted Davis? A Yes, sir.

Q Did he make any statement to you with regard to the secrecy of this card?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Hamlin) Did he make any statement to you with regard to the use of this card for an election? A He said that the union would represent us.

Q I asked you, did he make any statement to you with regards to an election? A Repeat the question, sir.

Q Sir? A Would you repeat it again?

Q Did he make any statement to you with regard to an election? A He said, he didn't say nothing about it when we signed the card, but I know what it was for, I knew what it was for, if we signed the card, the union would represent us. That they would represent us at the time, at the date set for an election.

* * * *

[fol. 217] SAMUEL M. SNOW

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

MR. COWHERD: I would like to have this marked for identification.

TRIAL EXAMINER: 6(k).

(The document above-referred to was marked General Counsel's Exhibit No. 6(k) for identification.)

TRIAL EXAMINER: Have a seat, and state your name and address for the record.

THE WITNESS: Samuel M. Snow, 267 Beddington Street, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Where are you employed, Mr. Snow? A General Steel.

Q General Steel Products? A Yes, sir.

Q At High Point? A Yes, sir.

Q Are you working there now? A Yes, sir.

Q Did you work there in 1964? A Yes, sir.

Q Did you sign an authorization card with the Upholsterers' International Union of North America? A Yes, I did.

Q Did you read the card before you signed it? A Yes.

TRIAL EXAMINER: Speak up louder.

MR. HAMLIN: I couldn't hear the last answer.

THE WITNESS: Yes, sir.

Q (By Mr. Cowherd) Mr. Snow, I show you General Counsel's Exhibit marked for identification Number 6(k) and ask you if you can identify that. A Yes, sir.

Q Is that your signature on the card? A Yes, it is.

Q Does the date on that card represent the approximate time at which you signed the card? A Yes, I imagine it is.

Q Yes or No? A Yes, sir.

MR. HAMLIN: What's the date?

MR. COWHERD: The date is July 20, 1964.

I offer General Counsel's Exhibit Number 6(k) into evidence.

* * * *

[fol. 219] VOIR DIRE EXAMINATION

(BY MR. HAMLIN)

* * * *

[fol. 221] Q Did anybody tell you what the purpose was of signing the card? A Yes, they did.

Q Who was this? A It was one of the union men, I can't think of his name.

TRIAL EXAMINER: Speak up louder, please, Mr. Snow.

Q (By Mr. Hamlin) Was it one of the men here in the room? A Yes, it was Ted.

Q Mr. Ted Davis? A Yes.

Q What did he tell you about the purpose of signing it? A He said it was to get the union in—

* * * *

[fol. 222] Q (By Mr. Hamlin) Did Mr. Davis tell you that the card would be used in obtaining an election? A Yes, he did.

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Hamlin) Did Mr. Davis tell you that the cards would be secret except for using them to get an election, or anything like that?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: The same ruling.

Q (By Mr. Hamlin) Did Mr. Davis tell you that the card was for the purpose of having the union represent you?

MR. WILLIAMSON: Objection.

Q (By Mr. Hamlin) Regardless of any election?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Hamlin) Did Mr. Davis tell you that the union would come in only if it won an election or anything to that effect?

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Hamlin) Did Mr. Davis tell you that you could vote either way if you signed a card?

MR. COWHERD: Objection.

TRIAL EXAMINER: Same ruling.

* * * *

[fol. 224] Q (By Mr. Cowherd) Mr. Snow, did Mr. Davis make the statement that the card was only for the purpose of an election? A Yes.

* * * *

[fol. 225] Q Do you recall whether I came to your house? A Oh, yes, sir, I remember that.

Q Do you remember I asked you if that was your signature on the card? A Yes.

Q Do you remember signing an affidavit? A Yes, sir, I remember signing the affidavit.

Q Do you remember reading it? A Yes, sir.

Q All right, would he help your memory any if I showed you your affidavit now? A Yes.

* * * *

[fol. 226] Q (By Mr. Cowherd) Mr. Snow, would you take a look at this and read it over to yourself and see if that refreshes your memory.

That is your signature on that? A Yes, it is.

Q All right, now, Mr. Snow, do you recall now whether or not you were told specifically by Mr. Davis whether that you were signing the card only for the purpose of a union election?

MR. MARTIN: Objection.

MR. HAMLIN: Objection.

TRIAL EXAMINER: He may answer.

THE WITNESS: You mean specifically—

Q (By Mr. Cowherd) Only for the purpose, was this statement made to you, only for the purpose of a union election?

MR. MARTIN: Objection.

TRIAL EXAMINER: Overruled. The question is, now that you have had your memory refreshed, you are being asked again, did Mr. Davis tell you that the card would be used only for an election?

THE WITNESS: It would be used for an election.

TRIAL EXAMINER: The question was, did he say it would only be used for that purpose?

THE WITNESS: I can't remember whether he said it or not right now. I know we were talking about it, but I can't remember it; it has been right long ago. He was talking—

TRIAL EXAMINER: He was talking about what?

[fol. 228] THE WITNESS: About the card.

Q (By Mr. Cowherd) When was it that Mr. Davis talked to you again?

Before you signed the card, how long was it? A You mean after I signed the card?

Q Before you signed the card, how long before you signed the card did Mr. Davis talk to you? A I couldn't remember that.

Q Was it a day? A Well, it could have been a month, a day or two, I can't remember that.

Q A long time?

TRIAL EXAMINER: A little while ago you testified that you thought it was about two months before you signed the card.

THE WITNESS: I said I wasn't sure; it could have been two months or it could have been a month.

Q (By Mr. Cowherd) At least a month? A Somewhere about a month.

Q Now, Mr. Snow, referring to your affidavit, refer to this line right here, would you begin right there.

MR. MARTIN: If the Court please, he has already examined him about that.

MR. COWHERD: I have exhausted his memory.

A "I was told that I was signing the card just so the"—

Q (By Mr. Cowherd) I was what? Start over. A I was not told that I was signing the card just so the union could have an election.

* * * *

[fol. 231] Q (By Mr. Cowherd) Mr. Snow, who is your foreman at General Steel? A You mean now or back then?

Q Back when the organizing campaign, back when the union was organizing the plant? A Jim Riggsbee.

Q And what department was he working in? A Department 32.

Q And what job did you have? A I was running a spinning machine.

Q Now did your foreman or any other foreman talk to you about the union during the campaign of 1964? A Yes, Jim Riggsbee talked to me about it.

Q Do you recall what the date was? A Around August 8 through the 11, one day there.

Q How did this conversation arise, how did it come up? A I was working on the machine, and they come around to the machine; and we was talking about it.

Q About what? A About the union.

Q All right. A He asked me did I sign a union card, and I told him that it wasn't none of his business.

* * * * *

[fol. 234] HOWARD THOMAS SLATE

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Will you state your name and address, please.

THE WITNESS: Howard Thomas Slate, 408 Coltrane Street, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Slate, where do you work? A Crown Flex, Crown Flex of North Carolina.

Q Is that Crown Flex of North Carolina here in High Point? A Yes, sir.

Q Mr. Slate, what is your job there? A I am a packer at the present time.

Q What was your job last year? A Working on the machines on the second shift.

Q For the same company? A Yes, sir.

Q Same place? A Yes, sir.

Q And who is your foreman? Who was your foreman? A Well, we had two; Ernest Curry for foreman on daytime; and Francis Amos was on the other one.

Q Now, Mr. Slate, did you sign an authorization card for the Upholsterers' International Union of North America? A I did.

Q Did you read the card before you signed it? A I think so. I am not sure whether I did or not.

Q Now— A But I usually read whatever I sign.

Q I show you General Council's Exhibit marked for identification 6(l).

6(l)

(The document above-referred to was marked General Counsel's Exhibit No. 6(1) for identification.)

Q (By Mr. Cowherd) And ask you if you can identify that card. A Yes.

Q Is that your signature on the card? A It is.

Q Does it refresh your memory about whether you read that card or not? A I read it.

Q You read it? A Yes.

Q Is that the approximate date on which you signed the card? A Right here.

Q Right there. A Yes, sir.

[fol. 236] Q 7-10-64. A Yes.

MR. COWHERD: I offer General Counsel's Exhibit marked for identification 6(1) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Slate, did someone come to see you to ask you to sign this card? A Yes, they did.

Q Who was that? A George, I don't know his last name.

Q Is he someone that is in the room? A He is.

Q Is he an official of the union? A He is.

Q What did he tell you about the purpose of this card at the time he visited you to ask you to sign it? A Well, I don't know whether he told me anything about what the purpose was or not; I read the card before I signed it.

Q Was there no conversation with him? A I suppose there was.

Q Was there any conversation on the subject I have asked you about, about the purpose of this card? A Yes.

Q What was it? A To get an election in for a union.

Q Did he tell you that the card was to be used only for the purpose of getting an election? A He didn't say nothing about "only."

Q You don't remember any word "only"? A No.

Q Did he tell you that you could vote either way? A Yes, he did.

Q Did he tell you that if the union won that it could come in? A He did. I already knowed that.

Q And that if it lost, it would not? A No, I don't think he said anything about that.

* * * *

[fol. 238] Q The man who asked you to sign the card, did he tell you that it would be secret, or anything to that effect?

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Hamlin) Did he tell you that it would be shown only to the Labor Board?

TRIAL EXAMINER: I thought that stipulation

MR. HAMLIN: I don't know to what extent that stipulation extends, Your Honor, and I am fearful about the record.

TRIAL EXAMINER: I assure that I—I don't know how I can say it any more plainly but it may be understood that you asked that question and the other question concerning the secrecy of every witness, and that I sustain an objection.

MR. HAMLIN: All right, sir.

TRIAL EXAMINER: I don't know how I can make it any plainer than that.

MR. HAMLIN: Then it isn't a matter of the form of the question; your ruling extends to that area of inquiry.

TRIAL EXAMINER: Yes, to the question which you just now asked of this witness, the two questions pertaining to any statement made that the card would be kept a secret and it would only be disclosed to the Board.

* * * *

[fol. 243] Q (By Mr. Cowherd) Mr. Slate, I believe you said that your foreman was Ernest Curry, is that correct? A That is.

Q Was he your foreman back in 1964 when the union campaign was going on? A He was on first shift.

Q And were you on first shift? A No, sir, I was on night time.

Q You were on night time? A Yes.

Q Now had any foreman or supervisor talked to you about the union, at that time, along about that time? A In a way he did.

TRIAL EXAMINER: In a way he did?

THE WITNESS: Yeah.

Q (By Mr. Cowherd) Who is "he"? A Mr. Curry.

Q I see. And when was this? A Well, it was one evening about five o'clock; five-thirty.

Q And do you remember the date approximately? A No, sir, I don't.

Q You don't? A I think it was sometime along in July, the 4th of July, along in there sometime.

Q Was it before or after July 4th? Had there been a holiday? A Yes, sir.

Q Does that help you to remember? A I think it was before.

Q Before the fourth of July? A Yes.

Q All right, now, how did this conversation come up? A He come to the machine.

[fol. 245] Q While you were working? A Yes, sir.

Q And how did he happen to be working on the same shift that you were? A Well, he doesn't usually leave until about 5:30 or 6:00 o'clock.

Q I see. He works overtime? A No, he don't come until eight in the morning.

Q He stays over through two shifts? A Part of it.

Q Part of the second shift? A Right.

Q I see. Now what was it that Mr. Curry told you? A He come by and asked me had a man been by to see me.

Q I see, and what man was he referring to? A The union representative.

Q And what did you tell him?

MR. HAMLIN: I move to strike that last answer. There is no indication that Mr. Curry said who he was referring to.

TRIAL EXAMINER: I will hold ruling in abeyance, and see what develops here.

Q (By Mr. Cowherd) Mr. Slate, what was your reply to him? A I asked him if he was talking about a man from the union, and he said, "Yes", and I told him, "No."

Q You told him, "No"? A That the man hadn't been by to see me.

Q I see.

TRIAL EXAMINER: In the light of this testimony, the motion will be denied, or the objection will be overruled.

* * * *

[fol. 250] BILLY DON BROWN

* * * *

[fol. 254] Q (By Mr. Hamlin) You have described Mr. Ohan as the person who solicited you to sign the card? A He asked me would I sign the card, yes.

Q Did Mr. Ohan ask others to sign cards?

MR. COWHERD: I didn't hear the question.

Q (By Mr. Hamlin) Was Mr. Ohan asking others to sign cards? A I don't know.

Q Did you sign this and deliver it to him? A I signed the card, yes, he was in the car.

Q To whom did you give it? A I gave it to him.

Q Was there anybody in the car beside you? A I don't remember.

Q What did he tell you at the time you signed the card?

MR. COWHERD: Object.

TRIAL EXAMINER. Same ruling.

Q (By Mr. Hamlin) Did he tell you whether or not the cards were for the purpose of obtaining an election?

MR. COWHERD: Objection.

TRIAL EXAMINER: Same ruling.

MR. HAMLIN: I understand there is a stipulation about the secrecy question.

TRIAL EXAMINER: Yes.

MR. HAMLIN: That there would be the same ruling?

TRIAL EXAMINER: Yes.

Q (By Mr. Hamlin) Did he tell you that you could vote either way?

MR. COWHERD: Object.

TRIAL EXAMINER: Same ruling.

Q (By Mr. Hamlin) Did he tell you that the cards would be disclosed only to the Labor Board?

* * * *

[fol. 258] W. L. CHRISLEY

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Cowherd) Would you give your name and address for the record, please. A W. L. Chrisley, 506 Flint Street, High Point; Willam Lawrence Chrisley.

Q Mr. Chrisley, where are you employed? A Now?

Q Now. A Pittsburgh Plate Glass.

Q Mr. Chrisley, have you ever worked at the General Steel Products Company? A I worked for Crown Flex.

Q You worked for Crown Flex? A Yes, sir.

Q Of North Carolina, Incorporated? A Yes, sir.

Q Mr. Chrisley, when was this that you worked for the company? A I worked for them about 18 months. I went to work in '61 or '62 and I worked for them until '64, until June or July of '64.

Q Mr. Chrisley, while you were employed at the Crown Flex Company, did you ever sign a Union card? A Yes.

Q For the Upholsterers' International Union? A Yes.

Q Of North America? A Yes.

Q Did you read the card first before you signed it? A Yes.

Q I show you General Counsel's Exhibit marked for identification 6(n) and ask you if you can identify this card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(n) for identification.)

A Yes, that is the one I signed.

Q (By Mr. Cowherd) Is that your signature? A Yes, sir.

[fol. 260] Q Is that the date on which you signed it? A I wouldn't say for sure about the date.

Q Did you fill out the card, sir? A Yes, sir.

Q Did you write everything on the card? A Yes, sir.

Q Let the record show that the date on the card is July 22, 1964.

TRIAL EXAMINER: Well, did you write the date on there too?

THE WITNESS: Sir?

TRIAL EXAMINER: Did you write the date on there?

THE WITNESS: Yes, sir. I wrote the date but I couldn't say what date it was, what month.

Q (By Mr. Cowherd) Mr. Chrisley, did you write the date on the card at the same time that you signed it? A Yes, sir.

Q Mr. Chrisley, did you put the date on the card at the time you signed the card, the date? A It was at night when I signed it.

MR. HAMLIN: I couldn't hear that.

TRIAL EXAMINER: It was at night.

THE WITNESS: It was at night, in the evening, I put the date on it.

Q (By Mr. Cowherd) And you put it on the same day? A Yes, sir, that evening.

MR. COWHERD: I offer into evidence General Counsel's Exhibit 6(n).

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Where were you when you signed this, sir? A Sitting on my front porch.

Q Did someone call on you and ask you to sign it? A Yes, sir.

Q Who? A Mr. Brown and that man sitting beside of him.

Q Is that Mr. Napolean Brown? A Yes, sir, that colored fellow.

Q And the man beside him, which side? The one towards the aisle? A Yes, sir.

Q Mr. Ted Davis? A That's right.

Q Are they officials of the union? A I imagine that they are.

MR. WILLIAMSON: We will stipulate that they are.

Q (By Mr. Hamlin) Did Mr. Brown or Mr. Davis

tell you what the purpose of the card was when they asked you to sign it? A No, I knew what it was for.

Q Now— A I signed it, I figured I was joining the union when I signed it.

Q Did they tell you anything about it at that time? A No.

* * * *

[fol. 273] JONAH C. GATES

TRIAL EXAMINER: Come around to be sworn.

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Be seated and give us your full name and address, please.

THE WITNESS: Jonah C. Gates, Route 5, Winston-Salem.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Gates, have you ever been an employee of General Steel Products Company? A I was.

Q In High Point? A Right.

* * * *

[fol. 275] Q (By Mr. Cowherd) I show you General Counsel's Exhibit marked for identification 6(p) and ask you if you can recognize that document. A Yes, I can recognize it

Q What is it? A It is a union card.

Q Did you read the union card before you signed it? A I did.

Q Did you put the date on there when you signed it? A I most certainly did.

Q What is that? A The date of it?

Q Yes. A 8-13-64.

Q And that is your signature, sir. A Nobody else's.

TRIAL EXAMINER: Well is it yours?

[fol. 276] THE WITNESS: It is mine.

TRIAL EXAMINER: All right.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(p) into evidence.

TRIAL EXAMINER: What date did you sign it?

THE WITNESS: 8-13-64.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Is all of the writing other than the exhibit number on this card yours? A That is my scribbling.

Q Including the date? A That's right.

Q What department were you in? A 23.

Q Who approached you with regard to signing the card? A Well, about 35 or 40 other people; which one I just couldn't put my finger on.

Q For which one did you sign this card? A Ted Davis.

Q Did Mr. Davis say anything to you in your presence about the purpose of the card? A He asked me did I know what it was and what it stood for and I told him, yes, I did.; and he said, "Put your name here," And I did.

Q Was that the total conversation? A That's right.

* * * *

[fol. 277] Q (By Mr. Hamlin) Were you told by anyone that the card would be presented to the Labor Board to secure an election?

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Hamlin) Were you told by any[illegible] that the cards would be disclosed to no other, to n[illegible]e else except the Labor Board?

MR. COWHERD: Objection.

TRIAL EXAMINER: Same ruling.

[fol. 278] MR. HAMLIN: The secrecy question.

TRIAL EXAMINER: I didn't hear you.

MR. HAMLIN: The same understanding as to the secrecy question.

TRIAL EXAMINER: Yes.

* * * *

REDIRECT EXAMINATION

Q (By Mr. Hoffman) Mr. Gates, you were an observer at the election, were you not? A That's right.

* * * *

[fol. 282] TRIAL EXAMINER: Now before you talked with the government man, did you know that you were going to be an observer at the election?

THE WITNESS: A few days before, yes.

TRIAL EXAMINER: And where did you find that out, who told you that?

THE WITNESS: Ted Davis.

* * * *

[fol. 292] NORMAN SMITH

was called as a witness by and on behalf of the General Counsel and, after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give your full name and address, please.

THE WITNESS: Norman H. Smith, 2305 Delaware Street.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Smith, have you ever worked for General Steel Products Company? A Yes, sir.

Q What was your job? A I was a job inspector.

Q Inspector? A Yes, sir.

MR. COWHERD: I would like to have this marked for identification.

(The document above-referred to was marked General Counsel's Exhibit No. 6(q) for identification.)

[fol. 293] Q (By Mr. Cowherd) What department did you work in? A I don't remember the number of the department. I know that I worked under Ivan Simpson.

Q Mr. Smith, I show you General Counsel's Exhibit

marked for identification 6(q) and ask you if you can identify that document. A Yes, sir.

Q Is that your signature on that? A Yes, sir.

Q What is it, what is the document? A Well.

TRIAL EXAMINER: It will speak for itself.

Q (By Mr. Cowherd) Did you read that document before you signed it? A Yes, sir.

Q And did you write the date on there? A I am not sure. My wife could have written that date.

Q Was it dated at the same time you signed it? A Yes, sir.

MR. COWHERD: Let the record show that the date on the card is August 1, 1964. I offer General Counsel's Exhibit 6(q).

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) What part of the writing on here is your writing, Mr. Smith? A That is my signature.

That is all mine. The other part, my wife.

Q The other part your wife wrote? A Yes, sir.

Q All right. A I am not sure about the date. I don't know where I wrote the date or not.

Q Are you sure whether the date was written on it at the time? A Well.

Q That you signed it? A At the time I signed my name the date was put in there.

Q Who solicited you to sign this card? A One of the union officials.

Q Which one, which union official? A Ted Davis I believe.

Q Was there anyone present beside you and your wife? A No.

MR. WILLIAMSON: Mr. Examiner, I wonder if counsel and the witness can speak up. I have a little difficulty hearing.

MR. HAMLIN: I will be glad to.

Q (By Mr. Hamlin) What did Mr. Davis tell you about the purpose of the card at the time he gave it to

you to sign? A He just showed it to me and asked me if I knew what it was and I told him, "yes." He asked me if I would sign it and told him, "yes."

[fol. 295] Q Did you read it? A My wife read it to me.

Q Are you able to read, sir? A Some, not too good.

Q Are you able to read well enough to understand the text on this card? A Yes.

Q Would you attempt to read it.

MR. COWHERD: Louder.

A I can't read it all.

Q (By Mr. Hamlin) A little louder, please. A I do hereby; I can't read it all; some I can read and some I can't.

Q All right, sir. Did Mr. Ted Davis say anything else to you about the card at the time he called on you to sign it? A No.

Q Did he tell you that the card would be used to obtain an election? A Well, I am not sure. It has been so long ago.

Q Did he tell you that you were naming the union to represent you? A He might have, I don't know.

Q You don't remember that? A No.

Q Did he tell you that you could vote either way in the election even though you signed it?

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Hamlin) Did he tell you that the matter would be settled by a secret ballot?

MR. COWHERD: Objection.

Q (By Mr. Hamlin) Or anything like that?

TRIAL EXAMINER: Same ruling.

MR. HAMLIN: The same questions, Your Honor, as to secrecy?

TRIAL EXAMINER: Yes, the same understanding.

MR. HAMLIN: We object.

TRIAL EXAMINER: Is it offered?

MR. COWHERD: Yes. I think I offered it when I finished.

TRIAL EXAMINER: I see. You say your wife read something to you from this card?

THE WITNESS: Yes, sir.
TRIAL EXAMINER: What is the substance of what she read to you?
THE WITNESS: Oh, I can't remember all of that because it has been a long time ago, and I almost forgot about it.
TRIAL EXAMINER: What did you think that you were doing when you signed that card?
[fol. 297] MR. HAMLIN: Objection.
MR. WILLIAMSON: Objection.
TRIAL EXAMINER: You may answer. What did you intend doing by signing that card?
MR. WILLIAMSON: May I be heard on this?
TRIAL EXAMINER: How is that?
MR. WILLIAMSON: May I be heard?
TRIAL EXAMINER: Yes.
MR. WILLIAMSON: My understanding is that you are not allowed to go into the witness' subjective—
TRIAL EXAMINER: I am aware of that rule, but in view of the fact that he can't read, that he apparently cannot read well enough, and that it was read to him by his wife, I think that is an altogether different circumstance. And that is why I want to find out what it was he thought he was doing when he signed that card.
MR. WILLIAMSON: Well, sir, there is testimony that the wife did read the card to him.
TRIAL EXAMINER: How does he know whether she read it to him?
MR. WILLIAMSON: Well.
TRIAL EXAMINER: That is the reason I asked the question.
MR. WILLIAMSON: That is what he testified to.
TRIAL EXAMINER: How is that?
MR. WILLIAMSON: That is what he testified to.
TRIAL EXAMINER: I know, but how does he know whether she actually read what was on that card as it appears here today?
MR. WILLIAMSON: Well, I suppose she could have recited "Mary had a little lamb" or something.
TRIAL EXAMINER: That's right.

* * * *

[fol. 299] TRIAL EXAMINER: Is there any reason why your wife can't come to here?

THE WITNESS: Well, no. But I think; well, I am not supposed to think.

TRIAL EXAMINER: In the present state of the record, I don't know what his wife read to him. If you are willing to leave it rest there, then I am satisfied.

MR. WILLIAMSON: Well, no, sir, if you are not satisfied about whether his card reflects that he chose the union for his collective bargaining agent, we certainly intend to bring another witness.

TRIAL EXAMINER: Well, see, that is up to you.

MR. WILLIAMSON: All right, sir.

TRIAL EXAMINER: Is there anything further?

MR. COWHERD: Not from this witness.

MR. WILLIAMSON: Not from this witness.

TRIAL EXAMINER: Well, for the time being, I will withhold ruling on the admissibility of the 6(q).

* * * *

[fol. 317] MR. WILLIAMSON: As previously stated, I will make no objection to testimony concerning what a card-signer was told by the person who induced him to sign the card at the time of the signing without reference to whether such person inducing a signature was a union organizer or any other person.

* * * *

[fol. 318] JOHN LEROY JACOBS

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: State your full name and address for the record.

THE WITNESS: John Leroy Jacobs, 536 Royal Street.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Jacobs, have you ever worked for or been employed by General Steel? A Yes, sir.

Q When was that? A October 1, 1963.

Q Did you work there during the time that the union organizing campaign was going on at General Steel? A Yes.

Q At the plant there? A Yes.

Q What was your job? A Spinner.

Q Who was your foreman? A Ivan Simpson.

MR. COWHERD: I would like to have this marked for identification.

TRIAL EXAMINER: General Counsel's Exhibit Number 6(s).

(The document above-referred to was marked General Counsel's Exhibit No. 6(s) for identification.)

Q (By Mr. Cowherd) Mr. Jacobs, I show you General Counsel's Exhibit Number 6(s) and ask you if you can identify that document. A Yes, sir, that is my handwriting, all but on the bottom.

MR. COWHERD: Let the record reflect that the company's name is written to where the witness is pointing, General Steel Products, Inc.

Q (By Mr. Cowherd) Now, Mr. Jacobs, did you read the card before signing it? A No, sir.

Q Did someone read it to you? A Yes, sir.

Q Who read it to you? A Ted Davis.

TRIAL EXAMINER: Who?

THE WITNESS: Ted Davis.

Q (By Mr. Cowherd) Does the date on that card reflect the date on which you signed the card?

MR. HAMLIN: Objection.

TRIAL EXAMINER: When did you sign the card?

[fol. 320] THE WITNESS: In April or July 1 when I signed.

MR. WILLIAMSON: Can we ask if the date on the card refreshes his memory?

TRIAL EXAMINER: Yes.

Q (By Mr. Cowherd) Does the date on the card refresh your memory as to when you signed it? A No, sir, it don't.

Q Would you read the date on the card. A 6-12-64.

Q Was the date put on the card when you signed it? A No.

MR. MARTIN: Objection.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Are you able to read? A A little bit.

Q Can you read the text of that card? A I can read it at the top.

Q Do you know what it says in fine print here? A No.

Q So when you signed the card, you signed the card after it was read aloud, purportedly read aloud by Mr. Davis? A Yes, sir, Mr. Davis.

Q You had no way of knowing whether he read it correctly or not? A Yes, sir, it was correct.

Q You have no way of knowing? A Yes, sir, it was correct the way he read it.

Q But you didn't read the card? A No, sir. I can read a little bit.

Q Did Mr. Davis tell you what these cards were for? A Yes, sir.

Q Did he tell you that they would be used to obtain an election? A Yes, sir.

Q Did he tell you that they would be used just to obtain an election? A He said they would be used to get the union in.

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[fol. 322] Q (By Mr. Hamlin) Was there anything said to you about what the cards would be used for, what purpose would be served if you signed one? A To represent us.

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[fol. 327] ROY GILLILAND

was called as a witness by and on behalf of the General Counsel and, after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Will you give us your full name and address, please.

THE WITNESS: Roy Gilliland, 427 South Elm Street.
MR. MARTIN: What is your middle initial?
THE WITNESS: Daniel, "D".

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Gilliland, have you ever worked at General Steel Products Company? A Yes, sir.

* * * *

[fol. 328] Q Did you sign a union card while you were working at General Steel? A Yes, sir.

Q While you were working at General Steel? A Yes, sir.

Q I show you General Counsel's Exhibit marked for identification 6(t) and ask you if you can identify this card. A Yes.

Q Is that your signature on the card? A Yes, sir.

* * * *

[fol. 329] TRIAL EXAMINER: When did you sign this card that you have in your hand now?

THE WITNESS: About July.

TRIAL EXAMINER: Were you working at the plant at that time?

THE WITNESS: Yes, sir.

* * * * *

[fol. 331] Q (By Mr. Cowherd) Did anyone read this card to you? A Yes.

Q Who was that? A George O'ham.

Q He read it to you? A Yes, sir.

Q Do you recall what he said when he read it? A No, sir.

MR. COWHERD: You may voir-dire.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) You don't remember just what Mr. O'ham said to you when he got you to sign the card? A No, sir.

Q Did he tell you that there would be an election? A No, sir.

Q Did he tell you that you could vote either way? A Yes, sir.

Q Were you told that the fact you signed the card would be kept secret or confidential, or anything like that? A No, sir.

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Sustained.

* * * *

[fol. 333] TRIAL EXAMINER: I don't recall whether you asked him. Can you read?

THE WITNESS: No, sir.

MR. COWHERD: We will reserve offering it until we can have Mr. O'ham here.

TRIAL EXAMINER: All right, we will reserve on this. I will reserve ruling on that.

* * * *

[fol. 334] MANUEL J. MASHBURN

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Would you give us your full name and address, please.

THE WITNESS: Manuel J. Mashburn, 1124 Tryon Street, High Point.

MR. MARTIN: What was the address?

THE WITNESS: 1124 Tryon Street.

TRIAL EXAMINER: Speak up loud, please.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Mashburn, have you ever been employed at General Steel Products Company in High Point? A Yes, sir.

Q Were you employed there during the time the union campaign was going on? A Yes.

Q What was your job? A Rivet machine operator.

Q And who was your foreman? A Walter Parish.

Q Mr. Mashburn, I show you General Counsel's Exhibit marked for identification 6(u) and ask you if you can identify this document.

(The document above-referred to was marked General Counsel's Exhibit No. 6(u) for identification.)

Q (By Mr. Cowherd) This card? A Yes.

Q Is that your signature on the card? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

Q Mr. Mashburn, what was the date that you signed this card? A 7-17-64

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[fol. 338] ALBERT L. TAYLOR

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address and speak out loud, please.

THE WITNESS: Albert Lester Taylor, 206 Allen Jay Road, High Point, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Taylor, have you ever been an employee of General Steel Products Company? A I have.

Q Did you work there during the summer of 1964? A I did.

Q What was your job, sir? A Punch press operator.

Q And who was your foreman? A Thomas Allen.

Q Now were you working there in August last year? A Yes, sir.

MR. COWHERD: I would like to have this marked for identification.

TRIAL EXAMINER: 6(v).

(The document above-referred to was marked General Counsel's Exhibit No. 6(v) for identification.)

Q (By Mr. Cowherd) I show you General Counsel's Exhibit Number (v), marked for identification as 6(v), and ask you if you can identify this card. A I can.

Q Is that your signature, sir? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

TRIAL EXAMINER: When did you sign it?

THE WITNESS: 6-4-64.

* * * *

[fol. 341] Q (By Mr. Hamlin) Did Mr. Davis make a speech before you signed this card? A Yes, sir.

Q In this speech did he say he was seeking to get an election in the plant, or anything to that effect? A Yes, sir.

Q Did he tell you that you would be free to vote either way even though you signed the card? A I don't recall, sir.

Q Did he tell you that these cards were just to get an election? A I do not recall, sir.

Q Did he tell you that except for getting an election the cards would be kept secret or confidential, or anything to that effect? A Yes, sir.

* * * *

[fol. 348] WILLIAM D. MOSS

was called as a witness by and on behalf of General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: William D. Moss, Route 5, Box 24, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Moss, have you ever worked at General Steel Company in High Point? A Yes, sir.

Q Did you work there— A Crown Flex.

* * * *

[fol. 350] Q Is that your signature on the card? A That's right.

Q Did you read the card before you signed it? A Yes, sir, I did.

Q And what date did you sign it? A 7-10-64.

* * * *

[fol. 354] Q (By Mr. Cowherd) Mr. Moss, I believe you testified that you were working at Crown Flex, is that right? A That's right.

Q Now who was your foreman again, please? A Francis Amos, second shift.

Q Now who is Mr. Amos' boss? A I think Ernest Curry is.

Q Now, Mr. Moss, has any company official or supervisor or foreman talked to you about the union? A Yes.

Q Who was that that talked to you? A Ernest Curry.

Q When did this happen? A Around July 23 I think it was.

Q About July what? A Around July 23 I think it was.

Q What year was that? A '64.

Q Back during when the union was organizing? A That's right.

Q Now what was it that Mr. Curry said to you? A Well, he come over to my machine and asked me if I had heard anything about the union, and I told him, "No".

He said that if Frank Hoffman found out that anyone was for it or anything like that, that Frank would fire them.

Q Now were you working at the time? A Yes, sir.

Q That this took place in the plant? A Yes, sir.

Q And did you go to him or did he go to you? A He come by my machine.

Q Now after this, did anyone talk to you about, did any foreman or supervisor talk to you about the union? A Well, the day after that, Harold Lewis, who was working at the next machine, he said he heard the union was back out there again, and if anyone tried to get me to join or anything like that for me not to have anything

to do with it; and he said if Frank Hoffman found out anybody was for it that he would probably fire them.

Q Well, did this end the conversation? A That is all that I can remember.

Q And where were you when you had this conversation with Mr. Lewis? A I was working at the machine.

Q And who is Mr. Lewis? A I think he is the foreman on the Burflex machines on the day shift.

Q What is his first name? A It is R. H. Lewis.

* * * * *

[fol. 361] EUGENE HEATON

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: My name is Eugene Heaton. My address, 500 South Elm, High Point, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Heaton, have you ever been an employee of General Steel Products, Inc? A Yes, sir.

Q In High Point? A Yes, sir.

Q Were you employed there during the year 1964? A Yes, sir.

Q Were you employed there in August of 1964? A Yes, sir.

Q Were you employed there in July of 1964? A Yes, sir.

Q What was your job back in those months? A Spring up.

Q And who was your foreman? A Richard Davis.

Q Mr. Heaton, I show you General Counsel's Exhibit marked for identification 6(z) and ask you if you will identify that card.

(The document above-referred to, was marked General Counsel's Exhibit No. 6(z) for identification.)

A Yes, sir.

Q (By Mr. Cowherd) Is that your signature on the card? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

Q And what was the date that you signed the card? A July 23, 1964.

MR. COWHERD: I have no further questions.

I offer General Counsel's Exhibit 6(z) into evidence.

VOIR DIRE EXAMINATION

(BY MR. HAMLIN)

* * * *

[fol. 364] Q He told you that the cards would be used just to get an election? A No, sir.

* * * *

[fol. 365]

DIRECT EXAMINATION RESUMED

Q (By Mr. Cowherd) Mr. Heaton, who is your foreman? A Then?

Q Yes, then. A Well, Richard Davis.

Q Is he still your foreman? A No, sir.

Q Did you vote in the election? A No, sir.

Q Were you working there during the time of the election? A No, sir, I had some problems at home in Tennessee and so I had to be there. I left about two weeks before the election, a week to two weeks.

Q Now, Mr. Heaton, while you were working there, did any foreman talk to you about the union? A Yes, sir.

Q And who was that? A Richard Davis.

Q And when did this occur? A Two weeks before the election, two or three weeks.

Q Now where were you when this conversation took place? A Me and my buddy were working at springing table.

Q Who is your buddy? A Walter Lewis.

Q And would you tell us how the conversation started. A Well, he come down to the table.

Q When you say "he", who are you referring to? A Richard Davis, our foreman.

Q All right. A And asked us how we were going to vote; we told him that we were going to vote "Yes"; he said, "Well, if you do, I will fire you"; and laughed and walked off.

* * * *

[fol. 367] CROSS EXAMINATION

* * * *

[fol. 368] Q (By Mr. Hamlin) At the time Richard Davis told you this you already knew from company officials, Mr. Clapper, or Mr. Hoffman, or someone else that the company would not fire you for voting for the union, did you not? A I didn't believe that they would fire us it being that close to the election.

MR. HAMLIN: You may examine.

REDIRECT EXAMINATION

* * * *

[fol. 369] Q (By Mr. Cowherd) Did you have any belief that you would be fired?

MR. MARTIN: Objection.

Q (By Mr. Cowherd) At all?

MR. MARTIN: Objection.

TRIAL EXAMINER: Based on what you had been told.

Q (By Mr. Cowherd) Based on what you had been told?

MR. MARTIN: Objection.

TRIAL EXAMINER: He may answer.

A Well, I believe that afterwards that if they had found it out, and he would tell them that, if they had knew that I had voted for the union, I believe they would have fired me.

MR. HAMLIN: Move to strike the answer.

TRIAL EXAMINER: The motion will be denied.

MR. COWHERD: No further questions.

RECROSS EXAMINATION

Q (By Mr. Hamlin). The last question, as I recall it, I believe was based on what you had heard, did you have a belief about this matter. What were you referring to that you had heard when you recited your belief? A What my boss man had told me?

Q What were you referring to that you had heard— A Well, from what he had told us at the table, I believe he would have fired us afterwards.

Q You stated in the beginning of your testimony, did you not, sir, that you did not believe that at the time? A Not being that close to the elecion, I didn't believe they would fire me at the time.

* * * *

[fol. 397] ROGER C. DAVIS

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: Roger C. Davis, Winston-Salem, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Davis, for whom do you work? A For the Eleventh Region, National Labor Relations Board.

Q And what position do you hold in the Eleventh Regional Office, sir? A I am Office Manager.

Q Could you outline for us briefly, very briefly, sir, what the duties of the Office Manager are. A The Office Manager is in charge of all the administrative, clerical procedures in the Regional Office.

Q All right, sir. Mr. Davis, what can you tell us about the practice of the Regional Office as it involves incoming documents? A All incoming documents are given to the Mail and File Clerk who stams them immediately upon recepit with an electric time stamp which we have.

Q I show you a card marked General Counsel's Exhibit 6(u) and ask you if you recognize the stamp on the back of that card, sir. A Yes, sir.

Q What does that say? A This is our date stamp that goes on every document that comes in our office.

Q Are the documents stamped the same day that they are received? A They are stamped immediately upon receipt on the same day.

Q Does the stamp reflect the time of day, morning or afternoon, that the documents are received? A Yes, sir.

Q All right. A The time, the month, the day, and the year.

Q All right, sir. How long have you been Office Manager in the Eleventh Region, Mr. Davis? A 12½ years.

Q And you are still Office Manager? A Yes, sir.

Q How long have they had that time stamp machine there? A This particular stamp since May of 1964.

* * * *

[fol. 403] Q (By Mr. Williamson) When union authorization cards are brought into the Regional Office, Mr. Davis, what is the routine whereby they are handled? A These cards are given to the Docket Mail and File Clerk; they are date-stamped; they are then counted; they are then acknowledged by letter, receipt of them, to the person that brings them in, an index card is then made giving the case name, the number, the number of the case, the number of cards which were submitted, who submitted the cards for the purposes of returning them; they are then put in the File Room in a File Drawer that is designated for authorization cards.

* * * *

[fol. 412] JAMES B. TAYLOR

was sworn as a witness, having been called as a witness by and on behalf of the General Counsel, and after having been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give your full name and address, please.

THE WITNESS: James B. Taylor, 900 Putnam Street, High Point, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Taylor, have you ever been an mployee of the General Steel Products Company in High Point? A Yes, sir.

Q Were you an employee back in August of last year? A Yes.

Q Were you employed during the month of, were you an employee during the month of July, 1964? A Yes, part of it.

Q Now, Mr. Taylor, who was your foreman over there? A I had two different ones, Richard Hill and Bobby Sparks.

Q And what was your job, sir? A Punch press operator.

Q Mr. Taylor, I show you General Counsel's Exhibit marked for identification 6(a) (2) and ask you if you can identify this document or card? A Yes, sir.

Q Is that your signature on the card, sir? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

Q And what date did you sign it, the card? A 7-14-64.

(The document above-referred to was previously marked General Counsel's Exhibit No. 6(a) (2) for identification.)

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a) (2) into evidence.

VOIR DIRE EXAMINATION

* * * *

[fol. 415] (BY MR. HAMLIN)

Q How did you come to get the card? A George O'ham gave it to me.

Q Did he give it to you or did you ask him for it? A He gave it to me, I read it and signed it.

Q And he told you nothing about what it was? A No.

MR. HAMLIN: That's all.

TRIAL EXAMINER: Is there any objection to the card?

MR. HAMLIN: No.

* * * *

JAMES BODIFORD

was called as a witness by and on behaf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Cowherd) Will you state your name and address for the record. A Jimmy Bodiford, 620 South Elm Street, High Point.

Q Mr. Bodiford, have you ever been an employee of the General Steel Products Company in High Point? A Yes.

Q Were you an employee back in the month of August, 1964? A Yes.

Q Were you an employee during the month of July, 1964? A Yes.

Q What was your job? A Spinner operator, automatic operator.

Q And who was your foreman? A Jim Riggsbee and Wayne.

MR. HAMLIN: I can't hear the witness.

MR. COWHERD: He said, "Wayne."

MR. COWHERD (continuing): I would like to have this marked for identification.

TRIAL EXAMINER: General Counsel's 6(a)(3).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(3) for identification.)

Q (By Mr. Cowherd) Mr. Bodiford, I show you General Counsel's Exhibit marked for identification 6(a)(3) and ask you if you can identify this card. A Yes, sir, I can.

Q Is that your signature on the card? A Yes, sir.

Q What date did you sign the card? A 7-20-64.

MR. HAMLIN: What is the number?

TRIAL EXAMINER: 6(a)(3).

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a)(3) into evidence.

Q (By Mr. Hamlin) Mr. Bodiford, you came to work there in July? A That's right.

Q When did you leave? A Sometime in January, 1965.

Q 1965? A Yes.

Q You are not the Bodiford who works in the plant? A No, I have a brother and cousin now.

Q Is there someone named Gene Bodiford there? A That is my brother.

Q Mr. Bodiford, what part of the writing on this card [fol. 418] was done by you? A I believe every bit. I wrote my name and the date.

Q Including the date? A General Steel.

TRIAL EXAMINER: A little louder, please.

Q (By Mr. Hamlin) The initials GBK appearing on the back, do they have any significance to you? A Not as I recollect.

Q To whom did you talk about signing this card before you signed it? A Well, I talked to my brother about it.

Q Anyone else? A And the man who signed me up.

Q Who was that? A I know him when I see him. I believe it was Napolean Brown.

Q Napolean Brown? A Yes.

Q Did Mr. Brown tell you or did your brother tell you that these cards would be used to secure an election? A Not as I recollect, they did not.

Q Were you told that you would be allowed to vote either way even though you signed a card? A Yes, sir.

Q Did you tell him whether you had already made up your mind or not?

MR. COWHERD: Objection.

TRIAL EXAMINER: He may answer.

THE WITNESS: What was that now?

Q (By Mr. Hamlin) Did you tell them, either Mr. Brown or your brother that, whether you had already made up your mind about how to vote? A No, I had not at that time.

Q You had not at that time? A No, sir, I had not.

Q And which one of them assured you that you could

vote either way? A Both of them told me that I could vote either way. Nobody told me I couldn't vote one way.

TRIAL EXAMINER: I didn't hear what you said.

THE WITNESS: Nobody told me I couldn't vote one way, that I didn't have to vote one way; they all said I could vote any way I wanted to.

Q (By Mr. Hamlin) And did you tell them that you would make up your own mind? A That's right.

• • • •

[fol. 420] Q (By Trial Examiner) Can you read? A No, sir, I don't read too well; not enough to read it and understand it, I don't.

Q Did he read it out loud to you? A He read it aloud and I went along with him, the best I could, and looked.

• • • •

[fol. 422] RICHARD S. HOFFMANN

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Hoffmann, will you state your name and address for the record. A Richard [fol. 423] S. Hoffmann, 1405 Cromwell Road, Byrn Mawr, Pennsylvania.

Q By whom are you employed? A The Upholsterers' International Union of North America.

Q And what position do you hold with them? A General Counsel.

Q Does the Upholsterers' Union, International Union of North America, is that an organization for the purpose of bargaining with employers on wages, hours, and terms, and other conditions of employment of their employees? A Yes, sir.

• • • •

DALE JACOBS

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address and speak out loud so that we can all hear you.

THE WITNESS: Dale Jacobs, 260 Proctor Road, High Point.

MR. COWHERD: I would like to have this marked for identification.

TRIAL EXAMINER: 6(a)(4).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(4) for identification.)

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Jacobs, have you ever been an employee of the General Steel Products Company? A Yes, sir.

Q Of High Point? A Yes, sir.

Q Were you employed there during August, 1964? A Yes, sir.

Q Were you employed there during July, 1964? A Yes, sir.

Q What was your job, sir? A Spinning.

Q And who was your foreman? A Ivan Simpson.

MR. HAMLIN: Who is that?

THE WITNESS: Ivan Simpson.

Q (By Mr. Cowherd) Mr. Jacobs, I show you General Counsel's Exhibit marked for identification Number 6(a)(4) and ask you if you can identify this card. A Yes, sir.

Q Is that your signature on the card? A Yes, sir.

Q What is the date you signed the card? A 7-22-64.

Q And did you read the card before you signed it? A Yes, sir.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a)(4) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Jacobs, you are not working at the company now? A No, sir.

Q How much of is written on the front of this card was written by you? A My name, and that.

Q Your name and what? A All of it, I guess. I think it was. Yes, I am pretty sure it is.

* * * *

[fol. 427] Q (By Mr. Hamlin) Did they tell you that they were getting cards signed just to get an election? A No.

Q Or anything like that? A No.

Q Did they tell you that you could vote either way? A Yes.

Q Did you tell them that you had not yet made up your mind how you would vote?

MR. COWHERD: Objection.

TRIAL EXAMINER: I will sustain the objection to that.

* * * *

[fol. 428] Q (By Mr. Hamlin) Were you told that the cards would be kept secret or confidential? A That's right.

* * * *

[fol. 430] WALTER ALESHIRE

was called as a witness by and on behalf of General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Take that chair and give us your full name and address, please.

THE WITNESS: Walter V. Aleshire, 114½ West Greene Street, High Point, North Carolina.

TRIAL EXAMINER: Walter what?

THE WITNESS: Walter Vernon Aleshire.

TRIAL EXAMINER: All right.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Aleshire, have you ever been an employee of General Steel Products Company in High Point? A Yes, sir.

Q Were you working there during the month of Au-
[fol. 431] gust, 1964? A Yes, sir.

Q And what was your job, sir? A Sewing machine operator.

Q And who was your foreman? A Mr. Tommy Allen.

Q All right, Mr. Aleshire, I show you General Counsel's Exhibit marked for identification 6(a)(5) and ask you if you can identify that card. A Yes, sir.

Q Is that your signature, sir? A Yes, sir.

* * * *

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Aleshire, what part of the writing on that card is yours? A Just the signature.

Q Who wrote the other matters that are on there? A Mr. Davis with my permission.

Q Did he put the address, 114½ West Greene? A Yes.

Q And so on? A Yes.

Q That is Mr. Davis' handwriting? A Yes.

Q Who put the date on here? A He did. He filled it all out, I had grease on my hands, and I didn't want to get the card dirty.

Q Did you get it back after he filled it out? A Yes. I read it and signed it.

Q After he filled it out? A Yes.

* * * *

[fol. 438] Q (By Mr. Cowherd) Do you know when the union petitioned for an election? A Not the exact date, no.

Q Was it before or after you signed the card? A It was after.

* * * *

[fol. 434] JOSEPH ALLEN

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a chair there, and state your full name and address for the record.

THE WITNESS: Joseph Allen, Route 4, High Point.

MR. COWHERD: I would like to have this marked for identification.

TRIAL EXAMINER: 6(a)(6).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(6), for identification.)

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Allen, have you ever been an employee of the General Steel Products Company of High Point? A For approximately seven years.

Q Mr. Allen, were you working back in the month of August, 1964? A Yes, sir.

Q And were you working there in the month of July, 1964? A I worked all 12 months of last year, 1964.

Q And what was your job, sir? A Spot welder.

Q And who was your foreman? A They changed several times; Tommy Parish; Ivan Simpson; several of them.

Q I show you General Counsel's Exhibit maked for identification 6(a)(6) and ask you if you can identify that card. A Yes, sir.

Q Is that your signature on the card? A That is my name and address.

Q And did you sign the card? A Yes, sir.

Q Did you read it before you signed it? A I don't read, I can't read. I can write my name, that's all.

Q Was it read to you? A It was read enough. I understood what it was. It was read enough to me that I understood what it was.

Q You knew what it was? A Yes, sir.

Q What was the date that you signed it? A 7-18-64.

TRIAL EXAMINER: Who read it to you?

THE WITNESS: Mr. O'ham started to, and I said he didn't need to read it all because I understood what it was.

MR. COWHERD: I offer General Counsel's Exhibit marked for identification 6(a)(6) into evidence.

TRIAL EXAMINER: What did you understand it to be?

THE WITNESS: AFL-CIO workers, to get a workers representative to represent us in a union.

* * * *

[fol. 449] DWIGHT BARLOW

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Your full name and address, please.

THE WITNESS: Dwight Wesley Barlow, 1426 Curtis Road, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Barlow, have you ever been an employee of the General Steel Products Company? A Yes, sir.

Q Were you employed there during the month of Au-[fol. 450] gust, 1964? A Yes, sir.

Q Were you employed there during the month of June, 1964? A Yes, sir.

Q What was your job, sir? A Truck driver; deliver around town, shipping department.

Q Now who was your foreman? A Bob Simpson.

Q Now, Mr. Barlow, I show you General Counsel's Exhibit marked for identification 6(a) (8) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (8) for identification.)

A Yes, sir.

Q (By Mr. Cowherd) Is that your signature, sir? A Yes, sir.

Q What date did you sign that card on? A 6-10-64.

Q And you read the card before you signed it? A Yes, sir.

MR. COWHERD: I offer General Counsel's Exhibit 6(a) (8) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Are you with General Steel now? A Yes, sir.

[fol. 451] Q Did you write everything that is on the face of this card except the number at the top? A Yes, sir.

Q You do read? A Yes, sir.

Q Where did this happen, where were you at the time? A At the time I signed the card?

Q Yes. A At my mother's house.

Q Who asked you to sign it? A Richard Hill.

Q Were you told the purpose for which the cards were being solicited? A Yes, sir.

Q At the time? A Yes, sir.

Q Were you told that the cards were being solicited just to get an election? A No, sir.

* * * *

Q (By Mr. Hamlin) Were you told that there would be an election? A Yes, sir.

Q And that you would have a right to vote as you pleased? A Yes, sir.

Q And did you tell him that you had not yet made up your mind how you would vote?

MR. WILLIAMSON: Objection.

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

* * * *

[fol. 453] JAMES BENSON

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a chair, and state your full name and address for the record.

THE WITNESS: James Benson, 502 West Ray Street, High Point.

MR. COWHERD: I would like to have this marked for identification.

TRIAL EXAMINER: General Counsel's Exhibit No. 6(a) (9).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(9) for identification.)

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Benson, have you ever been an employee of General Steel Products Company in High Point? A Yes.

Q Were you employed there during the month of August, 1964? A Yes, sir.

Q What was your job there, sir? A Punch press operator.

Q And who was your foreman? A Richard Hill.

Q And Mr. Benson, I show you General Counsel's Exhibit marked for identification 6(a)(9) and ask you if you can identify that card. A Yes, sir.

Q Is that your signature? A Yes, sir.

Q What was the date that you signed that card? A 8-5-64.

* * * *

[fol. 455] Q (By Mr. Hamlin) Go ahead and tell the conversation.

TRIAL EXAMINER: What did they say at that time?

THE WITNESS: They said that they were going to represent the union, they wished us to sign a card so that they could have an election.

Q (By Mr. Hamlin) Did they tell you that the cards were just to get an election? A Yes, sir.

Q Did they tell you that in the election you could vote either way you pleased? A Yes, sir.

Q What was the conversation in which they told you that, would you recite their words and yours? A You asked me that a while ago. I don't believe that I could do that.

Q Did they tell you that if the union won that you would have a union and that if it lost that you would not, or anything like that? A No, sir.

Q Did you tell them that you were not agreeing to support the union? A No, sir.

Q Did you tell them by signing the card you were not agreeing to be bound?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Sustained.

MR. HAMLIN: Exception.

A Yes.

MR. WILLIAMSON: I move that the answer be stricken.

TRIAL EXAMINER: It may be stricken.

MR. HAMLIN: We object to the card.

MR. COWHERD: I would like to ask one or two questions.

DIRECT EXAMINATION RESUMED

Q (By Mr. Cowherd) Mr. Benson, I believe you tes-
[fol. 457] tified on that the union organizer, Mr. who? A Mr. Brown.

Q That Mr. Brown told you that the only reason he wanted you to sign a card was to get an election, is that true? A Yes.

MR. COWHERD: Mr. Examiner, I claim surprise on this witness based on a prior inconsistent statement.

TRIAL EXAMINER: Proceed.

MR. HAMLIN: We object.

Q (By Mr. Cowherd) Mr. Benson, did you give a statement to the Board Agent?

Have you ever given a statement to a Board Agent? A I don't know.

Q Did you talk to Mr. Williamson? A Yes.

Q Did he come to see you? A Yes, sir.

Q And did he show you your card? A Yes, sir.

Q And did he ask you some questions? A Yes.

Q And did he ask you to read this affidavit? A Yes, sir.

Q And tell you if it was, to tell him if it was true? A Yes, sir.

Q Did he swear you in? A Yes, sir.

Q And you swore that it was true? A Yes, sir.

Q Is this your signature, sir? A Yes, sir.

Q Is this the statement that you swore to? A Yes, sir.

Q Do you want to read it? A I can see it.

Q Referring your attention to the line right here, begin reading right there, please. A "I was not told that I was signing the card just so the Union could not have an election."

MR. WILLIAMSON: "Just so the Union could not have an election."

Q (By Mr. Cowherd) Do you want to read it again, please.

MR. HAMLIN: Object to the re-reading.

MR. COWHERD: I am not clear what it was that he read; if you would read it again.

TRIAL EXAMINER: Well, apparently counsel is in doubt as to what he read. I thought I understood it but if he didn't, go ahead, read it again.

THE WITNESS: "I was not told that I was signing a card just so the Union could have an election."

[fol. 459] MR. COWHERD: I offer this statement into evidence as General Counsel's—

Q (By Mr. Cowherd) Do you want to change your statement in the light of this affidavit, or do you want to change your testimony in the light of this statement? A No. The statement is right.

Q This statement is correct? A Yes.

TRIAL EXAMINER: You mean the statement you just read from the affidavit?

THE WITNESS: Now you done got me confused.

Q (By Mr. Cowherd) Does this refresh your memory as to what was actually told to you or was not told to you when you talked to Mr. Brown? A What I was told?

Q Yes, as to what you were told?

This is true? A Yes, sir.

TRIAL EXAMINER: When you say "this", you are referring now—

MR. COWHERD: I am referring to this affidavit that I have shown to this witness.

(The document above-referred to was marked General Counsel's Exhibit No. 10 for identification.)

MR. COWHERD: I offer the affidavit of James H. Benson into evidence as General Counsel's Exhibit Number 10.

MR. HAMLIN: We object.
TRIAL EXAMINER: It may be received.

* * * *

[fol. 462] EXAMINATION

Q (By the Trial Examiner) I would like to have you tell me exacty as you recall it, now what was said to you at the time you signed the card by either one of the two men, just tell me in your own words what was said. A Well, they came to the house, and said they they were representing the union, and if I wanted to sign a card, I don't know what else, because they said they would have an election.

Q Did they say anything else? A No, sir.

Q How long were they there? A About three or four minutes, maybe five.

* * * *

[fol. 468] MURRAY BRIM

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.
THE WITNESS: Murray Brim, 1412 Long Street.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Have you ever been an employee of the General Steel Products in High Point? A Yes, sir.

Q Were you an employee there in August of 1964? A Yes, sir.

Q Who was your foreman? A Tommy Parrish.

Q Who? A Walter Parrish.

Q What was your job, sir? A Run a rigging press.

Q Mr. Brim, I show you General Counsel's Exhibit marked for identification 6(a)(11) and ask you if you can identify that card. A Yes, sir.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(11) for identification.)

Q (By Mr. Cowherd) Is that your signature on the card? A Yes, sir.

* * * *

[fol. 471]

VOIR DIRE EXAMINATION

Q (BY MR. HAMLIN)

* * * *

Q Can you read that card to the Trial Examiner. A No, I am a slow reader.

Q Are you able to read it? A I could but I can't read too good.

MR. HAMLIN: We would like to ask that he attempt to read it.

THE WITNESS: No, sir. That is why I had my wife fill it out because I can't read too well.

MR. HAMLIN: Well, you have said that you read it before you signed it.

THE WITNESS: Yes, sir, but it took me a long time.

TRIAL EXAMINER: I didn't get that last part of the answer.

COURT REPORTER: He said "It took me a long time."

TRIAL EXAMINER: I see.

MR. HAMLIN: We would like to ask he read a few words, Your Honor.

TRIAL EXAMINER: Just try, see what you can do with it.

THE WITNESS: I can't, my eyes—

TRIAL EXAMINER: Well, you mean, it that because of your eyesight?

THE WITNESS: No, I am nervous.

TRIAL EXAMINER: Oh, you are nervous?

THE WITNESS: Yes. I can't read too good but I signed it, and I knowed what it was all about.

MR. HAMLIN: I couldn't hear the answer. What was it?

COURT REPORTER: "Yes. I can't read too good but I signed it, and I know what it was all about."
MR. HAMLIN: All right.
TRIAL EXAMINER: Well, what was it all about?
THE WITNESS: I signed it.
TRIAL EXAMINER: Speak up a little louder.
THE WITNESS: I signed it to join the union.
[fol. 473] MR. HAMLIN: What did you say?
THE WITNESS: I signed it to join the union.
MR. HAMLIN: You say you signed it to join the union?
THE WITNESS: That is why I signed it.
MR. HAMLIN: We will concede this card, Your Honor.
TRIAL EXAMINER: Anything further?
MR. WILLIAMSON: Nothing further.
TRIAL EXAMINER: All right. You may step down. It may be received, without objection.

* * * * *

WILMA BRYANT

was called as a witness by and on behalf of the General Counsel and, after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address for the record.
THE WITNESS: Wilma Bryant, 1105 Campbell.
MR. COWHERD: I woud like to have this document marked for identification.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(12) for identification.)

MR. COWHERD: May we go off the record?
TRIAL EXAMINER: Off the record.

(Off the record discussion.)

TRIAL EXAMINER: On the record.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Have you ever been an employee of General Steel Products in High Point? A Yes, sir.

Q And were you employed there during the month of August, 1964? A Yes.

Q Were you employed there the whole month? A Yes.

Q What was your job? A Spinner operator.

Q Spinner operator? A Yes.

Q Now who was your foreman at the time? A Jim Riggsbee and Wayne Farrington.

Q Now, Mrs. Bryant, I show you General Counsel's Exhibit marked for identification 6(a)(12) and ask you if you can identify this card. A Yes, sir.

Q Is that your signature on the card? A Yes, sir.

* * * *

[fol. 476] Q (By Mr. Hamlin) Did she tell you that these cards were being signed up just for the purpose of getting an election? A Yes, sir.

* * * *

Q (By Mr. Cowherd) What was it exactly that you were told when Mrs. Jennings gave you the card to sign? A She said it would be better to have a union where we worked at.

Q Was this all that was said? A Yes.

Q Do you remember anything else about the conversation? A No.

[fol. 477] Q At that time she handed you the card? A Yes.

Q And is that when you signed it? A Yes, sir.

Q Right after those words? A Yes, sir.

MR. COWHERD: No further questions.

CROSS EXAMINATION

Q (By Mr. Hamlin) Was it she or someone else that told you that these cards were just to get an election?

MR. COWHERD: Objection.

TRIAL EXAMINER: She may answer.

Q (By Mr. Hamlin) Was it she or someone else? A She is the one.

Q She is the one? A Yes, sir.

MR. HAMLIN: That's all.

EXAMINATION

Q (By the Trial Examiner) I am a little confused by your testimony here. In response to a question by the counsel, you said that you were told that the only reason for signing the card was to get an election? Now later on though when you were questioned by this other attorney, you were asked to give the whole conversation as to what took place at the time you signed the card. And then you said at that time the whole conversation consisted merely of a statement; well, tell me again what was said. A Well, she handed me the card, and I said, "Well, I don't know"; and she said, "If you sign, it would be better to have a union where we work"; and I said, "I will think about it" and then I said, "I will sign a card."

Q Well, was anything said at that time about an election? A She said it was better to have a union where we worked at. That is all she said.

Q And so nothing was said about an election at that time? A No, that is all that was said.

MR. COWHERD: Do you have any more questions?

MR. HAMLIN: I might.

MR. COWHERD: We are going to offer the card.

RECROSS EXAMINATION

Q (By Mr. Hamlin) Was it then or at some other time that you were told that these cards were just for the purpose of getting an election?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Sustained.

MR. HAMLIN: Exception. We object to the card.

TRIAL EXAMINER: Just a moment. Will you read that last question back to me, Miss Reporter.

(Question read.)

TRIAL EXAMINER: Do you understand the question?

[fol. 479] THE WITNESS: Yes, sir.

TRIAL EXAMINER: Can you answer it?

THE WITNESS: She handed me the card and told me that it would be better to have a union where we worked, and I told her I didn't know, and she said, "Think about it", and I did. I signed the card.

* * * *

TEDDY BULLARD

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

MR. COWHERD: Would you state your name and address for the record, please.

THE WITNESS: Teddy Bullard, 2211 Hilton Court, High Point.

MR. COWHERD: I would like to have this marked for identification.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(13) for identification.)

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Bullard, have you ever been an employee of General Steel Products in High Point? A Yes, sir.

Q Were you an employee there during the month of August, 1964? A Yes, sir.

Q Were you employed there during the month of July, 1964? A Yes, sir.

Q Now what was your job? A Machine Helper.

Q And who was your foreman? A Carrol Lewis.

Q And Mr. Bullard, I show you General Counsel's Exhibit marked for identification Number 6(a)(13) and ask you if you can identify that card. A Yes, sir, that is my signature.

Q That is your signature? A Yes, sir.

Q What date did you sign the card? A 7-21-64.
Did you read the card before you signed it? A Yes.

* * * *

[fol. 482] TRIAL EXAMINER: Give me the best you can what Mr. Aleshire told you at the time you signed the card.

THE WITNESS: Well, he asked me would I like to have a union come in, and I told him, "Yes"; of course, I didn't know nothing about a union when I came there, but when he told me about it, I liked it. He told me to sign a card to get a union to represent us and I did.

* * * *

[fol. 483] JAMES R. CARLYLE

was called as a witness by and on behalf of the General Counsel, and, after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address for the record.

THE WITNESS: James R. Carlyle, 316 South Hamilton, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Carlyle, have you been, ever been an employee of General Steel Products in High Point? A Yes, I have.

Q Did you work there during the month of August, 1964? A Yes.

Q Did you work there in July of '64? A Yes.

Q What was your job? A Fab machine operator.

Q And who was your foreman? A Richard Davis.

Q Now, Mr. Carlyle, I show you General Counsel's Exhibit marked for identification Number 6(a) (14) and ask you if you recognize that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (14) for identification.)

A I do.

Q (By Mr. Cowherd) Is that your signature on the card? A It is.

* * * *

[fol. 486] A I attended a meeting before I signed that card.

Q How long before? A I wouldn't say because I really don't know.

Q Was it more than a month? A Well, it could have been a month. In fact, I didn't know too much about a union until it was just about over with.

Q What's the longest meeting was before this, two months?

MR. WILLIAMSON: He has already testified as to that.

Q (By Mr. Hamlin) Can you give us your best estimate.

MR. WILLIAMSON: He has testified that he doesn't remember.

TRIAL EXAMINER: Give us your best etsimate as to how long before the election, before you signed the card.

THE WITNESS: Oh, I would say 30 days as a rough guess.

Q (By Mr. Hamlin) Was anything said at that meeting to the effect that cards were being signed just to get an election out there?

MR. COWHERD: Objection.

TRIAL EXAMINER: You may answer.

THE WITNESS: Not as I remember.

* * * *

[fol. 488] NATHAN CARTER

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Cowherd) State your name and address for the record, please. A Nathan Carter, 3118 Bowers Street, High Point.

TRIAL EXAMINER: Is that Charles N. Carter?

THE WITNESS: Yes.

Q (By Mr. Cowherd) Mr. Carter, have you ever been employed at General Steel Products? A Yes.

Q And were you employed during the month of August, 1964? A Yes, sir.

Q And were you employed there during the month of May, 1964? A Yes.

Q What was your job, sir? A Press operator.

Q And who is your foreman? A Tommy Allen.

Q Now I show you General Counsel's Exhibit marked for identification Number 6(a)(15) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(15) for identification.)

A Yes, sir.

Q (By Mr. Cowherd) Is that your signature, sir? A Yes, sir.

Q That is your name? A Yes, sir.

Q And what date did you sign it on? A 5-26-64.

Q Did you read the card before you signed it? A No, sir.

Q Was it read to you? A Yes, sir.

Q Who read it to you? A My wife.

* * * *

[fol. 491] VOIR DIRE EXAMINATION

(BY MR. HAMLIN)

* * * *

Q Who approached you about this, sir? A Ted.

Q Did he tell you that this card was just to get an election? A No, sir.

MR. COWHERD: Objection until he establishes the time.

TRIAL EXAMINER: He has answered the question. Your answer was no.

* * * *

[fol. 492] HELEN CAUSEY

was called as a witness by and on behalf of the General Counsel, and after having been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Helen Nichols Causey, 319 Green Oak Drive, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Miss Causey, have you been, ever been an employee of General Steel Products? A Yes.

Q In High Point? A Yes.

Q And were you employed there during the month of August, 1964? A Yes.

Q And were you employed there during the month of —let me ask you this—what was your job, ma'am? A Spinner operator.

Q And who was your foreman? A Jim Riggsbee and Wayne Farrington.

Q Now Miss Causey, I show you General Counsel's Exhibit marked for identification Number 6(a) (16) and ask you if you can identify this card.

(The document above-referred to was marked for identification as General Counsel's Exhibit No. 6(a) (16).)

A Yes.

[fol. 494] Q (By Mr. Cowherd) Did you fill out that card? A I did.

Q Is that your signature? A Yes.

Q What date did you sign the card? A 8-5-64.

Q Now did you read the card, ma'am before you signed it? A I did.

MR. COWHERD: I offer General Counsel's Exhibit marked Number 6(a) (16) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) You both signed and filled out the card, did you? A Yes, sir.

Q And you filled in the date? A Yes, sir.
Q The initials TBD on the back indicate Ted Davis, do they? A I imagine so.
Q Did he call on you? A Yes.
Q And ask you to sign the card? A Yes.
Q Was this your home ? A Yes, sir.
[fol. 495] Q Did Mr. Davis tell you that these cards were just for the purpose of getting an election? A No.

* * * *

LOWELL T. CARUTHERS

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.
THE WITNESS: Lowell Caruthers, Jamestown Road.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Caruthers, have you ever been an employee of General Steel Products Company? A Yes.
Q In High Point? A Yes.
Q Now were you employed there back in August of 1964? A Yes, sir.
Q Now what was your job there? A At that time, punch press operator.
Q And who was your foreman? A James King.
Q Now, Mr. Caruthers, I show you General Counsel's Exhibit marked for identification Number 6(a) (17) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (17) for identification.)

A Yes, sir.
Q (By Mr. Cowherd) Is that your signature? A Yes, sir.
Q And what date did you sign the card? A 8-10-64.

Q 8-10-64, is that what you said? A Yes.

Q Now, Mr. Caruthers, did you read the card before you signed it? A Yes, sir.

* * * *

[fol. 498] Q (By Mr. Hamlin) Did Mr. Davis tell you that these cards were merely to get an election? A As well as I recollect, it was to represent us to get a union in.

Q To get a union in? A Yes.

Q Did he tell you about an election? A He said they might have to have one.

Q Did he tell you that you could vote either way in an election? A I don't think that was mentioned.

* * * *

[fol. 499] Q (By Mr. Hamlin) Did you not tell Mr. Martin that Mr. Davis had told you that the cards were being signed for the purpose of having an election, vote as you see fit, either for or against? A I probably did.

Q Was that a true statement? A Well, as well as I recollect, it probably was at that time.

* * * *

[fol. 501] Q (By Mr. Williamson) Where did Mr. Davis see you about the signing of this card? A At my home.

Q Were you and he the only ones present? A I think there were only two of us in the room at that time.

Q All right, I want you to relate as close as you can remember the entire conversation between yourself and Mr. Davis about the signing of the cards. A It has been a good while. I am afraid I don't remember.

Q Well, tell us all that you remember of it.

TRIAL EXAMINER: Just do the best you can and tell us, as well as you can remember, what was said at that time by Mr. Davis. A Well, he showed me the card, and I read it.

TRIAL EXAMINER: And did you read it at that time?

THE WITNESS: Yes, I did.

TRIAL EXAMINER: All right, and then what was said?

THE WITNESS: Then he said that there were signing these cards to get a union in the plant out there, and he asked me if I would sign one.

Q (By Mr. Williamson) Did you sign it? A Yes, I did.

Q Now at what point in this conversation was it that Mr. Davis mentioned anything about an election at the plant? A Well, he told me, he said that we would probably have to have an election before getting the union in.

Q Did he say whether or not he intended to make any demands on the company before an election? A No, sir, he didn't.

Q Did he state whether or not he would request recognition for the union? A I believe he said that if he got the cards signed that he would.

* * * *

[fol. 503] Q (By Mr. Hamlin) Did he tell you that your card would be shown only to the Labor Board?

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

* * * *

[fol. 504] ROGER DALE DEESE

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a seat, and give your full name and address.

THE WITNESS: Roger Dale Deese, 400 Centennial.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Deese, have you ever been an employee of General Steel Products? A I have.

Q In High Point? A That's right.

Q Were you an employee during the month of August, 1964? A That's right.

Q What was your job? A Spring up.

Q Who was your foreman? A Richard Davis and Bobby; no, Mr. Davis and Carrol Beck, I believe.

Q Now, Mr. Deese, I show you General Counsel's Exhibit Number, marked for identification as Number 6(a)(18), and ask you if you can identify that card.

(The document above-referred to, was marked General Counsel's Exhibit No. 6(a)(18) for identification.)

A Yes. That is my signature.

Q Did— A Signed everything right there.

Q Now what date did you sign the card? A Eighth month, tenth day, '64.

MR. COWHERD: I would like the record to reflect that he was pointing to the exhibit number.

Q (By Mr. Cowherd) Did you read the card before you signed it? A Yes.

MR. COWHERD: I offer General Counsel's Exhibit marked number 6(a)(18) into evidence.

I would like to clear up something. I made the statement that he was pointing to the Exhibit Number. That was not when he was reading the date.

Q (By Mr. Cowherd) Read the date again, please. A Eighth month, tenth day, '64.

* * * *

[fol. 508] Q (By Mr. Hamlin) Did Mr. Kaiser or your friend tell you they were getting cards signed just in order to get an election? A No, sir. He said for a union to represent us.

Q Who said that? A My friend.

Q Did they tell you that there would be an election? A No, sir, he didn't.

* * * *

[fol. 509] Q Did somebody tell you that he would get even with you if you did not sign the card?

MR. COWHERD: Objection.

TRIAL EXAMINER: He may answer.

Q (By Mr. Hamlin) Or anything like that? A Something like that but I don't remember who it was.

[fol. 510] Q Was this before you signed? A I believe it was.

Q You say you can't tell us now who it was? A No, sir.

Q Did you not know the fellow? A No, sir.

Q Somebody who worked at the plant? A Somebody but I don't know where he works.

MR. WILLIAMSON: Can we establish how long before he signed the card?

Q (By Mr. Hamlin) How long before you signed the card did this happen? A I don't remember.

Q At the outside, was it a few days? A I don't remember.

Q It wasn't any more than a month, was it? A I don't remember.

Q Were you fearful of this fellow; were you— A No, sir.

* * * *

[fol. 511]

GURNEY HEYWOOD DIAMOND

was called as a witness by and on behalf of the General Counsel and, after having first been sworn as a witness, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please, and speak up loud.

THE WITNESS: Gurney Heywood Diamond, 2103 Merritt Drive, Greensboro.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Diamond, have you ever been employed at General Steel? A Yes, sir.

Q Were you employed there during the month of August, 1964? A Yes, sir.

Q What was your job, sir? A Punch press operator.

Q And who was your foreman? A Victor Allen.

Q Now, Mr. Diamond, I show you General Counsel's Exhibit marked for identification Number 6(a)(19) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(19) for identification.)

A Yes.

Q (By Mr. Cowherd) Is that your signature, sir? A Yes, sir.

Q And what was the date that you signed the card? A 8; let me see August 10, '64. I should have remembered.

Q Mr. Diamond, did you read the card before you signed it? A I read part of it.

Q Did you understand what you read? A Yes, sir.

TRIAL EXAMINER: What part did you read?

THE WITNESS: The part telling me that it was a union card, I had signed two or three before; I had read two or three before.

TRIAL EXAMINER: What do you mean by a union card?

THE WITNESS: Well, it is authorizing a union to be your representative as a worker with the company.

* * * *

CONLEY J. EDWARDS

[fol. 517] Q (By Mr. Cowherd) Mr. Edwards, did you state your name and address? A No. Conley J. Edwards, 1812 Wilburn Street, High Point.

Q Mr. Edwards, have you ever been an employee of General Steel Products? A Yes, sir.

Q Were you employed there during the month of August, 1964? A Yes, sir.

Q Were you employed there during the month of May, 1964? A Yes, sir.

Q What was your job during that time? A Punch press operator.

Q And who was your foreman? A Thomas Allen.

Q Now, Mr. Edwards, I show you General Counsel's Exhibit marked for identification Number 6(a)(21) and ask you if you can identify that card. A I can.

Q Is that your signature? A It is.

Q What is the date on which you signed your card? A 5-26-64.

Q Now, Mr. Edwards, did you read the card before you signed it? A I did.

MR. COWHERD: I offer General Counsel's Exhibit 6 (a) (21) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Is this your signature? A It is my signature.

Q And is all of the writing including the date in your handwriting? A Yes.

Q Did Mr. Davis solicit you to sign a card? A Yes, sir.

Q Mr. Ted Davis? A Yes.

[fol. 519] Q Mr. Edwards, did Mr. Davis tell you that these cards were just to get an election, or anything of that nature? A Yes, sir.

Q What did he tell you about an election? A He didn't tell me anything at that time about an election.

Q Had you talked with him before? A Yes, sir.

Q Had he told you anything about an election? A No.

Q No discussion on it? A No discussion on an election.

Q Did you talk with anyone else before you signed this card about the purpose of obtaining cards? A No.

Q What were you told, if anything, about the purpose? A When I signed the card—

MR. WILLIAMSON: Objection unless you limited the conversation to the time right around when he signed the card.

TRIAL EXAMINER: Yes. I thought that was the question. What was said about—well, repeat your question again, please.

Q (By Mr. Hamlin) What were you told about the reason for signing the card?

TRIAL EXAMINER: At the time you signed it.

THE WITNESS: To have the International Upholsterers' Union represent me.

* * * *

[fol. 525] RALPH BLACK

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Ralph Black, 506 S. Elm, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Black, have you ever been an employee of General Steel Products in High Point? A Yes, Sir.

Q Were you employed there or were you an employee of General Steel Products in High Point in August of 1964? A Yes.

Q And during the month of July, 1964? A Yes.

MR. COWHERD: I would like to have this marked for identification.

[fol. 526] (The document above-referred to was marked General Counsel's Exhibit No. 6 (a) (22) for identification.)

Q (By Mr. Cowherd) Mr. Black, I show you General Counsel's Exhibit marked for identification Number 6 (a) (22) and ask you if you can identify that card. A Yes, sir.

Q Is that your signature, sir? A Yes, sir.

Q What date did you sign the card? A The 7th of July.

Q July what? A It was in some part of the month. I don't know the exact date.

That is the 17th of July.

Q The 17th of July? A Yes. 1964.

Q Did you read it before you signed it? A I did.

MR. COWHERD: I offer General Counsel's Exhibit marked for identification as Number 6(a) (22) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 528] Q Did either Mr. Kaiser or Mr. Brown tell you before you signed the card that it was for the purpose of obtaining an election? A No.

* * * *

[fol. 528] Q What were you told about the use that [fol. 529] would be made of this card? A That if I wanted to have someone to represent us, that it would be an advantage to have a bargaining agent between, you know, the worker and the company.

Q What did they tell you that they would do with the cards? A I don't really know what they said they would do with the cards. To my understanding, they would be sent to Washington, I don't know exactly the words to explain it, to get, you know.

Q In order to get an election? A No, no election; they just wanted to know that I would be willing for the company to represent me, for the union to represent me, and election was never mentioned.

* * * *

[fol. 534] REX HUGH FITCH

was called as a witness by and on behalf of the General Counsel and, after having first been called and first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: Rex Hugh Fitch, 115 North Deese Drive.

DIRECT EXAMINATION

[fol. 535] Q (By Mr. Cowherd) Mr. Fitch, have you ever been an employee—well, you are an employee of General Steel Products Company? A Yes, sir.

Q Were you an employee there during the month of August, 1964? A Yes, sir.

Q Were you an employee there during the month of May, 1964. A Yes, sir.

Q Mr. Fitch, what was your job? A Press operator.

Q And who was your foreman? A Thomas Allen.

Q Mr. Fitch, I show you General Counsel's Exhibit marked for identification Number 6 (a) (24) and ask you if you identify that card? A Yes, sir.

(The document above-referred to was marked General Counsel's Exhibit No. 6 (a) (24) for identification.)

Q (By Mr. Cowherd) Is that your signature there sir? A Yes, sir.

Q And what date did you sign the card? A 5th, 21st, '64.

[fol. 536] Q And did you read the card before you signed it? A Yes, sir.

* * * * *

[fol. 537] BOBBY FULP

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: Bobby Fulp, 946 West Mountain Street, Kernersville.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Fulp, were you an employee of General Steel Products in August of 1964? A I was.

Q Were you an employee there during the month—let me ask you this—what was your job? A At the time I was an assembler of parts on the riveter.

Q And who was your foreman? A James King.

Q Now, Mr. Fulp, I show you General Counsel's Exhibit marked for identification Number 6(a) (25) and ask you if you can identify that card.

[fol. 538] (The document above-referred to was marked General Counsel's Exhibit No. 6(a) (25) for identification.)

A I cannot read or write.

Q (By Mr. Cowherd) You cannot read and write? A No.

Q Is that your signature? A George Kaiser is the one that signed it for me.

Q Did you request Mr. Kaiser to sign it for you? A Yes.

Q And he filled it out for you? A Yes.

Q Did he read the card to you? A Yes.

Q Before you signed it? A Yes, he did. And I had one two weeks before that and I had my wife and boy to read it.

Q And so it was read to you twice? A Three times.

* * * *

[fol. 539] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 541] Q And did they tell you that this card would just be used to get an election? A Not necessarily.

Q With the Labor Board? A They said the card would be if you wanted to be represented by the union.

* * * *

[fol. 542] JOE HEDRICK

was called as a witness by and on behalf of the General [fol. 548] Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: Joe Hedrick, Route 1, Thomasville, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Hedrick, have you ever been an employee—were you an employee of General Steel Products? A Yes.

Q Were you an employee there during the month of August, 1964? A Yes, sir.

Q Were you employed there in July, 1964? A Yes, sir.

Q What was your job, sir? A Press operator.
Q And who was your foreman? A Thomas Allen.
Q Mr. Hedrick, I show you General Counsel's Exhibit marked for identification Number 6(a) (26) and ask you if you can identify that card. A Yes, sir.
Q Is that your signature on the card? A Yes, Sir.
[fol. 544] Q On what date did you sign it? A Seventh month, 23rd day of '64.
Q Did you read the card before you signed it? A Yes, sir.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (26) for identification.)

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a) (26) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 545] Q And did he tell you that they were getting these cards signed up only for the purpose of getting an election? A No, sir.

* * * *

[fol. 551] WALTER J. HOLDER

was called as a witness by and on behalf of the General Counsel, and after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.
THE WITNESS: Walter J. Holder, Route 5, Box 72, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Holder, have you ever been an employee of General Steel Products? A Yes, sir.
Q In High Point? A Yes, sir.

Q Were you employed there during the month of August, 1964? A Yes, sir.

Q Were you employed there during the month of June, 1964? A Yes, sir.

[fol. 552] Q What was your job during that time? A Press operator.

Q And who was your foreman? A Thomas Allen.

Q Mr. Holder, I show you General Counsel's Exhibit marked for identification Number 6(a)(28) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(28) for identification.)

A Yes, sir.

Q Is that you signature, sir? A Yes.

Q Did you sign the card? A Yes.

Q And what date did you sign it? A Well—

MR. HAMLIN: I can't hear.

THE WITNESS: Well.

Q (By Mr. Cowherd) Can you read, sir? A I can't read too good. What is that?

A June. A June, 1964; June 9, 1964.

Q Did you fill out the card? A I just signed it.

Q You just signed it? A Yes.

[fol. 553] Q And who wrote the date on it? A My wife.

Q Your wife wrote the date? A Yes.

Q Did she do that at the same time that you signed the card? A Yes, sir.

* * * *

Q Did you read the card before you signed it? A She read it to me.

Q Your wife read it to you? A Yes.

Q Do you recall what she read to you? A Not just exactly.

TRIAL EXAMINER: In substance, what was it that she read to you?

THE WITNESS: It was for the union to represent the employees at General Steel.

* * * *

[fol. 557] JOHN H. HOLMES

was called as a witness by and on behalf of the General Counsel, and after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Would you give us your full name and address, please.

THE WITNESS: John H. Holmes, 1200 Wood Street, High Point, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Holmes, have you ever been an employee of General Steel Products? A I have. [fol. 558] Q In High Point? A Yes, sir. Crown Flex.

Q Crown Flex of North Carolina? A That's right.

Q Here in High Point? A That's right.

Q Over where General Steel is? A Yes, sir.

Q Now, Mr. Holmes, what is your job? Were you employed there in August, 1964? A Yes, sir, machine operator.

Q And were you employed there in July? A Yes, sir.

Q, 1964? A Yes, sir.

Q And who was your foreman? A Ernest Curry.

Q Now I show you General Counsel's Exhibit marked for identification 6(a) (29) and ask you if you can identify the card. A That is my signature. Everything on there.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (29) for identification.)

Q (By Mr. Cowherd) What date did you sign the [fol. 559] card? A 7-29-64.

Q Did you read the card before you signed it? A Yes, sir.

• • • • •

[fol. 563] JESSE F. GIBBS

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Would you give your full name and address, please.

THE WITNESS: Jesse Floyd Gibbs, 1328 Potts Street.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Gibbs, were you an employee of General Steel Products in the month of August of 1964? A Yes.

Q Were you employed there during the month of July, 1964? A Yes, sir.

Q What was your job, sir? A Riveting machine operator.

Q Who was your foreman? A Tommy Parish.

Q Mr. Gibbs, I show you General Counsel's Exhibit [fol. 564] marked for identification Number 6(a)(30) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(30) for identification.)

A Yes, sir.

Q (By Mr. Cowherd) Is that your signature on the card? A Yes, sir.

Q What is the date you signed the card? A 7-16-64.

Q Now did you read the card before you signed it? A Someone read it to me.

TRIAL EXAMINER: Who read it to him?

MR. COWHERD: Someone else read it to him.

Q (By Mr. Cowherd) Who read it to you? A Rabon Wolford.

Q Rabon Wolford? A Yes.

Q Now did you put the date on the card? A No, sir, he put it on.

Q He put it on? A Yes.

Q Did he put it on the same time, the same day that you signed the card? A Yes, sir.

Q The card was filled out altogether at the same time?

[fol. 565] A All at the same time.

Q And that is your signature? A Yes.

Q Now you say he read the card to you? A Yes, sir.

Q To the best of your recollection, can you recall exactly; as best you can recall what he said when he read it? A The best I remember he said sign the card so that we could get a union in.

* * * * *

[fol. 571] CECIL TAYLOR

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your name and address, please.

THE WITNESS: Cecil Taylor, 101 Adams Street, Kernersville, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Taylor, were you an employee of General Steel Products in August of 1964? A Crown Flex.

Q You worked for Crown Flex? A Yes, sir.

[fol. 572] Q In High Point? A Yes, sir.

Q Now, Mr. Taylor, what was your job there? A Machine operator.

Q Who was your foreman? A Robert Lewis.

Q Mr. Taylor, I show you General Counsel's Exhibit marked for identification 6(a)(31) and ask you if you can identify that card. A Yes, sir.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(31) for identification.)

Q (By Mr. Cowherd) Is that your signature? A Yes, sir.

Q And what date did you sign the card? A On the eighth month, third day of '64.

Q Did you read the card before you signed it? A Yes, I did.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a)(31) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) You wrote your name on this card. Who wrote the rest of it? Did you? A Yes, I believe I did. As far as I remember, I did.

[fol. 573] Q Did you write the date? A I believe I did.

Q Someone has written "General Steel" in here. Was that you or somebody else? You would say "Crown Flex", wouldn't you? A It is all the same company.

Q It is all in the same building? A Yes.

* * * *

[fol. 576] J. P. SHANNAHAN

was called as a witness by and on behalf of the General Counsel, and after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address for the record.

THE WITNESS: J. P. Shannahan, Route 3, Kernersville, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Shannahan, were you an employee of General Steel Products in August of last year? A Yes.

Q What was your job? A Machine fixer.

Q Who was your foreman? A Ernest Curry.

Q Now, Mr. Shannahan, I show you General Counsel's exhibit marked for identification, 6(a)(32) and ask you if you can identify that card. A Yes, sir.

[fol. 577] Q Is that your signature? A Yes, sir.

Q What date did you sign the card? A 8-3-64.

Q Now did you read the card, sir, before you signed it? A Yes, sir.

MR. COWHERD: I offer General Counsel's marked 6 (a) (32) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 578] Q Did he tell you that he was getting up cards in order to get an election? A Well, he give me a card and told me to read it, and he said if I signed the card that this would authorize him to represent me.

* * * *

[fol. 579] RICHARD WALKER

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Would you give us your full name and address, please.

THE WITNESS: Richard H. Walker, Kernersville, Route 4.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Walker, were you an employee of General Steel Company in August of 1964? A Crown Flex.

Q Crown Flex. Who was your foreman? A Ernest Curry.

Q And what was your job? A Machine operator.

Q Now, Mr. Walker, I show you General Counsel's Exhibit marked for identification Number 6(a) (33) and [fol. 580] ask you if you can identify that card. A Yes.

Q Is that your signature, sir? A Yes.

Q What was the date on which you signed that card? A 8-5-64.

Q Did you read the card before you signed it? A Yes.

MR. COWHERD: I offer General Counsel's Exhibit 6 (a) (33) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Walker, you wrote your own name on here? A Yes.

Q Did you write the address? A No.

Q Who wrote that? A A fellow but I don't know his name.

Q Which one, Mr. Kaiser? A Yes.

Q The one who raised his hand? A Yes.

Q Wrote "Kernersville"? A Yes.

Q I call your attention to a date which appears to be [fol. 581] written in different ink. Do you know who wrote that on there? A Here?

Q No, sir, right here. A He wrote all of that at the same time.

Q You don't know why the date looks different from that? A No.

Q Mr. Walker, would you read part of this to the Examiner. A "I do hereby"—I don't know what that word is there—and I don't know what that is either—Upholsterers' International Union of North America, AFL-CIO—uh—to act—my—for the purpose of"—I don't know that—and to a rate of pay, wages, hours, and employees and others, something of the employees.

Q When Mr. Kaiser came to see you, did he tell you that he was getting cards signed up, and if he got enough, he would get an election? Anything of that sort? A He said that the card would show that I wanted him to represent us.

* * * *

[fol. 589] HOWARD THOMAS HUNT

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Take the chair and give us your full name and address, and please speak up loud.

THE WITNESS: Howard Thomas Hunt, Route 1, Thomasville.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Hunt, were you an employee of General Steel Products in August of 1964? A Yes.

Q Were you an employee there during the month of July, 1964? A Yes.

Q What was your job? A Press operator.

Q And who was your foreman? A Thomas Allen.

[fol. 590] Q Mr. Hunt, I show you General Counsel's Exhibit marked for identification Number 6(a)(36) and ask you if you can identify that card. A Yes, sir.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(36).

Q (By Mr. Cowherd) Is that your signature? A Yes.

Q And what date is that you signed the card? A 7-23-64.

Q Did you read the card before you signed it? A Yes, sir.

Mr. COWHERD: I offer General Counsel's Exhibit marked for identification Number 6(a)(36) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 592] Q Before you signed a card, were you told that these cards were being signed up just to get an election in the plant? A No, sir.

* * * *

[fol. 593] Q (By Mr. Hamlin) Were you told that you did not have to support the union unless you wanted to even though you signed a card?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: He may answer.

THE WITNESS: Repeat that again.

Q (By Mr. Hamlin) Were you told that you did not have to support the union unless you wanted to even though you signed a card? A Yes.

* * * *

[fol. 594] PAUL LIVINGSTON

was called as a witness by and on behalf of the General Counsel and, after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a seat, and state your full name and address for the record.

THE WITNESS: Paul Livingston, 109 Harris Street, Thomasville.

DIRECT EXAMINATION

[fol. 595] Q (By Mr. Cowherd) Mr. Livingston, were you an employee of General Steel Products in the month of August, 1964? A I was.

Q Were you employed there during the month of July, 1964? A I was.

Q Now what was your job? A Riveter.

Q Who was your foreman? A Walter Parish.

Q Now, Mr. Livingston, I show you General Counsel's Exhibit marked for identification Number 6(a) (37) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (37) for identification.)

A Yes. sir.

Q (By Mr. Cowherd) Is that your signature? A Yes, sir.

Q What date did you sign the card, sir? A The seventh month, 21st of '64.

Q Did you read the card before you signed it? A Yes.

MR. COWHERD: I offer General Counsel's Exhibit marked for identification Number 6(a) (37) into evidence.

VOIR DIRE EXAMINATION

[fol. 596] Q (By Mr. Hamlin)

* * * *

[fol. 597] Q Did Mr. McMurray tell you that these cards were just to get an election? A No, sir.

* * * *

[fol. 603] Q (By Mr. Hamlin) Did Mr. McMurray tell you that you could vote either way in the election? A No.

Q That these cards were just to get an election? A No.

* * * *

[fol. 612] ALTON B. MANESS

was called as a witness by and on behalf of the General Counsel, and after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Will you state your full name and address for the record.

THE WITNESS: Alton B. Maness, 3016 English Road, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Maness, were you an employee of General Steel Products in August of 1964? A That's right.

Q Were you employed there during the month of July 1964? A Yes, sir.

Q What was your job? A Riveting machine operator.

Q And who was your foreman? A Ray Fulp.

Q I show you General Counsel's Exhibit marked for identification 6(a)(4) and ask you if you can identify that card. A That is my card. That is my signature and my card too.

Q Now what date did you sign the card, sir? A 7-7; let me start over; seventh month, 22nd day, '64.

[fol. 613] Q Did you fill in all of that card? A All that is in this green ink.

MR. COWHERD: Let the record show that is the name, date, and address.

Q (By Mr. Cowherd) Did you read the card before you signed it? A Yes, sir.

MR. COWARD: I offer General Counsel's Exhibit marked for identification 6(a)(40) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Would you read a part of what it says there to the Examiner? A "I do hereby designate the Upholsterers' International Union of North America"—

MR. HAMLIN: That's all right.

Q (By Mr. Hamlin) Who approached you about signing a card, Mr. Maness? A Billy Fowler.

Q Somebody else at General Steel? A Another employee.

Q Did he tell you that they were getting cards signed in order to get a vote? A No, he didn't.

Q Did he tell you some other folks had signed cards? A Yes, he said that some of them had signed cards.

[fol. 614] Q And when they got enough, they would get a vote, didn't he tell you that? A No, he didn't say that. If he got a majority, 60 percent in each department, we would get the union; he didn't say anything about a vote.

Q Did he not say this is for an election? A No, he did not.

* * * *

[fol. 620] EDWARD EARL LAWS

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give use your full name and address and speak up loud, please.

THE WITNESS: Edward Earl Laws, Route 3, Thomasville.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Laws, were you an employee of General Steel during the month of August, 1964? A Yes, sir.

Q Were you an employee during the month of July, 1964? A Yes, sir.

[fol. 621] Q What was your job? A Spinning operator.

Q And who was your foreman? A Jim Riggsbee.

Q Now, Mr. Laws, I show you General Counsel's Exhibit marked for identification 6(a)(42) and ask you if you can identify this card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(42) for identification.)

A Yes, sir.

Q Is that your signature on the card? A Yes, sir.

Q And what date did you sign the card? A Seventh month, twenty-seventh, '64.

Q And did you write the date on there? A Yes, sir; let me see it; I believe I was the one that put it on there.

Q Now did you read the card before you signed it? A No, sir.

Q Was it read to you? A Yes, sir.

Q And who read it to you? A Ted Davis.

* * * *

[fol. 622] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 623] Q He did tell you, did he not, that those who signed up now would not have to pay any initiation fee which people later would have to pay? A He did not tell me that. He was talking after I done signed the card back down there, and the conversation come up which I gave you over in the plant if it was set up if we won the election, that an initiation fee would get; if an initiation fee would be set up, that the ones later would have to

pay is the way I explained it to you over there that day, and that is all that was ever said about an initiation fee.

* * * *

[fol. 628] Q (By Mr. Cowherd) And this line here is the line where it says— A Yes.

Q You were supposed to have signed it there? A Yes, sir, and he filled in that other part, and then when I started the leave, when I signed the paper and started to leave, I mentioned again about that because I didn't want to be caught in the middle where I was trying to make [fol. 629] out that there would be an initiation fee because I didn't know it; it was just brought up in a conversation with Ted after I had done signed the card.

* * * *

TRIAL EXAMINER:

I would like for you to tell me exactly what you told Mr. Hamlin on that day, just try to recall everything that you told him.

THE WITNESS: Well, we were talking, and he mentioned the card, and I told him that I had signed a card; and we went on further; and he asked me would the card be kept confidential; and it was supposed to be kept confidential; and he didn't tell me that it would be shown to nobody else; and I told him that.

TRIAL EXAMINER: I don't quite understand that. Tell me what was said about the card being kept confidential and not being showed to anybody else. Just tell [fol. 630] me that again, what you told him about that.

THE WITNESS: Well, I just told him, he asked me would it be kept confidential; and I said, yes, it would; that is what I was told.

TRIAL EXAMINER: Yes, all right.

* * * *

[fol. 633] CUSTER FRANKLIN LAWS

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Full name and address, please.
THE WITNESS: Custer Franklin Laws, Route 8, Thomasville.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Laws, were you an employee of General Steel Products in August of 1964? A I was.

Q Were you an employee there during the month of July, 1964? A Yes, sir.

Q Now who was your foreman? A I don't know his name.

Q What job did you have? A Maintenance.

Q All right, now, Mr. Laws, I show you General Counsel's Exhibit marked for identification Number 6(a) (43) and ask you if you can recognize that document.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (43).

A Yes.

Q Did you sign the card? A Yes.

[fol. 634] Q Is that your signature? A Yes.

Q And what date did you sign it on? A August 7.

Q Did you write in the date? A I don't know for sure if I wrote it or not.

Q Was it dated at the same time that you signed the card? A Yes.

Q Can you read that date? A Well.

Q The date on the card is July 27, 1964. Did you read the date before you signed it? A No, Ted read it to me.

* * * *

[fol. 637] Q (By Mr. Hamlin) Mr. Laws, did Mr. Davis talk about getting an election in the plant? A I don't believe he did.

Q You don't remember that word being used? A No.

Q And did he tell you that you would get a chance to vote either way on this? A I don't recall that he did.

* * * *

[fol. 639] CHARLES EUGENE LAWS

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Charles Eugene Laws, Route 3, Thomasville.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Laws, were you an employee of General Steel Products in August of 1964? A Yes, sir.

Q Were you an employee there during the month of July, 1964? A Yes, sir.

Q What was your job? A Painter.

Q And who was your foreman? A Elvin Bethea.

Q Now, Mr. Laws, I show you General Counsel's Exhibit marked for identification Number 6(a)(44) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit Number 6(a)(44) for identification.)

[fol. 640] A Yes.

Q (By Mr. Cowherd) Did you sign that card? A Yes, sir.

Q Is that your signature? A Yes, sir.

Q And what did, what date did you sign the card? A 7-27-64.

Q Did you date the card? A No, sir.

Q Who dated the card? A I believe Ted Davis.

Q Did he do this at the same time that you signed the card? A Yes, sir.

Q Did you read the card before you signed it? A No, sir.

Q Was it read to you? A Yes, sir.

Q Who read it to you? A Ted.

Q Did you understand what he read to you? A Yes, sir.

* * * * *

[fol. 641] THE WITNESS: I think he explained to me that the card was for the union to represent us.

* * * * *

[fol. 644] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) You were present at this same conversation that you, with Ted Davis, and your two brothers who were just on the stand, that they described to us, were you not? A I think so.

Q Mr. Davis at that time was asking all of you to sign cards? A I suppose so.

Q And was telling you why he wanted you to sign, was he not? A I suppose so.

Q And he told you, did he not, that he was getting cards signed in order to have an election? A I wouldn't know.

Q Or to have a vote, or anything like that? A He didn't tell me that; he just told me that he wanted to get the cards signed to get the union in to represent us.

* * * * *

[fol. 645] ZEB LAWS

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Cowherd) State your name and address for the record please. A Zeb Laws, Jr., Route 4, Thomasville.

Q Mr. Laws, were you an employee of General Steel in the month of August, 1964? A Yes, sir.

Q Were you employed there during the month of July, 1964? A Yes, sir.

Q What was your job? A Riveter.

[fol. 646] Q And who was your foreman? A Jim Riggsbee.

Q Now, Mr. Laws, I show you General Counsel's Exhibit marked for identification Number 6(a)(45) and ask you if you can identify that.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(45) for identification.)

A Yes, sir.

Q (By Mr. Cowherd) Is that your signature? A Yes.

Q And did you date the card? A No.

Q Who did? A Ted Davis.

Q Did he date the card the same day you signed it? A Yes.

Q The same time? A Well, as soon as I handed it back to him.

Q Now what is the date on the card?

MR. HAMLIN: Objection: I haven't been objecting on this point, Your Honor, but I think we are entitled to. There is no proof by this witness that the date is correct. All he is doing is reading off the card.

TRIAL EXAMINER: Well, the card speaks for itself.

Q (By Mr. Cowherd) Did you read the card before [fol. 647] you signed it? A No, sir.

Q Was it read to you before you signed it? A Yes, sir.

Q And who was that that read it to you? A Well, the first go around, Hogan Brown read it to me once, and then Ted Davis read it the night I signed it.

Q Now did you understand what was read? A Well, I understood some of it; I mean, there were some words in there that I don't know real good.

Q What do you recall that was read to you? A It was a union card; whatever the name of it at the bottom is there; I can't say all of them words there; Upholsterers' Union; and that is about all that I can remember about it; he read it to me before I signed it.

Q And you understood it? A I didn't understand all of it, but I understood that it was a union card.

* * * *

[fol. 648] (By Mr. Hamlin)

Q And did Mr. Davis or Mr. Brown tell you that they were getting up cards in order to have an election and it took so much to get an election? A Mr. Davis told me that they would have to get enough cards signed, a certain percentage before they could have an election.

Q Did he tell you that you were being asked to sign a card just so as to have an election in the plant, that you could vote either way? A He told me that I could vote either way.

[fol. 649] MR. WILLIAMSON: That is three questions in one.

TRIAL EXAMINER: Yes.

MR. HAMLIN: I will be glad to separate them.

TRIAL EXAMINER: Yes.

Q (By Mr. Hamlin) And did he tell you that this was just so as to have an election? A He told me that he was getting the cards signed to get a percentage so that they would have an election if they got enough cards.

Q If they what? A If there was enough percentage from the cards, that they would have an election.

Q Did he tell you that you could vote either way? A Yes. sir.

Q Did you tell him that you weren't agreeing as of then as to which way you would vote? A I told him I didn't know.

Q Did he tell you that this card would be kept secret?

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

* * * * *

[fol. 650] J. E. MISHOE

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: J. E. Mishoe, 1004 Virginia Road, Thomasville.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Mishoe, were you an employee of General Steel Products in August of 1964? A Yes, sir.

Q Were you employed there during the month of July, 1964? A Yes, sir.

Q What was your job? A Spring up man.

Q And who was your foreman? A Richard Davis.

Q Mr. Mishoe, I show you General Counsel's Exhibit marked for identification 6(a)(46) and ask you if you can identify that card. A Yes, sir.

Q Is that your signature? A Yes, sir.

Q Did you date the card when you signed it? A Yes, sir.

Q Now what is the date that you signed it? A 7-22-64.

Q Now what is the date you say you signed it? A 7-22-64.

Q Did you read the card before you signed it? A Yes, sir.

* * * *

[fol. 655] LLOYD D. MISHOE

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: Lloyd D. Mishoe, 235 Koontz Street, Thomasville, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Mishoe, were you an employee of General Steel Products in August of 1964? A Yes, sir.

Q What was your job? A Riveting machine operator.

Q And who was your foreman? A Ivan Simpson.

(General Counsel's Exhibit No. 6(a)(47) was marked for identification.)

Q I show you General Counsel's Exhibit marked for identification No. 6(a)(47) and ask you if you can identify it. A Yes, sir.

Q Is that your signature? A Yes, sir.

Q Did you date the card when you signed it? A No, [fol. 656] sir.

Q Who did? A I don't know what his name is. Him and Napoleon Brown were together.

Q Yes. A And they filled it all out but the name up here, and I signed my name to it.

Q And the other fellow, is that the gentleman sitting here? A Yes, sir, right yonder.

Q Mr. Kiser? A Yes, sir.

Q And they put the date on there? A Yes, sir.

Q And you saw them? A Yes, sir.

Q And they did it at the same time you signed the card? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a)(47) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 657] Q Did they tell you or explain to you that they were getting cards signed just so as to have an election in the plant? A No, sir.

Q Did they tell you you could vote for it or against it? A Yes, sir.

[fol. 658] Q Did you tell them you weren't making up your mind yet which way to vote?

MR. COWHERD: Objection.

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Objection sustained.

* * * *

JAMES G. MONCUS

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Take that seat and give us your full name and address, please.

THE WITNESS: James G. Moncus, 1500D Rowan Avenue, High Point, North Carolina.

[fol. 659] DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Moncus, were you employed during the month of August, 1964? A Yes, sir.

Q At the General Steel Products plant? A That's right.

Q Were you an employee there during the month of July, 1964? A Yes, sir.

Q What was your job during that time? A Press machine operator.

Q And who was your foreman? A Richard Hill.

Q I show you General Counsel's Exhibit marked for identification No. 6(a)(48) and ask you if you can identify the card.

(General Counsel's Exhibit No. 6(a)(48) was marked for identification.)

A Yes, sir.

Q Is that your signature? A Yes, sir, I am pretty sure it is.

Q You are pretty sure. Are you sure? A Well, I'm sure because I held it in my hand when I writ that "press". I remember writing it in big letters.

Q And how about your name? A I am sure that's my name.

[fol. 660] Q Did you write your name on the card? A Yes, sir.

Q And that is what you wrote? A That looks just like my handwriting.

TRIAL EXAMINER: Well, do you remember whether or not you signed that card?

THE WITNESS: Yes, siree, I read it and signed it.

Q (By Mr. Cowherd) Did you write everything on the card? A Well, I don't believe I wrote this G.C. 6(a)(48).

Q No, except for that. A I believe I did.

Q Did you write the date on the card yourself? A Yes, sir, I filled out the whole card myself.

Q Did you read the card before you signed it? A Yes, sir.

MR. COWHERD: I offer General Counsel's Exhibit marked for identification 6(a)(48) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) You say you signed this at your press in the plant? A No, I signed it in the front room in my home, 1500D Rowan.

Q Did I understand your testimony that something happened at your press in the plant. What was that? A I was a press operator. That is my job.

Q And where were you approached about signing a [fol. 661] card? Who came to see you? A Well, they didn't call me, I called them. A man, a friend of mine was standing on the side of the road, and we had a conversation about it, and I told him that—I told him after I decided I wanted to join the union to—if he saw them before I did to send them over to my place, I wanted to talk to them about joining.

* * * *

[fol. 662] Q (By Mr. Hamlin) Mr. Moncus, when I talked with you in the plant a week or two ago, you told me that you had not signed a card, did you not? A That's right.

TRIAL EXAMINER: How's that?

THE WITNESS: Yes, sir, I told him that.

MR. HAMLIN: We object to the card.

TRIAL EXAMINER: It may be received.

(The document above-referred to, heretofore marked General Counsel's Exhibit No. 6(a)(48) was received.)

TRIAL EXAMINER: Anything further?

MR. COWHERD: Just let me think a minute.

FURTHER DIRECT EXAMINATION

Q (By Mr. Williamson) Why did you tell Mr. Hamlin in the plant that you hadn't signed a card? A Well, I had kept it a secret all during the time. I hadn't told anybody that I had signed one, and I thought it was too [fol. 663] personal a question; being as I had kept it a secret that long, I would keep it all the way through. I thought it was too personal a question to have to answer it. I wasn't under oath whenever I answered it.

MR. WILLIAMSON: That's all.

TRIAL EXAMINER: Anything further?

CROSS EXAMINATION

Q (By Mr. Hamlin) And you had been told that this would be kept secret, hadn't you?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Wait a minute. What time are you talking about?

MR. HAMLIN: Before I signed the card.

MR. COWHERD: Objection.

TRIAL EXAMINER: That isn't what he was talking about.

MR. WILLIAMSON: I was talking about the interview in the office.

TRIAL EXAMINER: Now, what time are you talking about?

MR. HAMLIN: I am going back to the time of the card signing.

TRIAL EXAMINER: Objection sustained.

* * * *

[fol. 664] CARSON WADE NORRIS

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address and speak up loudly.

THE WITNESS: My name is Carson W. Norris, 800 East Kerns Avenue, High Point, North Carolina.

[fol. 665] DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Norris, were you an employee of General Steel Products in July, 1964? A Yes, sir.

Q Were you an employee there in August of 1964? A Yes, sir.

Q What was your job during that time? A A utility man.

Q And who was your foreman? A James Riggsbee.

(General Counsel's Exhibit No. 6(a)(49) was marked for identification.)

Q I show you General Counsel's Exhibit marked for identification No. 6(a)(49), and ask you if you can identify that card. A Yes, sir, I believe I can.

Q Is that your signature on that card? A No, sir.

Q Whose signature is it? A My wife's.

Q It is your wife's signature? A Yes, sir.

Q Did you ask her to sign it, this card, for you? A I had her fill it out, yes, sir.

Q And were you present when she signed it? A Yes, [fol. 666] sir.

Q Did she fill out the whole card for you? A Yes, sir.

Q Did she put the date on the card? A Yes, sir, I am pretty sure she did.

Q At the same time she filled out the rest of the card? A Yes, sir.

Q Did she read the card to you, or did you read the card to yourself? A Well, the guy that give me the card to fill out, he read it to me.

Q Who was that? A Jerry Moss.

Q Jerry Moss? A Yes, sir.

Q And did you understand what he read to you? A Yes, sir.

Q Do you recall now anything about what he read to you? A Yeah, about sign the card and the union, you know, will represent the plant.

Q Is that all you can remember? A About all we was talking about? We talked about other things—

COURT REPORTER: Can you speak a little louder, please?

TRIAL EXAMINER: Speak a little louder.

[fol. 667] THE WITNESS: About the union representing us at the plant, you know, in case they're going to have an election and everything.

Q (By Mr. Cowherd) And who was it that read this card to you? A Jerry Moss, one of the employees at the shop.

Q Was anybody else there? A Just my wife.

Q Just your wife? A Yes, sir.

Q Where did this take place? A At my house, at home.

Q Mr. Norris, when Mr. Moss read you the card, did he read anything to you about an election? A No, sir, I don't think he did.

MR. COWHERD: I offer General Counsel's Exhibit 6(a) (49) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Norris, you said that Mr. Moss didn't read anything off the card about an election, but he did tell you something about an election, didn't he? A We talked several time about the election, and things like that, you know.

Q And you talked about the election before you signed [fol. 668] the card, or had your wife sign it? A I don't know whether it was before or afterwards.

Q Was it that same night? A Same day; it happened in the afternoon.

Q He told you, didn't he, that these cards were just being signed up to get an election in the plant?

MR. WILLIAMSON: Objection.

THE WITNESS: To get a union in the plant.

* * * *

[fol. 673] JAMES LEWIS RANDALL

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: James Lewis Randall, 502 West Ray Street, High Point, North Carolina.

[fol. 674] DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Randall, were you employed at General Steel Products Company in High Point during the month of August, 1964? A Yes, sir.

Q What was your job? A Punch press operator.

Q And who was your foreman? A Victor Allen.

(General Counsel's Exhibit No. 6(a) (50) was marked for identification.)

Q I show you General Counsel's Exhibit marked for identification No. 6(a) (50) and ask you if you can identify that card? A Yes, sir.

Q Is that your signature? A Yes, sir.

Q Did you fill out the card, sir? A Yes, sir.

Q Did you date the card? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a) (50) into evidence.

[fol. 675] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 676] Q Did they tell you that the purpose of signing a card was to get an election at the plant? A No, sir.

* * * *

[fol. 680] BILLY J. SEARCY

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a seat and give your full name and address.

THE WITNESS: Billy J. Searcy, 228 Beddington, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Searcy, were you an employee during the month of August, 1964, at General Steel Products Company in High Point? A Yes, sir.

Q Were you employed there also in the month of June, 1964? A Yes, sir.

[fol. 681] Q What was your job, sir? A Riveting machine operator.

Q And who was your foreman? A Ray Fulp.

Q I show you General Counsel's Exhibit marked for identification Number 6(a) (51) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (51) for identification.)

A Yes, sir.

Q (By Mr. Cowherd) Is that your signature? A Yes, sir.

Q Did you fill out the card? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

MR. COWHERD: I offer General Counsel's Exhibit 6(a) (51) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 682] Q Were you told that the reason for signing the cards was to get an election? A No, sir.

* * * *

[fol. 688] IRVIN REAGAN

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: Irvin Reagan, 215 Oaklawn Avenue.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Reagan, were you an employee of General Steel Products in High Point during the month of August, 1964? A Yes, sir.

Q Were you employed there in June of 1964? A Yes.

Q What was your job? A Spinner operator.

Q Who was your foreman? A Ivan Simpson.

Q Now, Mr. Ragan, I show you General Counsel's Exhibit marked 6(a) (53) and ask you if you can identify that card. A Yes.

Q Is that your signature, sir? A Yes.

[fol. 689] Q And did you put the date on there? A No, sir.

Q Who put the date on there? A Mr. Smith.

Q And was he there when you signed your card? A Yes.

Q And did you see him write the date on that card? A Yes.

Q And is that the correct date you signed the card? A I believe it is.

Q All right, did you read the card before you signed it? A No, he read it to me.

Q Did he read it to you? A Yes.

Q Did you understand what he read? A Yes.

Q Can you recall what it was that he read to you? A Wanted to know did I wanted the union to represent us.

* * * *

[fol. 692] L. LEON ROBINSON

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Robinson, state your name and address for the record, please. A L. Leon Robinson, 1609 Lincoln Drive, High Point.

Q Now Mr. Robinson, were you an employee of General Steel Products in High Point during the month of August, 1964? A Yes, sir.

* * * *

[fol. 694] Q (By Mr. Cowherd) Now, Mr. Robinson, I show you General Counsel's Exhibit marked for identification Number 6(a)(54) and ask you if you can identify that card. A Yes, sir.

Q Is that your signature? A Yes, sir.

Q Did you fill out the card? A Yes, sir.

Q Did you put the date on it? A Yes, sir.

[fol. 695] Q Did you read the card before you signed if? A I didn't read it.

Q You didn't read it? A No.

Q Was it read to you? A No, I understood what it was about.

Q You understood what it was about? A Yes, sir.

Q What was it that you understood? A Well, I know what a union means, it is fair pay, and job security.

MR. HAMLIN: I can't hear you.

COURT REPORTER: I don't either.

TRIAL EXAMINER: I don't either.

MR. COWHERD: You will have to speak up louder.

TRIAL EXAMINER: Speak up louder. What did you understand? You said you understood what it was, what it meant. Now what did you understand?

THE WITNESS: A better place to work.

MR. HAMLIN: We object to what he understood.

TRIAL EXAMINER: Was anything said to you at the time you signed the card?

THE WITNESS: Well.

TRIAL EXAMINER: Have you read the card at any time?

[fol. 696] THE WITNESS: I haven't read it. I read it one time afterwards.

TRIAL EXAMINER: You read it afterwards?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: How long afterwards?

A THE WITNESS: I don't know, about seven months, a couple of weeks ago I read it.

* * * *

[fol. 698] Q I show you the card again, sir, and ask you if you can identify the card. A Yes, sir.

Q Would you tell me what it is. A It is a union card, Upholsterers' International Union.

Q Is that the card that you signed? A Yes, sir.

Q Who was it who gave you the card? A Larry Wayne Robinson.

Q Did he tell you what it was when he gave it to you?

MR. HAMLIN: Objection. He has already testified to that.

TRIAL EXAMINER: I will let him answer.

THE WITNESS: I asked him for it and he gave it to me. He told me it was a union card.

* * * *

[fol. 707] DOUGLAS J. SHIPP

was called as a witness by and on behalf of the General Counsel, and after having been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Speak out loud now, and give us your name and address, please.

THE WITNESS: John W. Shipp, 223 Dorothy Street, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Shipp, are you an employee of General Steel in High Point during the month of August, 1964? A Yes, sir.

Q Were you employed there during the month of June, 1964? A Yes, sir.

Q What was your job? A Inspector.

Q And who was your foreman? A Tommy Parish.

[fol. 708] Q Mr. Shipp, I show you a card marked as General Counsel's Exhibit 6(a) (57) and ask you if you can identify it. A Yes, sir.

Q Is that your signature?

(The document above-referred to was marked General Counsel's Exhibit 6(a) (57) for identification.)

A Yes, sir.

Q (By Mr. Cowherd) Did you fill out that card? A Yes, I did.

Q And did you date the card yourself? A No, sir, I am not sure about the date.

Q Right down here, can you make that out? A Oh, yeah, I signed that.

Q You filled that out? A Yes, sir, June 4, '64.

Q Now did you read the card before you signed it? A Yes, sir.

Q You did? A Yes.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a) (57) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Who asked you to sign this card, Mr. Shipp? A Bobby Smith.

[fol. 709] Q And where? A Union meeting.

Q There were other people at this meeting? A Yes, sir.

Q Did anyone make a talk at that meeting before you signed the card? A Sir?

Q Did anyone make a talk at that meeting before you signed the card? A Yes, there was a talk.

Q Who spoke? A Ted Davis.

Q Anybody else? A No, sir, that I; not that I know right off hand.

Q Did Bobby Smith in talking to you or Ted Davis in talking to you or speaking at this meeting make a statement that these cards were being gotten up for the purpose of having an election in the plant? A Well, the only thing said about an election; said if we got over a majority of the cards signed, there would be an election; but not until.

Q And was it stated that if the union won that it would come in and otherwise not? A No, sir, I don't remember hearing that.

* * * *

[fol. 710] ODELL STRICKLAND

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Cowherd) State your name and address for the record, please. A Odell William Strickland, 1822 Ridgecrest Drive, High Point.

Q Mr. Strickland, were you an employee of General Steel Products during the month of August, 1964? A [fol. 711] Yes, sir.

Q Were you employed there during the month of July, 1964? A Yes, sir.

Q Mr. Strickland, what was your job? A Press operator.

Q And who was your foreman? A Bobby Sparks.

Q Now, Mr. Strickland, I show you General Counsel's Exhibit marked for identification 6(a) (58) and ask you if you can identify that card. A Yes, sir.

Q Now is that your signature on your card? A Yes. Every bit of it.

* * * *

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 713] Q Did Mr. Ted Davis make any talk at these meetings which you attended before you signed this card? A I never heard no one talk before I signed the card. We had talked over at Johnson Hinge before we came into the new plant. We had talked over at Johnson Hinge about forming a union before we came into the new plant.

Q And is that where you obtained the information upon which you made your decision to sign a card? A No, sir. I got from, I got my information from working at General Motors in Ohio.

Q How long ago was that? A From 1959 to about '61.

Q You had never attended a meeting or heard anybody talk about this thing before you signed this card? A I had discussed it myself several times.

Q All right. A I had been to union meetings up north.

Q You discussed it with other people here or only up north. A Here also.

Q Well, with whom did you discuss it? A Anyone that would listen.

Q You mean, you are the one who was doing the talking? A Not only myself; anyone else with any sense would.

* * * *

[fol. 714] LONNIE TEAL

was called as a witness by and on behalf of the General Counsel and, after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Would you give us your full name and address, please.

THE WITNESS: Lonnie Teal, 215 Thomasville Street.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Teal, were you an employee of General Steel in High Point during the month [fol. 715] of August, 1964? A Yes.

Q Were you employed there in July of 1964? A Yes.

Q What was your job? A Inspector.

Q Who was your foreman? A Ray Fulp.

Q I show you General Counsel's Exhibit marked for identification Number 6(a) (59) and ask you if you can identify the card. A Yes.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (59) for identification.)

Q (By Mr. Cowherd) Is that your signature, sir? A Yes, sir.

Q Did you fill out the card? A Yes, sir.

Q Did you date it? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a) (58) into evidence, or excuse me, General Counsel's Exhibit Number 6(a) (59) into evidence.

[fol. 716] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Who approached you about signing the card? A Mr. Davis.

Q All right. A And Mr. Kaiser.

Q Mr. Davis and Mr. Kaiser? A Yes.

Q Where? A At my home.

Q At your home? A Yes.

Q Was there anybody else present? A No.

Q Did they talk with you about why they wanted the card signed? A Well, they said to represent the union.

Q Did they tell you that the purpose of the card was just to get a vote in the plant for you to vote on it? A No, sir.

Q Did they talk about an election? A No, they talked about representing a union.

Q They talked about representing a union? A At that time.

[fol. 717] Q Had they talked to you before? A No, sir.

Q Had anybody else talked with you about this matter? A No.

Q Did they tell you that you could vote as you chose? A Well.

Q In the election? A No, sir.

Q Either way? A I believe they did but not that time.

Q Had they told you that before? A After.

* * * *

[fol. 719] HENRY THOMPSON

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Speak up loud, and give us your full name and address, please.

THE WITNESS: Henry Thompson, 305 Kennedy Street, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Thompson, were you an employee of General Steel Products in the month of August of 1964? A Yes, sir.

Q Were you employed there in July of 1964? A Yes, sir.

Q What was your job? A Press operator.

Q Who was your foreman? A Bobby Sparks.

Q Now, Mr. Thompson, I show you General Counsel's Exhibit Number 6(a)(60) and ask you if you can identify [fol. 720] that card. A Yes, sir.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(60) for identification.)

Q (By Mr. Cowherd) It that your signature? A That's right, nobody can write like that but me.

Q Now—

TRIAL EXAMINER: I didn't hear that.

MR. COWHERD: Nobody can write like that but me.

TRIAL EXAMINER: All right.

Q (By Mr. Cowherd) Did you fill out the whole card? A Yes, sir.

Q Did you put the date on it? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

* * * *

[fol. 721] (By Mr. Hamlin)

Q Did Mr. O'ham tell you that he was getting cards signed up in order to have an election or something to that effect A Well, I know that he had cards.

Q Well, I am asking you, did he tell you that he was getting cards signed up so as to have an election? A If they got the percentage, yes.

Q And did he tell you that you would, did he tell you that these cards would be used for any other purpose? A No.

Q Did he tell you that you could vote any way you pleased even though you signed a card? A Yes, sir.

Q He did not tell you that you were making the union your representative even if it lost an election, did he? A [fol. 722] No, sir, he sure didn't.

Q Did he tell you that your card would be held secret or confidential?

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

* * * *

TRIAL EXAMINER: Well, did he tell you that the card would only be used for an election?

THE WITNESS: No, sir.

* * * *

ROSHIER WATTS

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: My name is Roshier Watts, I live on 404 Barnsville Street, Thomasville.

DIRECT EXAMINATION

[fol. 723] Q (By Mr. Cowherd) Mr. Watts, were you an employee of General Steel Products in August, 1964? A Yes, sir.

Q Were you employed there in July of 1964? A Yes, sir.

Q What was your job? A Spinner operator.

Q And who was your foreman? A Jim Riggsbee.

Q Now, Mr. Watts, I show you General Counsel's Exhibit marked for identification Number 6(a)(61) and ask you if you can identify that card. A Well, I have seen the card. I can't read but I have seen the card.

Q Did you sign the card? A No, sir.

Q Who signed it for you? A My wife signed it.

Q And did you ask her to? A Yes, sir.

Q Did she fill out the card for you? A Yes, sir.

Q Did she put the date on there, sir? A Yes, sir. As far as I know, she did.

Q What did she put on, what was it that your wife put [fol. 724] on there? A I guess she wrote it all on there, all of that writing.

Q She wrote it all? A As far as I know, she did, yes, sir.

Q And did you see her write it all on there? A Yes, sir. After I got home.

Q Now did she read the card to you? A Yes, sir.

Q Do you remember what she read to you? A The International Upholder, the International Upholding Union, represent of the union, representative.

Q It was a representative of the union, is that what you said? A Yes, sir.

Q Do you read it all? A No, sir, I can't read.

* * * *

[fol. 725] Q But your wife read it to you? A Yes, sir.

Q Read the whole card to you? A Yes, sir. I told her to fill it out for me.

Q After she read it? A Yes, sir.

Q Again what was it that you remember her reading?

MR. HAMLIN: Object to repetition.

TRIAL EXAMINER: You may answer.

A Representing the International Union.

Q (By Mr. Cowherd) Representing Upholsterers'— A International Union.

Q Representing?

TRIAL EXAMINER: What about the union, what did she read about the union?

THE WITNESS: Well, she said it was representing of the union, card.

* * * *

[fol. 726] MR. COWHERD: I am going to read you a part of this and I want you to tell me if this is what your wife read.

MR. HAMLIN: We object to that, sir.

TRIAL EXAMINER: No, I think in view of the testimony of the witness and the apparent, his apparent lack of education and ability to understand, I think you may do so.

MR. COWHERD: "I do hereby designate and authorize the Upholsters' International Union of North America, AFL-CIO and its representatives to act as my representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment."

THE WITNESS: That is the same card.

MR. COWHERD: Is that the same thing that she read to you?

THE WITNESS: Yes, sir, the same thing.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a) (61) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Watts, who did you get this card from? A My son brought it to me at the house.

[fol. 727] Q Had you been called on by any of the union organizers before? A No.

Q Had anyone talked with you about it before you signed? A No.

Q Did Mr. Ted Davis see you somewhere? A After I signed the card.

Q You think this was later? A Yes, sir.

Q And your son brought you your card, brought you this card, when it was brought you by him, did he tell you that this was just to get an election? A I don't think so.

Q Did he tell you that you would have a chance to vote either way on this? A No, sir.

Q Had anybody else told you that? A No, sir.

* * * *

[fol. 728] Q Would you tell us again, Mr. Watts, what it was that your wife read to you that night as far as you remember? A He just read the card and I told him that was right.

Q Well, sir, would you tell me what it was, as far as you remember, that your wife read? Just in your own words? A Well, my memory ain't so good and all I remember about it is representing of the union, Upholstery Union.

* * * *

[fol. 753] RABON WOLFORD

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Cowherd) Will you state your name and address for the record. A Rabon Wolford, Box 5, Trinity.

Q Mr. Wolford, were you an employee of General Steel Products during the month of August, 1964? A Yes, sir.

Q Were you employed there during the month of July, 1964? A Yes, sir.

Q What was your job, sir? A Utility man.

Q And who was your foreman? A Tommy Parish.

[fol. 754] Q Mr. Wolford, I show you General Counsel's Exhibit marked for identification Number 6(a)(64) and ask you if you can identify that card. A Yes, sir.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(64) for identification.)

Q (By Mr. Cowherd) Is that your signature on the card? A Yes, sir.

Q Did you fill out the card yourself? A Yes, sir.

Q Did you date the card the same time you signed it? A Yes.

Q Did you read the card before you signed it? A Yes, sir.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a)(64) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Wolford, who approached you about signing the card? A I don't know exactly who approached me. I believe I filled that out at the Union Hall, sir.

Q And was this the first such meeting that you had been to or had there been others that you had attended before that? A I don't recall exactly when I filled the [fol. 755] card out but it was at a union meeting.

Q Had union officials made talks at meetings which preceded your signing this card? A Yes, sir.

Q Which one? A Mr. Davis.

Q Mr. Davis, did he state that the only purpose of these cards was to obtain an election? A No, sir.

Q He did say that they would be used to obtain an election? A No, sir.

Q Did he not? A No, sir.

Q Was there no talk about an election? A I don't recall talk about an election.

Q Did he tell you that you could vote either way if an election came? A Yes, sir.

Q Then there was some talk about an election? What did he say about an election? A It seems as if he said something about if there would be one, we could vote either way, but my understanding was in our filling the card out that we would have a union to represent us.

Q Apart from your understanding, sir, I am asking you what you were told. Were you told that you would [fol. 756] avoid an initiation fee by joining now rather than later? A I don't recall that.

Q You don't remember an initiation fee being mentioned? A I don't recall it being mentioned.

Q You also have been approached or asked to sign a card by a fellow employee? A Well, I have talked with the employees, but I don't recall; maybe some of them had asked me; but I believe I had already signed; I believe some of them had approached me and asked me about it, but I had already signed the card.

* * * * *

[fol. 757] Q Before you signed this card, you were not told that you were naming the union as your representative? Were you? A Oh, yes, that is the reason I signed the card.

* * * * *

[fol. 762] Q Now you were told that this was to get an election? A No, to get a union.

Q Do you deny that you told Mr. Martin that? A I am not going to deny it. I could have told him that. If I did, I was mistaken.

Q Well, you made the same mistake when you read and signed the statements? A I must have misread it. That is my signature.

Q And you also made the statement, "I was not told I was naming the union as my representative", and that's true, isn't it? A It is on the card.

Q No one told you that you were naming the union as your representative to represent you without any election? A Repeat the question.

Q No one told you that you were naming the union to represent you without an election, did they? A Without an election. I don't recall anyone saying to me anything about having an election.

TRIAL EXAMINER: Would you mind standing back a little bit? You are too close to the witness.

MR. HAMLIN: Yes. I wanted to stand close enough so that he could see it.

[fol. 763] TRIAL EXAMINER: Well, hand it to him.

MR. HAMLIN: All right.

Q (By Mr. Hamlin) You have already testified, have you not, sir, that you were told that you could vote either way. You testified to that before you ever looked at the statement. A It seems like that had been repeated between some employees that they could vote either way they wanted to, but at the time I signed the card, I signed it for the union to represent me, not to have an election.

* * * *

[fol. 768] JAMES RICHARD SMITH

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

[fol. 769] TRIAL EXAMINER: Will you give us your full name and address.

THE WITNESS: James Richard Smith, 113 Vale Street, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Smith, were you an employee of General Steel Products in the month of August, 1964? A Yes, sir.

Q Were you employed there during the month of July, 1964? A Yes, sir.

Q What was your job during this time? A Riveting machine operator.

Q And who was your foreman? A Ivan Simpson.

Q Mr. Smith, I show you General Counsel's Exhibit marked for identification Number 6(a) (65).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (65) for identification.)

Q (By Mr. Cowherd) And ask you if you can identify that card. A Yes, sir.

Q Is that your signature? A Yes, sir.

Did you fill that card out? A Yes, sir.

[fol. 770] Q Did you date the card at the same time that you filled it out? A Yes, sir.

Q And what is the date on which you filled the card out? A 7-16-64.

Q Did you read the card before you signed it? A Yes, sir.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a) (65) into evidence.

VOIR-DIRE EXAMINATION

Q (By Mr. Hamlin) Where were you when you signed the card? A Up at the Union Hall.

Q Was this the first meeting you attended or had there been others? A This was the first one I attended.

Q Had Mr. Ted Davis or any other union official made a talk there at the meeting before you signed the card? A No, sir.

Q Had anybody approached you about signing a card? Who had approached you about signing a card? A I don't know who; somebody; I don't know who.

Q Where did it happen? A I believe it was at home.

Q Somebody came to your house?

[fol. 771] Q Was that perhaps Mr. Davis? A No, sir.

Q You wouldn't be able to identify the person who came? A No, sir.

Q That was a little while before you went to this union meeting where you signed the card? A It was about two weeks.

Q Now when you were called on about signing the card, you were told, were you not, that they were just getting cards signed up to have an election to get a vote one it?

MR. COWHERD: Objection.

Q (By Mr. Hamlin) Isn't that what you were told? A What was the question?

TRIAL EXAMINER: Excuse me, would you repeat the question, please.

Q (By Mr. Hamlin) When you were called upon about signing a card, you were told, were you not, that they were just getting cards signed up to have an election so that you would have a chance to vote on it? A No, sir.

MR. WILLIAMSON: Objection. It was several weeks before he signed the card.

TRIAL EXAMINER: He may answer.

Q (By Mr. Hamlin) Go ahead. A He asked me about a union, had I heard anything about it, and I told [fol. 772] him, "No"; and he asked me would I like to help get one in, try to get one in; and I told him, "Yes."

* * * *

[fol. 773] CHARLIE OAKLEY

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your name and address for the record.

THE WITNESS: Charlie Oakley, Route 3, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Oakley, were you an employee of General Steel Products during the month of August of 1964? A Crown Flex.

Q Crown Flex? A Yes, sir.

Q Were you employed there during the month of July, 1964? A Yes, sir.

Q What was your job there? A Machine operator.

Q Who was your foreman? A Arnold Laws.

Q Mr. Oakley, I show you General Counsel's Exhibit

marked for identification Number 6(a) (66) and ask you [fol. 774] if you can identify that card. A Yes.

Q Is that your signature? A Yes, sir.

Q Did you fill out the card? A Yes, sir.

Q Did you date the card when you signed it? A Yes, sir.

Q Did you read the card before you signed it? A No, sir.

Q You did not read it? A No, sir.

Q Was it read to you? A I don't remember, but I believe Ted read it to me, I am not sure.

Q Ted, who is Ted? A Ted Davis.

Q The Union reresentative? A Yes.

Q You believe he read it to you? A I believe he read it to me.

Q What do you recall that he read to you? A I don't remember what he read to me.

Q Can you read? A Yes.

[fol. 775] Q Would you like to refresh your memory and read the card? A Out loud?

TRIAL EXAMINER: No, just read it to yourself.

Q (By Mr. Cowherd) Read it to yourself. A Well.

TRIAL EXAMINER: Unless Counsel wants him to read it out loud. Both counsel indicate "No."

Have you read it?

THE WITNESS: Yes, sir.

Q Now does that refresh your recollection, your memory?

TRIAL EXAMINER: As to what?

Q (By Mr. Cowherd) As to what Mr. Davis read to you? A Yes, he said that he was going to represent us if we got up a union in the plant.

Q And is that what is on the card? A Yes, sir.

Q That he read to you? A That is what is on the card. Well, that is not exactly what the wording is on the card.

Q Would you read a portion of that out loud? A What portion do you want?

Q Starting with "I". A "I do hereby" do—what is that word? "Designate and otherwise rep Upholsterers' [fol. 776] Union of North America, AFL-CIO, and its—"

Q (By Mr. Cowherd) That is sufficient. Now do you recall Mr. Davis reading that to you? A Yes, sir, I believe I do. I believe he read it to me. I hadn't read it myself. That is the first time I read it.

Q And this is what you recall Mr. Davis reading? A Yes, sir.

* * * *

[fol. 777] (By Mr. Hamlin)

Q Did Mr. Davis or Mr. Brown tell you that they were getting cards signed up just to have an election in the plant? A Mr. Davis told me that they were getting signed cards, getting cards signed, and if he got enough signed, that they would have an election in the plant.

Q Did he tell you that if the union won that you would have a union in and if it lost that you would not? A That is what I understood, yes.

Q Did he tell you anything about an initiation fee and about people who same in later? A He said if the union came in and a man waited until a later date to join the union that there would be an initiation fee.

Q Did he tell you that except for getting an election that your card would remain confidential?

MR. WILLIAMSON: Objection.

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

* * * *

[fol. 778] Q (By Mr. Cowherd) Mr. Oakley, I want you to tell me exactly what you remember Mr. Davis said to you. A At my house?

Q Yes. A Well, he come down there and he asked me if I wanted to sign a card, and I told him I didn't know; and he was talking about what benefits I would get if I did sign a card; and if we got a union in the plant; if I signed a card and we got a union in the plant what benefits I would get; and I finally signed a card; and he told me that if we got the union in the plant and the man waited until a later date to join the union that there would be an inition fee.

Q If you got a union in the plant? A Yes, sir.

Q If we got a union in the plant, there would be an initation fee if a man waited until a later date to join.

Q Mr. Oakley, did he make a statement to you that he was asking you to sign the card for the purpose of an election? A Not only, now. I would say he didn't say only.

MR. COWHERD: No further questions.

RECROSS EXAMINATION

[fol. 779] Q (By Mr. Hamlin) But he did say whether the union came in would depend on the election, didn't he? A Yes, sir, as far as I know, sir, I think that is what he said.

* * * *

THERON B. WILLIAMSON

was called as a witness by and on behalf of the General Counsel and, after having first been duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Theron B. Williamson, 123 Alberson Road.

DIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Williamson, have you [fol. 780] ever worker for General Steel Company? A Yes, sir.

Q Were you working there last August of 1964? A Yes, sir.

Q Were you working there in July of 1964? A Yes, sir.

Q All right, sir, I show you a card which I have had marked as General Counsel's Exhibit 6(a) (67) and ask you if that is your signature. A Yes, sir.

Q Is that the date that you signed this card? A Yes, sir. 7-23-64.

Q Did you read this card before you signed it? A Not at the time.

Q Did you read it at any later time? A Yes.

Q How long after you signed it did you read it? A A couple of weeks ago.

Did anyone read this card to you at the time you signed this card? A No, sir.

Q Mr. Williamson, did anyone talk to you about signing this card before you signed it? A I heard talk around in the plant.

Q Did any one specific person ask you to sign the card? A There were several different ones.

[fol. 781] Q Well, name me some of them. A James C. Gates and Jerry Moss.

Q All right, sir, where did you get the cards? A George O'ham.

Q Where were you when Mr. O'ham gave you the cards? A We were in his car, on Alberson Road in front of my house.

Q Did you sign the card at the time he gave it to you? A Yes.

* * * *

[fol. 782] Q All right, now, how did you get in touch with Mr. O'ham? A Well, I knew him and he said, Mr. Gates said he had the cards.

Q Did you go seek Mr. O'ham out? A Yes.

Q And where did you find him? A Going out to his car after we got off of work that evening.

Q All right, now, when you saw Mr. O'ham, tell us what was said to the two of you there? A I told him that I heard that he had some cards.

Q What did Mr. O'ham say? A He didn't say much; I told him that I would like to have one and he said, "Get in my car and I will give you a lift there, to your house", I live out there right near the plant; we went around and stopped right in front of my house out in the street, and I signed one.

* * * * *

[fol. 783] WILLIAM W. DUGGINS

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: William W. Duggins, 821 Randolph Street, High Point, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Duggins, have you ever worked for the General Steel Company? A Yes, sir.

Q Were you working there in August of last year of 1964? A Yes, sir.

Q Were you working there in July of 1964? A Yes, sir.

Q Mr. Duggins, I show you a card which I have marked as General Counsel's Exhibit 6(a)(68).

(The document above-referred to, was marked General Counsel's Exhibit No. 6(a)(68) for identification.)

Q (By Mr Williamson) And ask you if you can identify that card, sir. A Yes, sir.

Q Is that your signature? A Yes, sir.

Q Is the date written on the card the same as the date you signed the card? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

* * * * *

[fol. 786] ROBERT PRITCHARD

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Speak up loud and give us your full name and address, please.

THE WITNESS: Robert Pritchard, 811 Worth Street, High Point.

DIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Pritchard, have you ever worked for General Steel or Crown Flex? A Yes.

[fol. 788] Q (By Mr. Williamson) Mr. Pritchard, do you know an individual by the name of Clark? A Yes, sir.

Q Is Mr. Raymond Clark working at General Steel, was he working at General Steel in August of last year? A Yes, sir.

Q Did you ever have any conversation with Mr. Clark on the subject of union cards? A Yes, sir.

Q I show you a card which I have had marked as Gen-
[fol. 789] eral Counsel's Exhibit 6(a) (70).

MR. HAMLIN: May I see it, sir?

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (70) for identification.)

Q (By Mr. Williamson) And I ask you if you can identify that card, sir? A Yes, sir.

Q Can you tell us the circumstances—is that Mr. Raymond Clark's signature on that card?

MR. HAMLIN: Objection. Objection to the leading.

TRIAL EXAMINER: Sustained.

Q (By Mr. Williamson) Whose signature is that on the card?

MR. HAMLIN: Objection.

TRIAL EXAMINER: Did you see anybody sign that card?

THE WITNESS: Yes, sir.

Q (By Mr. Williamson) Who did you see sign it? A Mr. Raymond Clark.

Q Was that card signed by him in your presence? A Yes, sir.

Q Do you know whether or not he read that card before he signed it? A Yes, sir.

Q Did he? A Yes, sir.

Q Did he sign a card at the same time that you signed
[fol. 790] your own card? A Yes, sir.

MR. WILLIAMSON: At this time, Mr. Examiner, I will offer into evidence General Counsel's Exhibit 6(a) (70).

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Where was this card signed? A In the parking lot of the plant.

Q Where is Mr. Clark now? A He is working in Ohio.

Q Do you know where in Ohio?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: He may answer.

A Middletown, Ohio.

Q (By Mr. Hamlin) Do you know his address? A No, sir.

Q How recently have you been in touch with him? A I took him home, moved him about a month ago.

Q Moved him where? A He wrecked his car and I took him and his wife to West Virginia, and his brother-in-law came from Ohio.

Q And the only address that you now know is Middletown, Ohio? A Yes, sir.

Q You say this card was signed at the same time your card was signed? A Yes, sir.

[fol. 791] Q The exhibit just before this? A Yes, sir.

Q Did Mr. Clark fill out his own card? A Yes, sir.

Q Did he fill in the date on it? A I think so.

Q Do you know whether he did or not. A I can't say the date but I know that the signature is his.

Q Well, you didn't fill in the date on his card, did you? A No, sir.

Q And either he did or somebody else did? A Yes, sir.

Q All right.

TRIAL EXAMINER: You said before that it was signed on the same date that you signed yours?

THE WITNESS: Yes, sir.

* * * *

[fol. 792] ROY JUNIOR SCEARCE

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

* * * *

[fol. 793] TRIAL EXAMINER: Give us your name and address for the record and speak up loud.

THE WITNESS: Roy Junior Scearce.

DIRECT EXAMINATION

Q (By Mr. Williamson) Have you ever worked for General Steel? A Yes.

Q Did you work for them in July of last year? A Yes.

Q Did you work for them during the month of August [fol. 794] of last year? A Yes.

Q I show you what I have marked as General Counsel's Exhibit 6(a) (71) and ask you if you can identify that card, sir.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (71), for identification.)

Q (By Mr. Williamson) All right. A Yes, sir, that is my card.

Q Is that your signature? A No, sir, my old lady signed it.

Q Did you give your wife permission to sign the card?

(Off the record discussion.)

Q (By Mr. Williamson) Did you give your wife permission to sign that? A Yes, sir.

TRIAL EXAMINER: How old is your wife?

THE WITNESS: 18.

Q (By Mr. Williamson) Did you read the card before you signed it? A No, she read it to me.

Q Can you tell us the substance of what it was that she read to you? A No, I don't remember that.

Q Can you read at all? A Not much.

[fol. 795] Q Can I ask you to try to read, if you would, sir, the printed portion? A I can't.

Q I am going to read it to you, the printed portion of this card, and I want you to listen to me and tell me whether or not it is what your wife read to you before you gave her permission to sign this card.

MR. HAMLIN: We object.

TRIAL EXAMINER: Overruled.

MR. WILLIAMSON: "I do hereby designate and authorize the Upholsterers' International Union of North America, AFL-CIO, and its representatives, to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment? A That sounds about right.

* * * *

[fol. 796] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

TRIAL EXAMINER: What did he tell you when he gave you the card?

THE WITNESS: He asked me did I want to help get the union and I told him, "Yes."

[fol. 797] TRIAL EXAMINER: Was that when you got the card?

THE WITNESS: Yeah, I believe it was.

* * * *

[fol. 798] FRANKLIN SMALL

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows.

TRIAL EXAMINER: Sit down there, and speak up loud, and give us your full name and address, please.

THE WITNESS: Franklin Small, 207 Oakwood Street, High Point, North Carolina.

DIRECT EXAMINATION

[fol. 799] Q (By Mr. Williamson) Mr. Small, have you ever worked for the General Steel Company? A Yes, sir.

Q Were you working for them in August of 1964? A Yes, sir.

Q I show you what I have had marked as General Counsel's Exhibit 6(a) (72) and ask you if you can identify that card, sir.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(72) for identification.)

A Yes, sir.

Q (By Mr. Williamson) Is that your signature? A Yes, sir.

Q Did you fill out the entire card? A Yes, sir.

Q Is the date that appears on the card the same date on which you signed the card? A Yes, sir.

Q Did you read the card before you signed it, sir? A Yes, sir.

MR. WILLIAMSON: At this time, I offer General Counsel's Exhibit Number 6(a) (72) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Who talked to you about signing a card? A Mr. Brown and that fellow down there on the end there.

[fol. 800] Q That is Mr. Kaiser? A Yes.

Q Did they come to your house? A Yes, sir.

Q Did they tell you that the purpose of getting these cards signed up was to get an election in the plant? A No, sir, they said to get a union in the plant.

Q They told you, did they not, that they would seek to get an election in the plant in order to get the union in? A I don't remember anything like that.

* * * *

[fol. 801] Q (By Mr. Hamlin) They told you if the union won that it would come in, did they not? A Yes, sir.

Q And they told you that if the union lost it would not come in? A Yes, sir.

Q And they told you that except for getting an election that your card would remain confidential, is that right?

MR. WILLIAMSON: Objection.

A I don't remember.

* * * *

[fol. 802] JIMMY PARKER

was called as a witness by and on behalf of the General Counsel and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your name and address.

THE WITNESS: Jimmy Parker, Route 5, High Point. When I signed the card, I lived on 302 Ennis Street.

Q (By Mr. Williamson) Mr. Parker, did you ever work for the General Steel Company? A Yes, sir.

Q Were you working for them in July of last year? A Yes, sir.

[fol. 803] Q Were you working for them in August of last year? A Yes, sir.

Q Mr. Parker, I show you what I have marked as General Counsel's Exhibit 6(a) (73) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (73) for identification.)

A Yes, sir.

Q (By Mr. Williamson) Is that your signature? A Yes, sir.

Q Is that date that appears on that—

MR. HAMLIN: I object to his examining about the date in that fashion.

TRIAL EXAMINER: When did you sign it?

THE WITNESS: Union Hall.

TRIAL EXAMINER: What is that?

THE WITNESS: Union Hall.

TRIAL EXAMINER: When and not where? About when did you sign it?

THE WITNESS: Right after they started getting the union up?

TRIAL EXAMINER: Do you remember about when it was?

THE WITNESS: No, sir, when the meetings first started. It has been a long time. I filled in everything but the date.

* * * *

[fol. 805] THE WITNESS: I filled my card out all but the date, and I taken it up there and laid it down there on a desk about like a table; and when I laid it down, he look at it; and I reckon he put in the date then.

Q (By Mr. Williamson) Who looked at it? A Him and him.

MR. WILLIAMSON: Let the record indicate that the witness is indicating Ted Davis and Napolean Brown.

TRIAL EXAMINER: Yes.

[fol. 806] Q (By Mr. Williamson) Mr. Parker, did you read this card before you signed it? A Yes, sir, I heard a lot of people, you know, explain it.

* * * *

[fol. 808] Q Do you know whether the union petitioned for an election or not? A I know that I wanted a union to represent me.

* * * *

[fol. 810] Q (By Mr. Williamson) Do you know Mr. Tony Parker? A Yes, sir.

Q Who is he, sir? A Brother.

Q (By Mr. Williamson) Do you know whether or not your brother signed a card during the union campaign? A Yes, sir.

TRIAL EXAMINER: Whether he signed?

THE WITNESS: Yes, sir, he did.

* * * *

[fol. 811] Q (By Mr. Williamson) All right, Mr. Parker, I show you what I have had marked as General Counsel's Exhibit 6(a)(74).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(74) for identification.)

Q (By Mr. Williamson) And ask you if you have seen that card before, sir? A Yes.

MR. HAMLIN: May I see the card, sir?

TRIAL EXAMINER: What is the answer?

THE WITNESS: Yes, sir.

[fol. 812] Q (By Mr. Williamson) Can you tell us whose signature in on the card?

MR. HAMLIN: Objection.

THE WITNESS: The one who filled it out or the one who signed it?

TRIAL EXAMINER: Did you see anybody sign that card?

THE WITNESS: Yes. I seen my wife fill in every bit of it.

TRIAL EXAMINER: I don't know why you have to ask leading questions.

MR. WILLIAMSON: My questions aren't leading.

Q (By Mr. Williamson) Who filled out the card? A My wife.

Q All right, can you tell us the circumstances under which you wife came to fill out that card. A Well, we were setting on the back porch.

Q Now who is we? A Me and my wife and Tony. And I gave him this card, and he looked at it a few minutes, and he handed it back to my wife and told her to fill it out; and he said that if she need to know anything to ask him questions, and he was sitting on one side of her and I was sitting on the other, to fill it out and give it back to him; and she filled it out and gave it back to him.

Q All right, do you remember approximately when [fol. 813] this was? A Pretty well in the summer time, September, somewhere along in there, I won't say for sure, but it was in the summer time.

Q Was your brother working at General Steel when this occurred? A Yes, sir.

* * * * *

Q (By Mr. Williamson) About how long after you signed your card would you say this incident with your brother happened in connection with your card? A I won't say for sure but I would say about a month.

* * * * *

[fol. 814] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * * *

A When I first gave it to him, he looked at it and laughed a little bit and said, "There are a lot of words here I can't read." And she read it off to him, and he said, "Go ahead and fill it out."

[fol. 815] Q She read it off to him? A Yes.

Q Can your wife read? A Yes, good.

Q Your brother cannot read? A He can read a little, about like I can.

Q And you don't know whether this card was dated at the time or not? A Yes, sir.

Q How do you know whether it was dated or not? A I set beside of her and watched her fill it out.

* * * *

[fol. 818] BOBBY LLOYD

was called as a witness by and on behalf of the General Counsel and after having been first duly affirmed, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address and speak up loud, please.

THE WITNESS: Bobby Lloyd, 291 A, Sophia, North Carolina.

* * * *

[fol. 821] Q (By Mr. Williamson) Mr. Lloyd, do you know Mr. Jack H. Roshier? Or Rozier? A Yes.

TRIAL EXAMINER: How do you spell his name?

[fol. 822] MR. WILLIAMSON: R-o-z-i-e-r.

MR. HAMLIN: What was the question?

(Question read.)

Q (By Mr. Williamson) Has Mr. Rozier ever worked at General Steel?

TRIAL EXAMINER: Doesn't the list establish it?

MR. WILLIAMSON: Sir?

TRIAL EXAMINER: The list establishes it, doesn't it?

MR. WILLIAMSON: I just wanted to tie it in.

TRIAL EXAMINER: All right.

Q (By Mr. Williamson) Did Mr. Rozier work there in July of last year? A Yes.

Q And did he work there in August of last year? A Yes.

Q Did you see Mr. Rozier on the job? A Yes.

Q I show you a card.

MR. HAMLIN: May I see it?

Q (By Mr. Williamson) As General Counsel's Exhibit 6(a) (76) and ask you if you can identify that card.

(The documents above-referred to was marked General Counsel's Exhibit No. 6(a) (76) for identification.)

A Yes.

Q (By Mr. Williamson). What is that card?

[fol. 823] MR. HAMLIN: Object.

TRIAL EXAMINER: Sustained.

A It is a union card.

MR. HAMLIN: Objection.

TRIAL EXAMINER: Sustained.

Q (By Mr. Williamson) Where have you seen that card before, sir? A I saw it at the union meeting.

Q Did you observe anyone put a signature on that card? A Yes. He did.

Q Who is that, sir? A Jack Rozier.

Q Did he do this in your presence? A I was sitting right next to him when he signed it.

Q Do you know whether or not be read the card before he signed it? A I don't recall that he read it at the moment, you know, I wasn't paying attention to him, but everything was explained at the meeting.

Q Did anyone read the contents of the card at this meeting? A Mr. Ted Davis.

Q Was Mr. Rozier present when Mr. Davis read that Card? A Yes, sir.

* * * *

[fol. 826] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 829] Q And you wouldn't know for sure wether the card he signed there in your presence is the very same card that has been presented to us here, would you? A I saw him when he turned it in.

Q Similar to this? A It was just like it. He turned it in.

* * * *

Q Mr. Davis had told you that you would get a chance [fol. 830] to vote on this matter and that you could vote either way? A If the company forced us into an election.

Q And you could vote either way? A My understanding when I signed the card—

Q Not your understanding, I am asking you what Mr. Davis said. A What do you mean, that you could vote either way?

Q Yes. A If there was an election, we could.

* * * * *

[fol. 831] PAUL WIDENER

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Widener, would you state your name and address for the record, please. A Paul Widener, 502 White Oak Street, High Point.

Q Mr. Widener, were you ever employed, were you an employee of General Steel Products in August of 1964? A Yes, sir.

Q Were you employed there during the month of July, 1964? A Yes, sir.

Q What was your job? A Bed assembler.

Q Mr. Widener, I show you General Counsel's Exhibit marked for identification Number 6(a) (77).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (77) for identification.)

Q (By Mr. Cowherd) And ask you if you can identify that card? A Yes.

Q Is that your signature on that card? A Yes, sir.

[fol. 832] Q Did you read the card before you signed it? A Yes, sir.

Q Did you fill out the card? A Yes, sir.

Q Did you date the card at the same time you signed it? A Yes, sir.

MR. HAMLIN: May I see the card, please, sir?

MR. COWHERD: We offer General Counsel's Exhibit marked 6(a) (77) into evidence.

Q (By Mr. Hamlin) Mr. Widener, did someone come to see you about this? A Yes.

Q And ask you to sign? A Yes.

Q Who was that? A Mr. Davis.

Q Where did he come to see you? A He came to my home, I lived on Wren Street then.

Q And was this on the same date that you signed the card? A Yes.

Q Did Mr. Davis tell you that the purpose of signing cards was just to get an election or something to that [fol. 833] effect ? A He said that they were trying to get an election in, to have a vote at General Steel. That is what he told me about it.

Q Did he go on to tell you that you could vote either way in this election? A Yes.

Q Did he tell you that signing a card didn't mean that you had to register your vote for the union? A Yes, sir.

TRIAL EXAMINER: I don't quite understand that question now, Mr. Hamlin, "Register a vote for the union"?

MR. HAMLIN: Yes.

TRIAL EXAMINER: You mean at an election?

MR. HAMLIN: I will ask a further question.

TRIAL EXAMINER: Yes.

Q (By Mr. Hamlin) He told you, did he not, that signing this card didn't necessarily mean that you were supporting the union? A That's right.

Q Did he tell you that your card would be kept confidential except for getting an election?

MR. COWHERD: Objection.

TRIAL EXAMINER: Sustained.

* * * *

[fol. 834] Q (By Mr. Cowherd) Mr. Widener, what was it exactly, sir, that Mr. Davis told you when you signed the card? A If I can remember, he was talking about trying to get a vote in, get an election down at the plant.

Q Well, sir, did he tell you that it was only for the

purpose of an election? A He didn't put it that way. He said that they were trying to get an election in, that's all.

MR. HAMLIN: I have one or two more.

FURTHER VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) But he did tell you that signing a card didn't mean that you were supporting the union? A He didn't say anything about that.

Q He did explain to you that signing a card did not mean that you were agreeing to support the union? A He didn't make it sound that way.

* * * *

TRIAL EXAMINER: Did you read the card before you signed it?

THE WITNESS: That's right.

[fol. 835] TRIAL EXAMINER: Did you understand it?

THE WITNESS: Pretty well, yes, sir.

* * * *

JOHNNY GIBSON

was called as a witness by and on behalf of General Counsel and, after having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Williamson) Will you state your name and address for the record, please. A Johnny Gibson, 300 West Main Street, Thomasville, North Carolina.

Q Mr. Gibson, did you ever work for the General Steel Company? A Yes, sir.

Q Are you working there now? A Yes, sir.

Q Did you work there during the year 1964? A Yes, sir.

[fol. 836] Q Did you work there during the entire year of 1964? A Yes, sir.

* * * *

[fol. 840]

FURTHER REDIRECT EXAMINATION.

Q (By Mr. Williamson) Mr. Gibson, do you know an individual by the name of John Wesley McCarter? [fol. 841] A Yes, sir.

Q Does he work at General Steel? A He did back last summer. I think he has quit now, I don't know; I don't know where he is right now.

Q I show you what has been marked as General Counsel's Exhibit 6(a) (79) purporting to be an authorization card for the Upholsterers' International Union—

MR. HAMLIN: We object to the characterization. May I see it before it is shown to the witness?

MR. WILLIAMSON: May I have the witness identify it and then I will show it to him?

TRIAL EXAMINER: Yes.

MR. MARTIN: He is identifying it himself.

TRIAL EXAMINER: Show him the card. There is no need for him to describe it.

THE WITNESS: Yes, sir, I remember it.

MR. HAMLIN: May I see the card?

MR. WILLIAMSON: You may now see the card.

TRIAL EXAMINER: Is this John W. McCarter, is that who you are talking about?

MR. WILLIAMSON: Yes.

Q (By Mr. Williamson) Where have you seen that card before, Mr. Gibson?

MR. HAMLIN: I didn't understand that he had said that he had seen it.

[fol. 842] Q (By Mr. Williamson) Have you seen the card before? A Yes, sir.

Q When was that, sir? A Out in the parking lot in George O'ham's car. Mr. Carter went out, and he asked me if I had any cards, and I said, "George O'ham has them in his car"; and George O'ham gave me permission—

MR. HAMLIN: Objection to recital of conversation with other people.

THE WITNESS: And I saw—

TRIAL EXAMINER: Would you read back what you have got so far, Miss Reporter.

(Record read.)

Q (By Mr. Williamson) Was Mr. O'ham there with you and Mr. Carter? A Yes, sir, he was sitting in the car.

Q All right, go ahead. A And Mr. McCarter read the card.

MR. HAMLIN: Objection to his conclusion that he read it.

MR. WILLIAMSON: Mr. Examiner, I think that is the sort of thing that a lay witness can testify to.

TRIAL EXAMINER: Overruled.

Q (By Mr. Williamson) Go ahead, sir. A I asked him to read it, and it appeared to me that he appeared to be reading it, and then he filled it out himself.

[fol. 843] Q Did he fill that card out in your presence? A Yes, sir.

Q What did he do with the card after he filled it out? A We left it with George O'ham and he turned it in.

MR. WILLIAMSON: All right, we don't insist on that last.

MR. HAMLIN: I understand the last may go out.

TRIAL EXAMINER: What O'ham did with it?

MR. WILLIAMSON: Yes.

TRIAL EXAMINER: All right, what O'ham did with it may go out.

Q (By Mr. Williamson) When did this happen? A It was around July.

Q Of what year? A '64.

[fol. 847] MR. HAMLIN: In 2491. The amended Paragraph 6 of the Complaint had two additional foremen, do you see the list there? Two additional supervisors identified as foremen, alleged supervisors, Richard Davis and Robert Simpson. We acknowledge that Richard Davis became a foreman on 9-23-64, and that Robert Simpson was a foreman at all times relevant in the complaint.

* * * *

[fol. 854] GEORGE HAROLD ORR

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: George Harold Orr, Archdale, Post Office Box 4064.

* * * *

[fol. 870]

FURTHER DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Orr, I show you General Counsel's Exhibit 6(a) (83) for identification.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (83) for identification.

Q (By Mr. Cowherd) And ask if you can identify that card. A Yes, sir.

Q And whose signature is on that card?

MR. HAMLIN: Objection.

TRIAL EXAMINER: If he knows.

A I am not sure about the signature there, but I believe it is the same boy that filled out, I would say it is Jimmy Monroe's I would say.

Q (By Mr. Cowherd) Mr. Orr, were you present when Mr. Monroe signed this union authorization card? A Yes, sir.

[fol. 871] MR. HAMLIN: Objection.

Q (By Mr. Cowherd) Or signed that exhibit number?

MR. HAMLIN: Objection.

A Yes, sir.

TRIAL EXAMINER: He may answer. The answer is in. The answer may stand.

Q (By Mr. Cowherd) Will you tell us the circumstances under which Mr. Monroe signed that card. A Me

and Mr. Napolean Brown went to his home, I knew the boy, and I saw I called him out, and we talked; and he took a card and read it; and he said, yes, he was interested in it; and so he took a card and signed it.

Q And you were present the whole time? A Yes, sir.

TRIAL EXAMINER: Just a moment. May I see Trial Examiner's Exhibit 1, please?

MR. COWHERD: May I proceed?

TRIAL EXAMINER: Go ahead.

Q (By Mr. Cowherd) Did Mr. Monroe fill out a whole card? A All of this writing on here he did.

Q What date did this occur on? A The seventh month, the second of '64, I believe it was, I am not sure of that.

Q What did Mr. Monroe do after he signed this card? A Well, he got out of the car and went back in his home.

[fol. 872] Q Did he take the card with him? A No, sir, he left it with Mr. Brown.

* * * *

[fol. 873] TRIAL EXAMINER: I show you this card, General Counsel's 6(a) (83). Are you sure that that was the card that Mr. Monroe signed?

The Witness: Yes, sir, this is the card.

* * * *

[fol. 901] JACK ROZIER

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Have a seat, and state your full name and address for the record.

THE WITNESS: Jack Rozier, Route 5, Box 311, High Point, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Rozier, I show you General Counsel's Exhibit Number 6(a) (76) marked for identification and ask you if that is your signature? A Yes.

MR. COWHERD: No further questions.

* * * *

[fol. 910] LARRY W. ROBINSON

resumed the stand and testified, further as follows:

TRIAL EXAMINER: Mr. Robinson, you are still under the same oath that you took before.

THE WITNESS: Yes.

DIRECT EXAMINATION RESUMED

Q (By Mr. Cowherd) Mr. Robinson, I show you General Counsel's Exhibit marked for identification Number 6(a)(87) and ask you if you can identify that card. A [fol. 911] Yes, sir.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(87) for identification.)

Q (By Mr. Cowherd) Whose signature appears on that card?

MR. HAMLIN: Objection unless he knows.

A Floyd Douglas Coe.

TRIAL EXAMINER: Did you see anybody sign that card?

THE WITNESS: Yes, sir, Floyd Douglas Coe.

Q (By Mr. Cowherd) Do you know Mr. Coe? A Yes, sir.

Q Is that his signature on the card?

MR. HAMLIN: Objection.

TRIAL EXAMINER: Objection sustained.

Did you see anybody sign that card? Coe.

THE WITNESS: Yes, sir.

* * * *

Q Did he read the card before he signed it? A I read the card to him.

Q You did? A Yes, sir.

Q Do you know where Mr. Coe is now? A He lives in Columbus, Georgia. That is all I know.

* * * *

[fol. 918] Q (By Mr. Cowherd) Mr. Robinson, do you know Larry Leon Robinson? A Yes, sir.

Q Is he any relation to you? A Yes, sir.

Q What is that? A He is my cousin.

Q Does he now work or did he work at General Steel Products Company? A He is still employed there I understand.

Q Did you or did you not give him a union organiza-
[fol. 919] tion card? A I did give him a union authorization card.

Q Can you tell us the circumstances of how you came to give him the card. A Well, I knew that he wanted one.

MR. HAMLIN: Objection.

Q (By Mr. Cowherd) Don't tell us what you know, but what happened, the circumstances. A It was July 23, I believe, I am not sure; the shipping office at supper time when I give him the card. And I presume he looked at it.

MR. HAMLIN: Objection.

TRIAL EXAMINER: Objection sustained.

Q (By Mr. Cowherd) What did he do? A I gave him the card, he read the card, and he signed it, and gave it back to me.

MR. HAMLIN: Objection.

Q (By Mr. Cowherd) Was he looking at the card? A Yes, sir.

TRIAL EXAMINER: Objection overruled.

Q (By Mr. Cowherd) Now can you tell us what was said? What did you tell him? A Well, I gave him the card and I told him that he would be represented by the union, and I wanted him to read it; and so he signed it, and gave it back to me.

[fol. 920] TRIAL EXAMINER: And then what happened?

THE WITNESS: After he signed the card—

TRIAL EXAMINER: After you gave him the card, and then what you told him, and then what happened?

THE WITNESS: He held it out in front of him like this, like he was reading it; and then he signed it, and filled it out and signed it; and gave it back to me.

TRIAL EXAMINER: I take it that this is with respect to GC (a) (54)?

MR. COWHERD: Yes.

Q (By Mr. Cowherd) I show you General Counsel's Exhibit marked 6(a) (54) and ask you if this is the card that was given back to you? A Yes, sir.

* * * *

[fol. 921] Q (By Mr. Cowherd) Mr. Robinson, I show you General Counsel's exhibit marked for identification number 6(a) (88) and ask you if you can identify that card. A Yes, sir.

Q Were you present when that card was filled out? A Yes, sir, I was.

Q Did you see the person on that card fill it out? A Yes, sir.

Q Did he fill it out entirely? A No, sir, I put the date.

MR. HAMLIN: May we have the name, sir?

MR. COWHERD: If I asked him the name, you would object.

Q (By Mr. Cowherd) Now, sir, whose signature appears on the card? A Dan T. Coe.

Q Is that the person who signed the card? A Yes, sir, it was.

[fol. 922] Q In your presence? A Yes, sir.

Q Did he read the card before he signed it? A Yes, sir, he did.

* * * *

Q (By Mr. Cowherd) Is Dan T. Coe an employee of General Steel Products now? A Yes, sir. I mean, no, sir.

Q Was he ever employed at General Steel Products? A Yes, he was.

Q And when was this? A He came to work after vacation time last year; I believe it was July 6; maybe two or three weeks after that.

[fol. 923] Q (By Mr. Cowherd) Two or three weeks after that, he did what? A He came to work for General Steel.

Q What? A I say a couple of weeks after that, a couple of weeks after vacation, June 6 or July 6.

TRIAL EXAMINER: He came to work at that time?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: All right.

Q (By Mr. Cowherd) Was he an employee there during the month of August? A Yes, sir.

Q Was he employed there—well, you have testified to that. Do you know where he is now? A No, sir.

* * * *

[fol. 925] (By Mr. Hamlin)

Q And you had not seen it since then until you went to this stand, is that right? A That's true, yes, sir.

Q Are you telling us that you did not meet with counsel who are pressing this case to find out whether you could identify this card or not? A I know the date that I signed—

TRIAL EXAMINER: That is not the question. Did [fol. 926] you talk to either of those gentlemen sitting on the other side of table there, these two lawyers sitting right here in front of you?

THE WITNESS: No, sir, I have never talked to those two lawyers about those cards.

* * * *

Q (By Mr. Hamlin) Do you know that he left the High Point area? A All I know is that he left General Steel and I haven't seen him since.

* * * *

[fol. 928] Q Mr. Robinson, I show you General Counsel's Exhibit marked for identification 6(a)(89) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(89) for identification.)

A Yes, sir.

Q (By Mr. Cowherd) Were you present when that card was filled out? A Yes, sir.

[fol. 929] Q Who signed it? A Curtis Benson.

Q Did he read the card before he signed it?

MR. HAMLIN: Objection.

TRIAL EXAMINER: Did you see whether he read it or not?

THE WITNESS: Yes, sir, he read the card.

MR. HAMLIN: Objection to his conclusion. He can describe what he saw.

TRIAL EXAMINER: Well, describe what you saw at the time—

THE WITNESS: He read the card aloud. I asked him to. He read the card aloud before he signed it.

TRIAL EXAMINER: Go ahead.

Q (By Mr. Cowherd) And did he fill out the whole card? A Yes, he did.

Q And was he working at the plant at the time he signed the card? A Yes, sir, he was.

Q And what was his job, do you remember? A He was a spring up man, a bed assembler.

Q And when was it that he signed the card? A It was July 9.

Q Now describe to us how it came to be that he signed the card, did you give it to him? A I give him the card, I told him that it was a union authorization card for the [fol. 930] union to represent him, and I gave him this card for him to read, and he read it aloud, and filled out the card, and signed his name, and gave it back to me.

Q Do you know where Mr. Benson is now? A No, sir, I don't.

* * * *

[fol. 932] Q (By Mr. Hamlin) Mr. Robinson, before this card was put before you on the stand, when was the last time you had seen it? A In January when this fellow and me discussed the cards.

MR. COWHERD: Let the record reflect that he is pointing at Mr. Cowherd.

Q (By Mr. Hamlin) Then you had been shown these cards in January? A That's right.

Q Including the other cards that we have referred to? A Yes, sir.

Q And you had discussed them with Mr. Cowherd? A Yes, sir.

Q And had you not also discussed these cards and seen these cards since we have been in session up here in this court room? A No, sir, I sure haven't.

* * * *

[fol. 933] GEORGE O'HAM

resumed the stand and testified further as follows:

DIRECT EXAMINATION

Q (By Mr. Williamson) State your name and address for the record. A George W. O'Ham, 815 Willow Place, High Point.

[fol. 936]

FURTHER DIRECT EXAMINATION

Q (By Mr. Williamson) I show you what has been marked, General Counsel's Exhibit marked for identification, Number 6(a)(91) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(91) for identification.)

A Yes, I can.

Q (By Mr. Williamson) Do you know who filled that card out? A Kelly Smith.

* * * *

[fol. 937] Q (By Mr. Williamson) Did you ever give Mr. Kelly Smith a union card? A I did not hand it to him. I told him where he could get one.

Q You told him where he could get one. Where did you tell him that he could get one? A In the front seat of my car.

Q All right, sir, do you know whether or not Mr. Smith got a union card out of the front seat of your car? A Evidently he did because he brought it—

MR. HAMLIN: Objection.

TRIAL EXAMINER: Objection sustained.

Q (By Mr. Williamson) Did Mr. Smith ask you for a card? A Yes, sir, he had asked me for one.

[fol. 938] Q And what did you tell him? A I told him that there was one in my car if he wanted to get it.

Q All right, now, did you have occasion to see Mr. Smith at any subsequent time after that? A Yes, sir, I saw him a time or two after that. He brought the card to me.

Q Did he hand you the card? A Yes, sir, he handed me the card.

Q And is the marked, the card I have marked as GC 6(a)(91), is that the card that he handed to you? A Yes, sir, that is the card.

Q Was there any conversation between the two of you when he handed you the card? A I asked him if he had read and signed it.

MR. HAMLIN: Objection to the hearsay.

TRIAL EXAMINER: You may answer.

Q (By Mr. Williamson) Answer the question. A I asked him if he had read the card and he said, "Yes."

MR. HAMLIN: Move to strike.

TRIAL EXAMINER: Motion denied.

THE WITNESS: I said, "Did you sign it?"

And he said, "Yes." I took the card, looked at it, and put it in my pocket.

MR. HAMLIN: I move to strike the answer and the question whether he signed it.

[fol. 939] TRIAL EXAMINER: Motion denied.

Q (By Mr. Williamson) Do you remember the date Mr. Kelly handed you the card on? A It was one day after the card was signed; if I am not mistaken, it already has the date on it; 7-22; I am not positive, '64; which would be July the 22nd. I am not positive without looking at the card but I think that it was 7-22.

Q When Mr. Smith got the card from you, Mr. O'ham, or asked you for it, did you have any conversation with him at that time about the union?

MR. HAMLIN: Objection.

TRIAL EXAMINER: He may answer.

A Not at the time.

Q (By Mr. Williamson) Did you have a conversation with him on the subject of the union at any time prior to the time he handed you General Counsel's Exhibit 6(a)(91)?

MR. HAMLIN: Objection.

A Yes.

TRIAL EXAMINER: Overruled.

Q (By Mr. Williamson) Where did you have that conversation? A At my home.

Q And who was present? A My son.

[fol. 940] Q Was Mr. Smith present? A Yes. Mr. Smith was there talking to my boy and I was talking to him about the union.

Q All right, tell what was said between you and Mr. Smith on that occasion?

MR. HAMLIN: Objection.

TRIAL EXAMINER: Was this before or after?

MR. WILLIAMSON: This was before the card was handed back to Mr. O'ham. He is, however, unclear as to whether or not the card had been signed.

TRIAL EXAMINER: He may answer.

MR. HAMLIN: Objection.

TRIAL EXAMINER: Overruled.

A He was there talking to my boy about trading automobiles, and when I went out the back door to see who was out there, I had just started to call my boy to supper; he asked me about a union card and I said, "Year, I don't have any now"; and then I asked him if he understood anything about it; and he said, "Yes"; I said, "well"; I said; we discussed it a little bit and it seemed he did understand it.

Q All right, tell what the substance of your discussion was. A Well, he wanted—

MR, HAMLIN: We object.

TRIAL EXAMINER: You may answer.

[fol. 941] THE WITNESS: Well, he wanted to know if signing the card was joining the union or just what effect it would have; I said, "As far as I know, you are joining the union"; I said, "That is what the cards have on the card." And that is why I told him to read the card again, if he got the card from me, so that he would understand; that is the reason.

Q (By Mr. Williamson) What reply, if any, did he make to these statements on your part? A He said he would read the card and be sure that—

* * * *

[fol. 942] Q (By Mr. Hamlin) Who wrote the words "General Steel" on this card, Mr. O'ham? A I asked Kelly Smith why the two different colored inks and he said, "I broke my pen." That is the only answer he gave me.

Q You are testifying that "General Steel" was on there when it was handed back to you? A That's right.

Q What did you do with this card? A I turned it in to Mr. Davis.

* * * *

[fol. 944] Q (By Mr. Williamson) Do you know Mr. Theron B. Williamson, Mr. O'ham? A Yes, sir, I do.

TRIAL EXAMINER: What number is that? Here, I can tell you. It is Number (67), all right.

Q (By Mr. Williamson) Do you know whether or not [fol. 945] Mr. Williamson signed an authorization card for the Upholsterers'—

MR HAMLIN: Objection.

TRIAL EXAMINER: You may answer yes or no.

THE WITNESS: Yes, sir.

Q (By Mr. Williamson) Were you present, sir? A Yes, sir.

Q Did you read the card to him before he signed it?

MR. HAMLIN: Object to the leading.

MR. WILLIAMSON: I don't know how else to ask him the question in common, ordinary, every-day English.

TRIAL EXAMINER: The objection is overruled.

THE WITNESS: Yes, sir, I read the card to him.

* * * *

[fol. 949] TRIAL EXAMINER: Well, as I say, just gathering from the general nature of your conversation and the correspondence that I have had with the counsel for the Respondent with respect to the issuance of subpoenas, I take it that you are now talking about the subpoenas which were issued directed to the Regional Director, is that correct?

[fol. 950] MR. COWHERD: Correct.

TRIAL EXAMINER: Well, what is your position on that?

MR. COWHERD: Well, we received one of them this morning directed to the Regional Director asking for all union authorization cards deposited with the Regional Director by Upholsterers' International Union of North America, AFL-CIO, on or about August 14, 1964, in connection with the petition for election in the above-entitled case.

* * * *

[fol. 951] MR. HAMLIN: We think that among the cards which General Counsel will offer in evidence that there are cards which were not dated concurrently with the signing, and that these additional cards which were deposited with the Regional Director as purportedly supporting this Petition will have among them cards that are obviously post-dated; people who weren't in the plant or working there at the time; and that is the best way I [fol. 952] know to investigate the question of whether there were cards deposited with the Board bearing a date different from the actual date of signing.

MR. COWHERD: We again say that it is irrelevant as we are not relying on these cards; and I might add that the cards that we have in our possession that were dated prior to the Petition are people who are not on the list supplied by the Company; and that was the criterion which we decided a relevant card was, the list that was supplied by the Respondent. If the name was not on there, and we had a card signed by that employee, by an employee who was not on the list, we did not intend to use it, we do not intend to use it.

MR. HAMLIN: But if there are among those cards, cards which bear a date when the man was unemployed by the company; in other words, obviously post-dated cards, they will cast doubt on the dating of all of those cards. Now obviously they are not going to put in evidence any card of a man who was not still working at the plant on the date of the Petition. Now apparently they have, in off-the-record discussions I have had indications that they do have numerous cards which don't appear on this list but which were deposited by the Union in support of this petition.

MR. COWHERD: Well, it is quite possible that the employees who signed those cards were either quit, discharged, and who are not working there; and that is—

[fol. 953] MR. HAMLIN: It bears on the Union's good faith, and the date that these cards bear may impeach the entire process.

MR. COWHERD: Well, I don't see where the Union's good faith has much to do with it. It is not a real issue in the case.

TRIAL EXAMINER: Well, where do we stand at the present moment then? What is it? I don't know what is pending before me.

MR. COWHERD: What is pending before you? Whether or not this subpoena, as stated here, is relevant.

TRIAL EXAMINER: Well, are you moving to quash?

MR. COWHERD: We are moving to quash the subpoena.

MR. HAMLIN: On the grounds that you have just stated?

MR. COWHERD: On the grounds that I have just stated, irrelevant, irrelevancy; it is too broad.

TRIAL EXAMINER: Well, I think that I, for the reasons stated by the General Counsel, and I am relying upon his statement that he will introduce into evidence all of the cards which he claims were signed on or before the date of the demand, and whose names appear on the list of employees supplied by the Company; and I understand that you are going to do that.

MR. COWHERD: That we intend to do.

TRIAL EXAMINER: The Motion to Quash will be granted.

[fol. 954] MR. HAMLIN: Exception.

* * * *

[fol. 957] JOE DILLS

was called as a witness by and on behalf of the General [fol. 958] Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Speak up loud, and give us your full name and address.

THE WITNESS: Joe Dills, 106 Oakwood Street.

TRIAL EXAMINER: Your next number will be 92; 6(a)(92).

MR. COWHERD: This card has already been marked as 6(a)(20).

TRIAL EXAMINER: 6(a)(20).

MR. COWHERD: He was called but he wasn't here.

TRIAL EXAMINER: Wait a minute. That's right.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Dills, have you ever been an employee of the General Steel Products Company? A Yes.

Q Did you work there during the month of August, 1964? Did you work there in July of 1964? Answer the question yes or no. A Yes.

Q Did you work there in August, 1964? A Yes.

Q Did you work there in July, 1964? A Yes.

Q And who was your foreman during those months? A I think it was; yeah, it was Reynold Potts.

[fol. 959] Q Mr. Potts? A Yes.

Q What department did you work in, what was your job? A 22, Press Operator.

Q Mr. Dills, I show you General Counsel's Number 6(a)(20) and ask you if you can identify that card. A Yes, sir.

Q Is that your signature, sir? A Yes.

Q Did you read the card before you signed it? A Yes.

Q And what date did you sign the card on? A I don't know exactly what date.

MR. HAMLIN: I object to leading him by showing him the card.

MR. COWHERD: I am refreshing his recollection. It is on the card.

MR. HAMLIN: If he put it there, then we would not object.

MR. COWHERD: I am going to ask him the question.

MR. HAMLIN: All right, sir.

Q (By Mr. Cowherd) Did you fill out the whole card yourself? A Yes, sir.

Q The date on there, did you write that in yourself or did someone else do it for you? A This date right here?

[fol. 960] Q Right there. A No, I didn't write that date in.

Q Well, who was present when you filled out your card? A I don't remember.

Q Do you recall anyone putting the date on for you? A No.

Q Looking at the date on the card, does that represent the approximate date that you signed the card?

MR. HAMLIN: Objection.

TRIAL EXAMINER: Do you remember approximately when you signed the card?

THE WITNESS: It was approximately this time right here the best I can remember.

TRIAL EXAMINER: You mean the time indicated on the card?

THE WITNESS: Yes.

MR. COWHERD: I offer General Counsel's Exhibit marked 6(a)(20) into evidence.

(The document above-referred to was marked General Counsel's Exhibit 6(a)(20) for identification.)

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Dills, you did not put that date on yourself? A No.

[fol. 961] Q And it was not put on in your presence, was it? A I don't remember whether it was or not.

Q About what time of year did you sign this card, sir? A The first time that the union tried to go in before the last election.

Q Was that back in the fall and winter? A I think it was a little bit before Christmas.

TRIAL EXAMINER: Well, now, just a minute, what were you referring to? The election or when he signed it?

MR. HAMLIN: I am referring to when he signed it, a little bit before Christmas.

Q (By Mr. Hamlin) Of what year now, do you know? A 1964.

Q When was it with reference to your moving into the new plant? A What?

Q Was it before you moved into the new plant? A No.

Q Was it shortly after you moved into the new plant? A Yes.

MR. HAMLIN: May the record show that this card bears a date, 7-21-64.

Q (By Mr. Hamlin) Mr. Dills, did Mr. Ted Davis here come to see you about signing this card? A Him?

[fol. 962] Q Yes, this gentleman here. A Yes.

Q Was anybody else with him? A I think there was two.

Q Before you signed this card, did you tell Mr. Davis that this did not necessarily mean that you were voting for the union?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Well, it seems to me in this line of examination, what we are trying to find out, and I assume that this is what you are trying to establish is what was told this employee at the time that the cards were signed.

MR. HAMLIN: Or what he told them if it also represents an understanding between the parties.

TRIAL EXAMINER: That's right.

MR. WILLIAMSON: I withdraw that objection.

TRIAL EXAMINER: All right.

Q (By Mr. Hamlin) Did you, before you signed this card tell Mr. Davis that signing the card didn't necessarily mean that you were voting for the union? A Yeah, I told him that.

Q Did you ask Mr. Davis if your card would be kept secret? A Yes.

Q What did Mr. Davis tell you about that? A He told me that nobody would know about it.

[fol. 963] Q Did he tell you that nobody but the Labor Board would know about it? A Yes.

* * * *

[fol. 964] WILLIAM WARD

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your name and address and speak up loud and clear, please.

THE WITNESS: William Ward, 304 Phillips Street, Thomasville.

MR. COWHERD: I would like to have this marked for identification as General Counsel's Exhibit Number 6(a) (92) for identification.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (92) for identification.)

[fol. 965] DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Ward, were you employed at General Steel or Crown Flex of High Point during the month of August, 1964? A Yes, sir, I was.

Q And what was your job? A Spring Up Department. I had different jobs. We would run core machines part of the time, and loop machines, and springing up beds part-time.

Q And who was your foreman? A Ed Cecil.

Q I show you General Counsel's Exhibit marked for identification marked number 6(a) (92) and ask you if you can identify that card, please. A I sure can.

Q Is that your signature? A Yes, it is.

Q Did you read the card before you signed it? A Yes, I did.

Q And did you fill out the whole card yourself? A I did, I sure did.

Q And did you put the date on there? A I sure did.

MR. COWHERD: I offer General Counsel's marked 6(a) (92) into evidence.

[fol. 966] VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Ward, who put the date on this card? A I put it on.

Q You are testifying that that date is also in your handwriting?

TRIAL EXAMINER: The answer is yes.

A Yes.

Q (By Mr. Hamlin) Who approached you about signing the card and asked you to sign the card? A Well, actually no one did. I heard some of them talking about it around the plant; no one seemed to have a card, an extra card. I went up and got the card myself.

Q Where did you go to get the card? A I went up to see Mr. Davis and Mr. Brown.

* * * *

[fol. 967] Q (By Mr. Hamlin) Did they tell you that this was just to get an election? A Well, I don't remember exactly about that. There were some of us that wanted a union to represent us. I was one of them.

Q Did they tell you anything to the effect that this was to get an election? A Oh, yes, he told me it was to get an election.

Q Did he tell you that you could vote either way in the election? A Yes, sir, he sure did.

Q Did he tell you that by signing this card that you were not necessarily registering a vote for the union? A Yes, sir.

Q Did he tell you that this card would remain confidential or secret except for showing it to the Labor Board? A I think they did, I am not sure. I am not too sure about that.

* * * *

[fol. 968] THOMAS RAY HAIRE

was called as a witness by and on behalf of the General Counsel and after having been first duly sworn was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: Thomas Ray Haire, 210 Harding Street.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Haire, were you employed at General Steel Products during the month of August, 1964? A Yes.

Q Were you employed there during the month of July, 1964? A Yes.

Q What was your job, sir? A Working on bed assembly.

Q Speak up loud and clear. A Worked on bed assembly.

Q Who was your foreman? A Bob somebody, I don't know his last name.

Q Sparks? A No, Bob.

Q What department were you in, do you recall? A [fol. 969] I believe it was three, I don't remember now. I don't know what department that was.

TRIAL EXAMINER: Speak up louder.

THE WITNESS: I don't remember what department that was.

Q (By Mr. Cowherd) Mr. Haire, I show you General Counsel's marked for identification Number 6(a)(93).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(93) for identification.)

Q (By Mr. Cowherd) And ask you if you can identify that card. A Yes.

Q Is that your signature on that card? A Yes.

Q Did you fill out the whole card? A No.

Q What part did you fill out? A Just signed it.

Q Just signed it? Did you read the card before you signed it? A No.

Q Was it read to you? A Yes.

Q Who read it to you? A Mr. Brown.

Q Did he fill out the rest of the card for you?

[fol. 970] MR. COWHERD: "I do hereby designate and authorize the Upholsterers' International Union of North America, AFL-CIO and its representatives to act as my representative for the purpose of collective bargaining with respect to rates of pay, wages, hours, of employment and other conditions of employment."

Q (By Mr. Cowherd) Now does that refresh your recollection as to what was read to you at the time you signed the card? A Yeah, he read what was on the card.

Q Is that what he read? A Yes.

Q What I read to you? A Yeah, before I signed the card.

Q Now do you recall approximately the date that you signed the card? A I think it was in July. I don't remember the exact date.

Q What year? A 1964.

MR. COWHERD: I offer General Counsel's Exhibit 6(a) (93) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) You say that the only writing on this card that you did was to write your name? A Yes.

Q And anything else on here has been put in here by [fol. 971] somebody else? A Yeah, but I was there when he put it there and I know what he put down on there.

Q Well, what was put down on here? A He just filled it out and I just signed it; and he read to me what he put on there.

Q And he filled it out first and then you signed it? A Yes.

Q And where did this happen? A I lived at 1517 Tyre Avenue.

Q And who came to see you there about this? A Mr. Brown.

Q Was anybody with him? A Yes, sir.

Q Was Mr. Kaiser with him? A No. It wasn't 'nary one of them.

Q I beg your pardon. A It wasn't 'nary one of them.

Q I see the initials GBK on the back of this card. They don't mean anything to you? A No.

Q There was somebody else with Mr. Brown but not one of these gentlemen? A There was somebody with him but not one of them.

Q All right, did Mr. Brown or the man with him tell

you that the purpose of these cards was just to get an [fol. 972] election in the plant? A No, he didn't.

Q Did they tell you that there would be an election and that you would be entitled to vote either way? A He said that there would be an election and you could vote however you wanted to.

Q Did he tell you that by signing this card that you weren't necessarily agreeing to vote for the union? A No, he didn't say I wouldn't vote for the union. I just signed the card for the union to represent me, whenever it got in.

* * * *

[fol. 987] BILLY JACK FOWLER

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: Billy Jack Fowler, Clinton Street, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Fowler, were you an employee of General Steel Products Company in the month of August, 1964? A Yes, sir.

Q Were you employed at General Steel Products Company during the month of July, 1964? A Yes.

Q What was your job, sir? A Utility man, set up machines; get out parts.

Q And who was your foreman? A Ray Fulp.

Q I show you, Mr. Fowler, General Counsel's Exhibit marked for identification Number 6(a)(95) and ask you if you can identify the card, please. A Yes, sir.

[fol. 988] Q Is that your signature? A Yes.

Q Did you fill out the card? A I filled out this top part.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(95) for identification.)

Q (By Mr. Cowherd) Which part was that? A My name and my address.

Q Name and the address? A Yes, sir.

Q Who put the date on? A Mr. Brown, I think, I am not sure.

Q Was it put on in your presence? A Yes, sir.

Q You saw it put on? A I didn't look at him, but he was writing it on there while I was there.

Q And this happened at the same time that you signed the card? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

Q Now I ask you what date was it that you signed the card approximately? A I couldn't say; it has been a long time ago.

[fol. 989] Q Do you remember the month? A No, sir. It was before July sometime, I think.

Q Before July or in July? A Sometime along there; I don't know exactly when it was.

* * * *

[fol. 993] Q (By Mr. Hamlin) Did any of them tell you that?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Tell you that the card would be used only for an election?

THE WITNESS: No, sir.

Q (By Mr. Hamlin) Did any of them tell you that the purpose of the card was just to get an election? A No, sir.

* * * *

[fol. 995] Q (By Mr. Hamlin) Did anybody tell you that nobody would see it but the Labor Board for the purpose of getting an election? A Yes, sir.

Q Who told you that? A Mr. Brown.

Q And how long before you signed that card did Mr. Brown make that statement? A Approximately about two weeks.

Q Was this at a meeting? A Yes.

MR. WILLIAMSON: Object and move to strike the whole line of testimony.

TRIAL EXAMINER: Motion denied.

Q (By Mr. Hamlin) This statement was made in a talk he made at a meeting? A Yes, sir.

Q And how many people attended that meeting? A [fol. 996] About 15.

* * * *

[fol. 998] GEORGE KAISER

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

[fol. 999] THE WITNESS: George Kaiser, 400r Sedgewood Road, Greensboro.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Kaiser, where are you employed? A AFL-CIO, Region 8.

Q Could you tell us some of the details of your job, please. A Well.

Q What staff are you on? A I am on the AFL-CIO Staff, Region 8, and my duties are to assist the International Unions in this area.

Q In what area? A Well, for the last two years up until this past February, I worked in the Greensboro-High Point area in various campaigns.

Q Now were you ever assigned to work with the Upholsterers' International Union? A Yes, sir.

Q And did you do, have any organizing activities for that union? A Yes, sir, I did.

* * * *

[fol. 1001] Q During the time between April and November of 1964 or to be more specific, during the time between April and the time the petition was filed in August, did you have occasion to sign up employees of General Steel? A Yes, sir, I did.

* * * *

[fol. 1003] Q (By Mr. Cowherd) Mr. Kaiser, I show you General Counsel's Exhibit marked for identification Number 6(a)(96) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a)(96) for identification.)

MR. HAMLIN: Objection at this point. May we at this point discuss, perhaps the Examiner would give us an indication of how he would prefer for us to proceed. We think that it is a leading question to present this witness with a card that is bearing a man's name, and asked him if he signed that man up.

* * * *

[fol. 1004] THE WITNESS: Yes, sir, I can identify it.

Q (By Mr. Cowherd) Whose signature appears on the card?

MR. HAMLIN: Objection.

TRIAL EXAMINER: He may answer.

A Curtis White.

Q (By Mr. Cowherd) Do you know Mr. White? A Yes, sir.

Q Did you have an occasion to sign him up for the union?

MR. HAMLIN: Objection.

A Yes, sir.

Q (By Mr. Cowherd) Or did you present him a card for the Upholsterers' Union? A Yes, sir, I did.

Q Did he sign the card in your presence? A He did.

Q Is that his signature? A Well,—

MR. HAMLIN: Objection.

TRIAL EXAMINER: He may answer.

A Yes, sir.

Q Did he read the card before he signed it?

MR. HAMLIN: Objection.

[fol. 1005] TRIAL EXAMINER: He may answer.

A Yes, sir.

* * * *

Q And what was the date that he signed the card?

MR. HAMLIN: Objection.
TRIAL EXAMINER: He may answer.
A It was in July the best I can remember.

* * * *

[fol. 1008] (By Mr. Hamlin)

Q Where is White now, Curtis White, Jr.? A I don't know.

Q Have you attempted to find him? A No, sir, I haven't, personally, no, sir.

Q Do you have any knowledge of efforts made to find him? A That specific person, do I know if anybody on that specific person, I don't; I know that there were efforts on some of them; I don't know; I didn't have anything to do with going out and getting the people up; I don't know.

Q In whose handwriting is the card other than the [fol. 1009] name of the man? A Well, the date on the card is Mr. Brown's.

Q Mr. Brown put that on? A That's right.

Q You did not put that on? A No, that doesn't look like my handwriting.

Q And Mr. Brown was not present at the time it was signed? A No, he wasn't.

* * * * *

[fol. 1013] Q (By Mr. Hamlin) I show you Trial Examiner's Exhibit 2, being a letter on the letterhead of the Upholsterers' International Union and bearing at the end of it a typed signature, typed signatures, Ted Davis, George Kaiser, and Nathan Brown. Will you examine [fol. 1014] that, sir. A Yes, sir, we put this out.

Q And in that letter, you confirmed to this man and all card signers that their cards were secret?

MR. COWHERD: Objection.
MR. WILLIAMSON: Objection.
Q (By Mr. Hamlin, continuing) Did you not, sir?
TRIAL EXAMINER: Objection sustained.

* * * *

MR. HAMLIN: I don't know whether we previously offered that as an exhibit for the Respondent. We would like to do so, sir.

TRIAL EXAMINER: I think you did, and I indicated at that time.

MR. HAMLIN: All right.

[fol. 1015] TRIAL EXAMINER: It is in the record, it has been admitted in evidence.

MR. WILLIAMSON: It wasn't offered by them, Mr. Examiner, it was offered by that Intervenor. And I think that I still have an objection to the receipt of it.

TRIAL EXAMINER: Well, it doesn't make any difference as to who else offered it, it is in evidence. Any and all parties may use it for whatever it is worth.

* * * *

Q (By Mr. Cowherd) Mr. Kaiser, what was it that you told Mr. White when you talked to him about signing the card? A Well, when I talked—

MR. HAMLIN: We object. The card has been received, as I understand.

TRIAL EXAMINER: Well, I don't know, he may answer.

THE WITNESS: I told him that, of course, we had a campaign on and I asked him to sign a card, and I told him what the purpose of the card was for.

[fol. 1016] TRIAL EXAMINER: What did you tell him about the purpose?

Q (By Mr. Cowherd) What exactly did you tell him? A Well, I asked him if he would sign the card to authorize the Upholsterers' International Union to represent him out where he worked.

* * * *

[fol. 1018] What is it that you tell people that you solicit about the purpose of your visit to them?

THE WITNESS: Well, of course, I go to them and I tell them, you know, who we are; and tell them who I am; and after they identify who they are; then I tell them that we have got a campaign on, which they know, and we are trying to get people to sign cards for the union to represent them; and then if the person will ask me if the card is kept secret or if there will be an election, then I tell them that actually when we get the majority of the people signed up, we will send a letter to the company

asking us to recognize, that is, asking them to recognize us; and in most cases, they probably won't recognize us; and then at that time, we petition with those cards to the National Labor Relations Board and file a petition; and then if we have to go to an election, of course, nobody knows how you vote; but I always tell people that if they are not for the union, well, then, don't sign the card.

* * * *

[fol. 1019] TONY PARKER

resumed the stand and testified further as follows:

TRIAL EXAMINER: You were administered the oath before and you are still under that same oath.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Parker, were you an employee of General Steel Products during the month of August, 1964? A Yes, sir.

Q Were you employed there during the month of—strike that—who was your foreman? A Tommy Parish.

Q What was your job? A Parts boy.

Q Parts boy? A Yes.

[fol. 1020] Q Mr. Parker, I show you General Counsel's Exhibit marked for identification Number 6(a) (74) and ask you if you can identify the card. A Yes.

Q Is that your signature on the card? A No, it ain't.

Q Whose signature is it? A It is my brother's wife.

Q And what is your brother's wife's name? A Thelma.

Q What is your brother's name? A Jimmy.

Q Jimmy Parker? A Yes.

Q Did Mrs. Parker, Thelma, did she sign the card in your presence? A Yes, sir.

Q Did you request her to do it for you? A Yes.

Q Did you read the card before you signed it? A She read it to me.

Q She read the card to you? A Yes.

Q What do you recall she read? A Well.

Q What do you remember?

[fol. 1021] TRIAL EXAMINER: The substance of what she read to you.

Q (By Mr. Cowherd) What was it about? A I couldn't tell you.

Q Was it about a union? A Yes. Getting a union to represent you.

TRIAL EXAMINER: I don't get that. What was the answer?

MR. COWHERD: Getting the union to represent you.

TRIAL EXAMINER: All right.

Q (By Mr. Cowherd) Now, Mr. Parker, do you recall the date that you signed the card? A No, I don't.

Q Do you remember the month? A Well.

Q Approximately?

TRIAL EXAMINER: What season of the year was it, was it during the winter or during the summer, or fall, do you remember?

THE WITNESS: It was in the summer.

* * * *

[fol. 1027] JAMES EUGENE MORGAN

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: James Eugene Morgan, 605 Kerns.

TRIAL EXAMINER: And speak up loud, please.

MR. HAMLIN: What's his name?

TRIAL EXAMINER: James Morgan; and his card is in evidence.

MR. COWHERD: Yes. 6(h), is that right?

Yes, that's right.

TRIAL EXAMINER: 6(h), yes.

DIRECT EXAMINATION.

Q (By Mr. Cowherd) Mr. Morgan, were you an employee of General Steel Products during the month of [fol. 1028] August, 1964? A Yes, sir.

Q Were you employed there in June of 1964? A Yes, sir.

Q What was your job, sir? A I was inspector.

Q Again? A I was inspector.

Q And who was your foreman? A Tommy Parrish.

Q Mr. Morgan, I show you General Counsel's Exhibit marked for identification Number 6(h) and ask you if you can identify the card. A Yes, sir.

Q Is that your signature? A Yes, sir.

Q Did you fill out the card? A No, sir.

Q Who filled it out? A Wayne McCall.

Q What date did you sign the card? A I don't remember the date. I believe it was back about the middle of June of July, something like that.

Q In the middle of June or July? A Yes.

[fol. 1029] Q Is that your answer? A Yes, sir.

Q Did you read the card before you signed it? A No, sir, he read it to me.

Q Who? A Wayne McCall.

Q Wayne McCall? A Yes.

Q Do you recall what Mr. McCall said when he read it to you? What did he read to you? A I understood did I want a union.

Q That you would want—say it again, and speak up, please. A He read it to me; and what I thought it meant, did I want a union; did I put my faith in the union.

MR. COWHERD: I offer General Counsel's Exhibit Number 6(h) into evidence.

TRIAL EXAMINER: It is in evidence.

MR. COWHERD: You may examine.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 1031] Q Did he tell you that this card was just to get an election in the plant, or just so the folks could vote on it, or anything like that?

MR. COWHERD: Objection.

MR. WILLIAMSON: Objection.

A No, sir, he said that he thought that we would get a chance to vote.

[fol. 1032] JOHN WESLEY McCARTER

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: John Wesley McCarter, 205 Abbot Street, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. McCarter, were you employed at General Steel during the month of August, 1964? A Yes, sir.

Q Were you employed there in the month of July, 1964? A Yes, sir.

Q What was your job during that time? A I was working on bed.

Q What? A Making beds.

Q Making beds? A Yes.

[fol. 1033] Q Who was your foreman? A Bob, I forget his last name.

Q Sparks? A No.

Q Simpson? A No, I have forgot his last name.

Q Bethea? A Bethea, yes.

Q I show you General Counsel's marked 6(a) (79) and ask you if you can identify the card, please. A Yes, sir.

Q Is that your signature? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

Q Did you fill out the whole card? A Yes, sir.

Q What date did you sign it on? A The middle of July, the first of August, one.

MR. COWHERD: That's all.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin)

* * * *

[fol. 1035] Q Now did he talk to you about the union and about the purpose of signing the card before you signed it? A Yes, sir.

Q Did he tell you that the purpose of signing these cards was just to get an election in the plant? A No, sir.

* * * *

[fol. 1036] JIMMY MONROE

was called by and on behalf of the General Counsel as a witness, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Jimmy Monroe, 207 Griclar Street, (spelling of witness), High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Monroe, were you an employee of General Steel Products Company in the month of August, 1964? A Yes, sir.

Q Were you employed there during July of 1964? A Yes, sir.

Q What was your job during that time? A Knock up, bed assembly.

Q Who was your foreman? A Bob Bethea.

[fol. 1037] Q I show you General Counsel's Exhibit marked for identification Number 6(a) (83) and ask you if you can identify the card, please. A Yes, sir.

Q Is that your signature on the card? A Yes, sir.

Q Did you fill out the card yourself? A Yes, sir.

Q Did you read the card before you signed it? A Yes, sir.

Q Approximately when did you sign the card? A In July.

Q What year? A 1964.

* * * *

[fol. 1041] VOIR DIRE EXAMINATION

* * * *

[fol. 1042] Q (By Mr. Hamlin) Did Mr. Brown and this other fellow have any discussion with you about signing the card before you signed it? A Yes, they read it and told me all about it.

Q Now which one of them read it to you? A Mr. Brown.

Q Now this conversation, where did this conversation take place? A Out on 1715 Tyre.

[fol. 1043] Q At your house? A No, sir, out on the road, aside the road.

Q Were you sitting in a car? A Yes, sir.

Q What time of day was it or night? A It was just about the edge of dark.

Q Do you know this fellow, George Orr? A I sure don't.

Q Do you know George Orr? A No, sir, not personally. I have seen him over there at General Steel once or twice.

Q Did George Orr also read it to you? A No, sir, I don't believe he did.

Q Did Mr. Brown tell you that the purpose of signing cards was just to get an election held in the plant? A No, sir.

Q Did he tell you that even though you signed a card that you could still vote either way you wanted to in the election? A Yes, sir.

Q Did he tell you that by signing a card you were not agreeing to support the union. A What was that again?

Q Did he tell you that by signing a card that you were not agreeing to support the union? A Yes, sir.

* * * *

[fol. 1050] Q (By Mr. Cowherd) He handed you the card, and as a result of that, what did you do? A I read the card, and filled it out, my address and stuff on it.

Q You read the card? A Yes.

Q Did he tell you something like what you read? A About like that.

* * * *

CURTIS BENSON

[fol. 1051] was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Speak up good and loud, and give us your name and address, please.

THE WITNESS: Curtis Benson, 815 Willow Place, High Point.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Benson, were you an employee of General Steel Products during the month of August, 1964? A For a while and then I quit.

Q Were you employed there in July? A Yes.

Q What was your job? A Spring up.

Q Who was your foreman? A Ed Cecil.

Q All right. A The last week I worked there, I worked the second shift, I worked for Larry Robinson.

Q I show you General Counsel's Exhibit marked for identification Number 6(a) (89) and ask you if you can identify the card, please.

Yes or no.

Q (By Mr. Cowherd, continuing) What is your answer? A Yes.

[fol. 1052] Q Is that your signature on the card? A Yes, it is.

Q Did you fill out the card? A Yes.

Q Did you read the card before you signed it? A Yes, I did.

Q What was the date that you signed the card? A It was in July.

* * * *

[fol. 1054] (By Mr. Hamlin)

Q Did Mr. Robinson tell you that the purpose of these cards was just to get an election in the plant? A Yes, he did.

[fol. 1055] Q Did he tell you that you had a right to vote either way you liked in this election? A Yes, sir.

Q And did he tell you that by signing a card you were not agreeing to support the union? A Yes, sir.

* * * *

Q (By Mr. Cowherd) Starting at the beginning of the conversation that you had with Mr. Robinson when he gave you the card, would you tell us exactly what was said. A I couldn't tell you exactly what was said: it has been a'quite a while back; he mentioned the union to me before he gave me the card.

[fol. 1056] TRIAL EXAMINER: What did he say?

THE WITNESS: He mentioned about the union.

TRIAL EXAMINER: Wait a minute. Just give us the best that you can everything that was said at that time.

THE WITNESS: Well, he brought the subject up and he asked me was I interested in it; and I asked him to tell me more about it; and he said to sign the card that I would be signing that I wanted the union to represent me with the company; and it sounded right good to me; and so I signed it.

TRIAL EXAMINER: Can you remember anything else that was said?

THE WITNESS: No, I can't.

Q (By Mr. Cowherd) After you signed the card, was there any talk about an election? A I don't remember too much about it; you see, I quit in August.

MR. COWHERD: That's all.

TRIAL EXAMINER: Well, do you remember anything being said about an election at that time?

THE WITNESS: You see, I couldn't say whether it was or not; George O'ham, he walked over there, and he kept talking about it; George O'ham, he is my uncle; and he came over there; and he kept talking about it, after I had already gone from there; he would come over there; and so I couldn't say whether I remember it from when I worked there or not.

* * * *

[fol. 1057] GEORGE B. KAISER

resumed the stand and testified further as follows:

Q (By Mr. Cowherd) Mr. Kaiser, do you know an employee at General Steel by the name of Bobby Fulp? A Yes.

Q Did you have occasion to visit him at his home about [fol. 1058] signing a union card? A Yes, sir, but he was; I went to his home but he was out in the tobacco field; is actually where I seen him.

Q Did you ask him to sign a union card? A Yes, sir.

Q Did he sign it? A No, sir.

Q All right. A He asked me to fill it out for him; when he, when I talked to him, he had his, he had an oil can; and it looked like he had been spraying; and he said, "Go ahead and fill it out"; and he, he also asked me if I knew Mr. Reid Stewart in this conversation; that he used to be a member of the union that Reed Stewart is an International Representative for, the Carpenters.

Q I show you General Counsel's Exhibit marked 6(a) (25) and ask you if you can identify that.

I will ask you if you can identify that card. A That's right.

Q Is that the card that you signed for him? A It is.

Q That is, Mr. Fulp? A That's right, yes, sir.

Q Did you fill out the whole card? A I filled out everything but the date; I didn't put the date on that.

[fol. 1059] Q Do you know who put the date on there? A Yes, sir, Mr. Brown put the date on there.

Q Did he date it the same date that you signed the card for Bobby Fulp?

MR. HAMLIN: Objection.

TRIAL EXAMINER: When did this occur, this conversation with Mr. Fulp?

THE WITNESS: When did it occur?

TRIAL EXAMINER: Yes, when did you fill the card out?

THE WITNESS: It was in the early August, I believe, the early part of August.

TRIAL EXAMINER: What year?

THE WITNESS: '64.

TRIAL EXAMINER: All right.

Q (By Mr. Cowherd) What did you do with the card after you filled it out? A Well, I took it back to the union hall.

Q What happened to it then? A I gave it to Mr. Brown and he put the date on it.

Q Did you see him put the date on it? A I did.

TRIAL EXAMINER: Well, when was that with relation to the time you filled it out for Mr. Fulp?

THE WITNESS: The same day but it was later on after I returned from Kernersville and got back to High Point.

[fol. 1060] Q (By Mr. Cowherd) Did you bring any other cards back with you that day? A I don't remember; not from over there, I don't think so; not from that section; when I speak of, over there; when I speak of that, I mean over there around Kernersville.

Q Have you on other occasion brought back cards and given them to Mr. Brown? A More than one card. I don't know; I know this particular time I brought it back; and give it to him; I didn't know what the date is; and I didn't have a calendar; otherwise, I would have put the date on it. I didn't know what the date was I mean; and I didn't have a calendar; otherwise, I would have put the date on it.

* * * * *

[fol. 1062] Q (By Mr. Cowherd) Mr. Kaiser, do you know an employee named, of General Steel, named Willie Shores? A Yes, sir.

Q And he worked there, or do you know whether he worked there during the month of August, 1964? A Yes.

* * * *

[fol. 1063] Q (By Mr. Cowherd) Did you have occasion to talk to Mr. Shores during August or July of last year? A Yes, sir, I did.

Q What was the conversation about? A I went to him, and talked to him and approached him about joining the union.

Q Where did you approach him? A At his home.

Q Did he sign the card while you were there? A Well.

Q Did he sign a card? A He did.

Q Were you there when he signed it? A Yes, sir.

Q I show you General Counsel's Exhibit marked 6(a) (97) and ask you if you can identify the card. A I can.

Q Is that the signature Mr. Shore put on the card? A That's right.

Q Did he fill out the card in your presence? All of it? A That's right.

Q Who put the date on there? A I put the date on there.

Q Did you read the card to him before he signed it? A I gave him the card and he read it.

[fol. 1064] Q He read it? A That's right.

Q Before he signed it? A That's right.

* * * *

[fol. 1067] Q That is the extent of your knowledge about his ability? A I approached him and asked him if he would be interested in having the union represent him and he told me that he would.

* * * *

Q (By Mr. Cowherd) Mr. Kaiser, do you know an employee named James Robinson? A Yes, sir.

Q Did you approach him about signing the union card? A Yes, sir.

Q Do you recall when this was approximately? A Yes, sir, it was in July; in fact, I had went to this boy's house; I believe this boy lived over on Lincoln Street; I know it was out close to the plant; and I went to see him [fol. 1068] a couple of times and I missed him; and I went to see him on a Saturday; I know there were two boys that lived in the house; I seen one of them on a Saturday; and then the next day which was Sunday; one of them was named Charles; and one of them was named James; but I can't remember which one I seen on Saturday, which one it was I seen on Saturday but I seen both of them; but I don't know which one I seen on Saturday or Sunday.

TRIAL EXAMINER: You mean you saw one of them on Saturday and the other one on Sunday, is that what you are saying?

THE WITNESS: Yes, sir. I had been over there several times and couldn't catch them; and since I only live about seven miles from High Point, I had come back on a Saturday or Sunday.

Q (By Mr. Cowherd) Did you give Mr. Robinson a union card to sign?

TRIAL EXAMINER: Now which one are you talking about?

MR. COWHERD: James Robinson.

TRIAL EXAMINER: All right.

Q (By Mr. Cowherd) Did you give him a card? A Yes, sir.

Q Did he read the card before he signed it? A Yes, sir.

M. HAMLIN: Objection.

TRIAL EXAMINER: He may answer.

THE WITNESS: Yes, sir, I gave him the card and [fol. 1069] he read the card but he didn't sign it on a Saturday; he told me that his brother worked there; and I came back on a Sunday.

MR. HAMLIN: Objection to hearsay.

TRIAL EXAMINER: You may go on.

THE WITNESS: I came back on a Sunday and as I drove up, both of the boys, undoubtedly, they seen me drive up, and they both come out; and they give me the cards; both of the boys then, you know, gave me the cards; it was each, each card was filled out.

Q (By Mr. Cowherd) I show you General Counsel's 6(a)(98).

(The document above-referred to was marked General Counsel's Exhibit 6(a)(98) for identification).

Q (By Mr. Cowherd) And ask you if you can identify the card. A I can.

Q Is that the card that James Robinson gave you? A That's right. That's the card.

Q Now I notice that there are two colors of inks there. Did you put anything on the card yourself? A Actually I didn't. The card was turned, both cards were turned into me on a Sunday; I didn't put anything on them.

Q Did you write the date on there? A No, sir, I didn't.

Q Is this the condition that the card was in when you received it with the exception of this identification? A [fol. 1070] Yes, sir, all of the red ink, what was in red was on the card when he gave it to me.

Q How about the date? A No, sir, the date wasn't on it.

Q Did you put the date on there? A No, sir.

Q What did you do with the card after you got it back from Mr. Robinson? A Well, I had two cards.

Q Two cards. What did you do with them? A Well, the following day was Monday and of course I turned the cards in.

Q To who? A I turned them in to Napoleon, Mr. Brown, and he put the dates on most of the cards.

Q Did you see him write the date on there? A I did.

TRIAL EXAMINER: What's the date on there?

MR. COWHERD: 7-18-64.

* * * *

[fol. 1076] Q (By Mr. Cowherd) Mr. Kaiser, do you know an employee by the name of Charles Robinson? A I do.

Q Is he any relation to James Robinson? A Yes, sir, he is; it is my understanding that there are, that they are brothers.

Q Is Charles Robinson the person that you have been referring to in connection with the testimony that you gave regarding James Robinson? A Yes, sir.

Q Did you ever approach Charles Robinson to sign a union authorization card? A I approached, I believe it was James that I talked to on Saturday; and then I went back on a Sunday; and then I talked to both of them; I know that their name is Robinson; but Charles and James, I mean, I know that they live at the same address, but I could be, you know, get mixed up on Charles and James; I know that both of their last names is Robinson.

Q Did you talk to the Robinson boys before you gave [fol. 1077] them cards? A I talked to him, I talked to one of them on a Saturday and I talked to both of them on a Sunday; the day that I picked up both of them.

TRIAL EXAMINER: Do we have to repeat all of this again? It seems to me very clear that he talked to both of them, both of the boys.

MR. COWHERD: It seems to me that it is clear but Mr. Hamlin—

TRIAL EXAMINER: But you are asking the same questions again; you have got that testimony in there; now if you have got anything further with reference to either Robinson, let's have it. There is no sense in repeating it.

Q (By Mr. Cowherd) Did Mr. Charles Robinson read he card before he signed it?

MR. HAMLIN: Objection.

TRIAL EXAMINER: You may answer.

MR. HAMLIN: He has testified that he did not see them sign it.

MR. WILLIAMSON: That's not the same thing as asking a man if he read it before he signed it; he can ask him if he read it or not.

TRIAL EXAMINER: You may answer, if you know.

THE WITNESS: When I went over on Sunday and they brought the cards out to me, they was both signed; and course, then that is when I, the boy on the Saturday did; but when I went out on a Sunday, they were both [fol. 1078] signed; both of them came out to see me; and I asked them; I said, "Now you all understand what this is all about".

And they said, "Yes."

And I said, "Well, do you understand that by signing those cards you are authorizing"—

MR. HAMLIN: Objection.

THE WITNESS: "—to represent you."

TRIAL EXAMINER: Part of the conversation. You may answer. Go on.

THE WITNESS: But I don't believe that I read it to him, the one Sunday because the card was all filled out; I can't remember reading it to him; and he had already filled it out; and I can't; I just can't remember him reading it to me or me reading it to him; but I do remember talking to him because of the situation the way it was.

Q (By Mr. Cowherd) All right, I show you General Counsel's Exhibit 6(a) (99) and ask you if you can identify the card.

(The document above-referred to was marked for identification as General Counsel's Exhibit No. 6(a) (99) for identification.)

A Yes, sir.

Q (By Mr. Cowherd) Is that the card that Mr. Charles Robinson gave to you? A That's right.

* * * *

[fol. 1086] GEORGE B. KAISER

resumed the stand and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Kaiser, do you know an employee by the name of Gordon Shuffler? A Yes, sir, I do.

Q Did you ever have ocassion to approach him regarding joining the union? A Yes.

TRIAL EXAMINER: What is that name?

MR. COWHERD: Gordon Shuffler.

TRIAL EXAMINER: All right.

Q (By Mr. Cowherd) Did you give him a union card? A Yes, sir.

Q Did he sign it in your presence? A Yes, sir.

MR. HAMLIN: Objection to the leading.

TRIAL EXAMINER: Yes. Objection sustained.

Q I show you General Counsel's 6(a) (100).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (100) for identification.)

Q (By Mr. Cowherd) And ask you if you can iden-[fol. 1087] tify the card. A Yes, sir.

Q Is that the card that Mr. Shuffler gave to you or did he give you a card? A That is the card that he signed.

Q Were you present when he signed it? A Yes, sir.

Q Did he fill out the card? A Yes, sir.
Q Do you know whether or not he read the card?
MR. HAMLIN: Objection.
TRIAL EXAMINER: If he knows.
A Yes, sir.
TRIAL EXAMINER: Did you see him read it?
THE WITNESS: Yes, sir, he was sitting in the kitchen.
Q (By Mr. Cowherd) And he filled out the whole card, did he? A That is my handwriting; I filled out the date.
Q You filled out what? A I filled out the date.
TRIAL EXAMINER: Who filled out the rest of it?
THE WITNESS: He did, Mr. Shuffler.
Q (By Mr. Cowherd) Did you put the date on the card at the time that you had the conversation with him? A Yes, sir, we were sitting down in the kitchen at the kitchen table there; and after he signed it, he gave it back [fol. 1088] to me, and I put the date on it.

* * * *

[fol. 1091] JOHN LEE SWANEY

was called as a witness by and on behalf of the General Counsel, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.
THE WITNESS: John Lee Swaney, Route 2, Denton.
MR. HAMLIN: What was that middle name?
THE WITNESS: Lee.

DIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Swaney, were you working for General Steel last August, 1964? A Yes, sir.
Q And what was your job at that time, sir? A Press Operator.
Q Sir? A Press Operator.
Q Were you working there during the month of July, 1964? A Yes, sir.

Q All right, sir, I show you what I have marked as General Counsel's Exhibit 6(a) (101) and ask you if you can identify that card.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (101) for identification.)

Q (By Mr. Williamson) Is that your signature on the card? A No, sir, it is my old lady's.

[fol. 1092] Q Sir? A It is my wife's.

Q Did you wife sign the card? A Yes, sir.

Q Did you give her permission to place your name on the card?

MR. HAMLIN: Objection to the leading, sir.

TRIAL EXAMINER: Yes.

Q (By Mr. Williamson) How did your wife come to sign the card? A I asked her to read it to me and she read it to me when I asked her to sign it.

Q You asked her to sign it? A Yes, sir.

* * * *

[fol. 1097] GEORGE B. KAISER

resumed the stand and testified further as follows:

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Kaiser, do you know an employee by the name of Frank Swink? A Yes, sir.

Q Did you have occasion to talk to him about signing a union card? A Yes, sir.

Q Do you know approximately when that was? A Yes, sir, I believe it was in July.

[fol. 1098] Q Did he sign a union card? A Yes, sir.

Q Were you present when he signed it? A Yes, sir.

Q Did you give him the card? A Yes, sir.

Q Do you know whether he read it or not before he signed it? A Well, he took it and looked at it, and I presume that he was reading it; I mean, he took and, you know, held it up; he didn't read it out loud.

TRIAL EXAMINER: Let the record show that the witness placed his hand in front of his face.

Q (By Mr. Cowherd) I show you General Counsel's Exhibit marked for identification Number 6(a) (102) and ask you if you can identify the card. A That's right.

Q Is that the card that Mr. Swink signed in your presence? A Yes, sir.

Q Did he fill out the whole card? A Yes, sir, I think he did.

Q Did he put the date on there? A Yes, sir, I think he did.

Q Well, think about a minute and make sure.

If you are sure, say so, and if you are not, say that [fol. 1099] you are, and if you are not, then you are not, and say that you are not. A He filled out everything on the card.

Q Did you put the date on there? A No, I didn't.

Q Was the card in this condition filled out like this when you got it back from Mr. Swink? A That's right.

* * * *

[fol. 1103] TED B. DAVIS

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Ted B. Davis, Route 2, Box 541, Brown Summit, North Carolina.

MR. HAMLIN: What address again?

COURT REPORTER: Route 2, Box 541.

MR. HAMLIN: Brown Summit?

COUT REPORTER: Yes.

DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Davis, what is your job? A International Representative for the Upholsterers' International Union of North America, AFL-CIO.

Q Mr. Davis, did you work on the organizational campaign that the Upholsterers' had at General Steel? A I did.

Q During last year? A Yes.

* * * *

[fol. 1104] Q (By Mr. Cowherd) Mr. Davis, do you know an employee by the name of Lenora Bryant?

TRIAL EXAMINER: Are you temporarily passing Mr. Furr?

MR. COWHERD: Yes.

TRIAL EXAMINER: All right, now, who are calling, what card now?

MR. COWARD: This will be Lenora Bryant.

A I do.

Q (By Mr. Cowherd) Did you approach Lenora Bryant in regards to signing a union authorization card? A [fol. 1105] Yes.

Q Do you recall approximatey when this was? A In the latter part of June or early July.

Q What year? A 1964.

Q Did you give her a union authorization card? A I did.

Q Did she sign it? A She did.

Q Were you present when she signed it? A I was.

Q Did she fill out the card? A Yes.

Q Herself? A Yes.

MR. HAMLIN: We object to the leading.

MR. COWHERD: It can be answered yes or not.

TRIAL EXAMINER: Who filled it out?

Q (By Mr. Cowherd) Who filled out the card? A Lenora Bryant, on Richardson Street in High Point, North Carolina in the house just behind the Employment Security Commission Office.

Q I show you General Counsel's Exhibit 6(a) (104) and ask you if you can identify the card, please. A Yes. [fol. 1106] Q Is that the card that Miss Bryant or Mrs. Bryant signed in your presence? A Yes.

Q And do you know whether or not she read the card before she signed it? A Yes, she did.

* * * *

MR. COWHERD: I offer General Counsel's Exhibit 6(a) (104) into evidence.

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (104) for identification.)

* * * *

[fol. 1108] (By Mr. Hamlin)

Q Now you told Mrs. Bryant, did you not, that these cards would only be used to get an election and would otherwise be kept secret? A No.

Q Did she attend any meetings? A Not to my knowledge.

Q You not only told her that they would be kept secret except for getting an election but you confirmed that in a letter to all employees, did you not?

MR. COWHERD: Objection. What are you referring—

MR. HAMLIN: Trial Examiner's, I am referring to Trial Examiner's Exhibit 2.

MR. WILLIAMSON: We object unless there is a specific showing that Mrs. Bryant got a copy of that.

TRIAL EXAMINER: I don't know, is there any testimony that she did get such a letter?

MR. HAMLIN: There is testimony that the letter was sent out and it was addressed to all employees.

TRIAL EXAMINER: Is it?

MR. HAMLIN: Yes.

TRIAL EXAMINER: Objection overruled.

THE WITNESS: Would you restate your question?

Q (By Mr. Hamlin) You confirmed by letter that you had told Mrs. Bryant and others that these cards would be kept secret?

MR. WILLIAMSON: Objection.

Q (By Mr. Hamlin) Did you not?

[fol. 1109] MR. WILLIAMSON: The letter speaks for itself.

TRIAL EXAMINER: Overruled.

A No, sir, I didn't tell her in the letter that I had told her previously that the cards would be kept secret and were just for an election.

Q (By Mr. Hamlin) But you told her in the letter that they would be kept secret?

MR. COWHERD: I renew my objection. The letter speaks for itself.

TRIAL EXAMINER: This is cross-examination. It is proper cross-examination. You may answer.

THE WITNESS: Could I see the letter?

As I read here, this letter reads: "Your petition for a secret ballot election has been filed. Your secret cards have been turned over to the Federal Government." I can see nothing in here where I have said that the cards would be kept secret to any point past the date of August 13.

Q (By Mr. Hamlin) All right, you interpret your letter then, your obligation to keep these cards secret stopped as soon as you sent out this letter?

MR. WILLIAMSON: Objection. Now there is no obligation on Mr. Davis' part—

TRIAL EXAMINER: The objection will be sustained.

MR. HAMLIN: All right, sir.

Q (By Mr. Hamlin) Now, then, the third paragraph from the bottom on the second page, you also refer to these cards as secret, do you not?

"Your signed secret card"; isn't that your reference to these cards there? A That's right.

Q And in that last paragraph you again refer to "signed secret authorization cards"? A That's right.

TRIAL EXAMINER: May I see that? May I see that exhibit?

MR. HAMLIN: Yes, sir.

We object to the card.

TRIAL EXAMINER: It may be received in evidence.

(The document above-referred to, heretofore marked General Counsel's Exhibit No. 6(a)(104), was received.)

FURTHER DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Davis, this letter marked Trial Examiner's 2, letter to employees, did you take any part in drawing up this letter? A I don't recall.

Q Who prepares the letters that are sent to the employees?

TRIAL EXAMINER: Now what is the purpose of this line of examination?

MR. COWHERD: I am going to ask him some questions about it. I am trying to lay a foundation to ask him some questions about what these terms mean in here. If he wrote the letter, he will certainly know.

[fol. 1111] MR. HAMLIN: We object to that.

TRIAL EXAMINER: Objection sustained. The letter is clear and plain, isn't it, on its face?

MR. COWHERD: He has been asking him about secret cards, asking him what they meant and all of this. I want to—

TRIAL EXAMINER: Objection sustained.

Q (By Mr. Cowherd) Mr. Davis, have any of the employees over at General Steel asked you whether their cards would be secret?

MR. HAMLIN: Object.

TRIAL EXAMINER: Sustained.

MR. COWHERD: I would like to know what grounds, Your Honor.

TRIAL EXAMINER: I sustain the objection.

MR. COWHERD: All right.

Q (By Mr. Cowherd) Did any of the employees that you signed up ask about secrecy?

MR. HAMLIN: We object unless he specifies the person he is talking about.

TRIAL EXAMINER: He may answer that.

THE WITNESS: Yes.

Q (By Mr. Cowherd) What did you tell them?

MR. HAMLIN: Objection.

TRIAL EXAMINER: Well, I think that I ought to restrict that type of question to testimony which has rela-
[fol. 1112] tion to any cards which you are trying to introduce through this witness.

Q (By Mr. Cowherd) Did Lenora Bryant talk to you about secrecy? A Yes.

Q What was said about it, what did she ask you? A Her first question was, would her Employer find out she signed the card.

Q What did you say? A I told her that if we had anything to do with it that they would not; that I had never lost a card to an employer nor revealed any cards to an employer or signatures to an employer; that I had never, that there would be no chance of an Employer getting one unless he took it away from me; and that I had never had a card taken away from me yet.

MR. COWHERD: Has the card been received?

TRIAL EXAMINER: Yes.

MR. COWHERD: Do you want to question on that?
MR. HAMLIN: Yes. Just a moment.

CROSS EXAMINATION

Q (By Mr. Hamlin) Mr. Davis, you are now engaged in a proceeding in which you do disclose this card to the Employer and everyone else, are you not?
MR. WILLIAMSON: Objection.
TRIAL EXAMINER: Sustained.
[fol. 1113] A Yes, sir.

* * * *

REDIRECT EXAMINATION

Q (By Mr. Cowherd) Do you know an employee named Lynch Whitmire? A Yes, sir.
Q Did you have occasion to approach him regarding the signing of a union authorization card? A Yes, sir.
Q Approximately when? A Somewhere between the middle of June or the first of August.
TRIAL EXAMINER: What is that name?
MR. COWHERD: Lynch Whitmire.
TRIAL EXAMINER: All right.
Q (By Mr. Cowherd) Did you hand him a union authorization card? A I did.
Q Did he sign the card in your presence? A He did.
Q Do you know whether or not he read the card before he signed it?
[fol. 1114] MR. HAMLIN: Objection.
TRIAL EXAMINER: He may answer that yes or no.
Q (By Mr. Cowherd) Well, did he read the card?
MR. HAMLIN: Objection.
TRIAL EXAMINER: He may answer.
A Yes.
Q (By Mr. Cowherd) I show you General Counsel's Exhibit marked 6(a) (105) and ask you if you can identify the card, sir. A Yes, sir.
Q Is that the card Mr. Whitmire signed in your presence? A Yes, sir.
Q Did he fill out the card, all of the card? A No, sir.

Q What part did he fill out? A I dated it for him when he handed it back to me undated and I called it to his attention, and he told me to go ahead and put the date on it.

Q And did you put the date on it? A I did.

Q At the same time? A Yes, sir.

MR. COWHERD: I offer General Counsel's Exhibit 6(a) (105) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Where is Mr. Whitmire now? A I don't know, sir.

[fol. 1115-1116] Q Have you made an effort to locate him? A Yes, sir.

Q What information do you have as to his whereabouts? A That he had gone back home.

Q And where was home? A Somewhere in the mountains of North Carolina.

Q Do you know where? A No, sir.

Q Did you attempt to find out? A Yes, sir.

Q What did you learn? A I went to; well, to give you the full details of it, the man was discharged from the plant sometime last fall, and he came to me and told me that he was going back home, and since the investigation has taken place, I went back to the last known address that we had on him, and asked if they had heard from him, or had any forwarding address, and they did not; and his statement to me was, that he was going back to the mountains.

* * * *

[fol. 1117] Q (By Mr. Cowherd) Mr. Davis, did you know a family by the name of Laws? A I do.

Q Do you know whether or not there are some Laws [fol. 1118] Brothers who worked at General Steel? A I do.

Q Do you know their names? A Yes, sir.

Q Could you tell us who they are? A Edward, Charles, Custer, and Zeb, Jr. And their father, Zeb, Senior, also works over there.

Q Did you ever have occasion to approach them re-

garding the signing of a union authorization card? A I did.

Q Can you relate the circumstances about your meeting them? A Yes.

Q Proceed. A I went to see the Laws brothers; and on my first trip, I saw three of the brothers, Charles, Custer, and Zeb and talked to them about the union, and they wouldn't sign a eard; they told me that I would have to see Ed; and whatever Ed did, they would follow suit; and so I made another trip at which time I caught Ed at home, Charles and Custer; and I talked with them; and after some discussion, they signed cards; I had to make a return trip to catch Zeb.

Q When was this? How long after? A Just a couple of days after.

Q I want to interrupt you. What month was this? A In July to my best recollection.

Q Approximatey when in July, can you pin point it? [fol. 1119] A I would say towards the last part of July, the last third anyway; and when I saw Zeb, there was no question at that time as to whether Brother Ed had signed or not; he signed the card readily and freely.

MR. HAMLIN: We object to the characterization.

TRIAL EXAMINER: Yes, that part may be stricken.

MR. COWHERD: What was the characterization?

TRIAL EXAMINER: "Freely."

MR. HAMLIN: "Readily and freely."

TRIAL EXAMINER: "Readily and freely." That part may be stricken.

Q (By Mr. Cowherd) Did the Laws Brothers read their cards before they signed them? A No.

Q Did you read it to them? A Yes, I did.

MR. HAMLIN: Object to the leading.

TRIAL EXAMINER: The answer may stand.

Q (By Mr. Cowherd) Do you know whether or not you read the card to them? A I did.

TRIAL EXAMINER: When you say them, I want to make sure who "them" is.

MR. COWHERD: The Laws Brothers.

TRIAL EXAMINER: Well, which one, there are four of them.

[fol. 1120] Q (By Mr. Cowherd) Do you know whether or not you read a union authorization card to Ed Laws? A I did.

Q You did read it or you do know? A I did read it.

Q Do you know whether or not you read a union authorization card to Charles E. Laws? A I did. I did read it to him.

Q Do you know whether or not you read a card to Custer F. Laws? A Yes, I did.

Q Did you read it? A I did.

Q Do you know whether or not you read a card to Zeb Laws, Jr.? A I did.

Q Did you read it to him? A Yes, I did.

Q When you were talking to the three Laws brothers, that is, Edward, Charles, and Custer, did you read the card three times or once? A I think I actually read it twice.

Q Were they all present? A Yes.

MR. COWHERD: I offer General Counsel's Exhibit Numbers 6(a) (42).

[fol. 1121] MR. HAMLIN: Would you give the names if you know them.

MR. COWHERD: That is Ed Laws. Ed Laws is 6(a) (42). I will offer General Counsel's Exhibit 6(a) (43) being the card of Custer Laws.

I offer 6(a) (44) being the card of Charles E. Laws.

I offer 6(a) (45) being the card of Zeb Laws, Jr. all into evidence.

TRIAL EXAMINER: When you say you read the cards to them, what cards are you talking about?

THE WITNESS: One of those cards.

TRIAL EXAMINER: One of these that has just been identified?

THE WITNESS: Yes, sir.

* * * *

Q (By Mr. Hamlin) These Laws brothers live together, do they? A They live in the same immediate area.

Q At Route 3, Thomasville? A Yes.

Q It is in the same house? A That's right.

Q None of them can read, can they? A I think possibly they all might be able to read a little bit, very limited.

Q At any rate, you read it to them? A Yes.

* * * *

[fol. 1125] Q (By Mr. Hamlin) You told these men, did you not, that their cards would remain secret? A I assured them that they wouldn't be turned over to their boss man.

MR. HAMLIN: I believe that's all we have.

TRIAL EXAMINER: They may be received, General Counsel's Exhibits Numbers 6(a)(42), (43), (44), and (45).

(The documents above-referred to, heretofore marked General Counsel's Exhibits Nos. 6(a)(42), (43), (44), and (45), were received.)

FURTHER REDIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Davis, do you know a person named Roy D. Gilliland? A I do.

Q Do you know whether or not—did you approach Mr. [fol. 1126]Gilliland about signing a union card? A I did.

Q Do you know whether or not Mr. Gilliland read the card before he signed it? A Well.

TRIAL EXAMINER: Well, let's get that identified. That's GC 6(t), is it not?

MR. COWHERD: Yes.

A (continuing) I believe that I read the card to him.

MR. COWHERD: We offer General Counsel's 6(t), being the card of Ray D. Gilliland into evidence.

TRIAL EXAMINER: I indicated that ruling on this was reserved; the claim at that time was that it was read to him by Mr. O'Ham.

MR. HAMLIN: That is my notes.

MR. COWHERD: Mr. O'Ham?

TRIAL EXAMINER: Yes.

MR. COWHERD: I was under the impression that it was Mr. Davis.

TRIAL EXAMINER: No, that is another card.

* * * *

[fol. 1128] (By Mr. Cowherd)

Q Was there any other discussion about the union? A Yes.

Q Can you tell us what that was about? A He wanted to know if his employer would stand a chance of seeing the card; I assured him that he wouldn't; and I also explained to him that the cards were being signed for representation purposes; that if and when he signed the card I was obligated to act as his representative whether they got a union out there or not; and that if he did not sign the card and his boss man did find out that he had talked to a union man, and taken any steps against him, that I couldn't represent him.

Q Did this conversation take place before or after he signed the card? A Before.

Q Mr. Davis, who was present when you went to see him? A His wife was part of the time.

Q And the rest of the time?

[fol. 1129] Q And the rest of the time? A She was in and out, and I think that Donald Jacobs got—I think that Donald Jacobs was there part of the time.

Donald Jacobs got married about that time and rented an upstairs apartment from him.

Q (By Mr. Cowherd) I show you General Counsel's Exhibit 6(t), and ask you if you can identify the card. A Yes, sir.

Q Now is that the card that Mr. Gilliland signed in your presence? A It is.

Q Did he fill out the whole card? A Yes, I think he did. To my recollection he did.

Q Did he give the card back to you? A Yes.

Q And what did you do with the card? A Carried it back to the office.

Q Carried it back to the office? A Yes.

MR. COWHERD: Mr. Examiner, I am a bit confused myself at this time. I am going to propose to offer this card into evidence again as General Counsel's Exhibit 6(t).

TRIAL EXAMINER: What do you mean? You are confused about what?

MR. COWHERD: Well, we have Mr. Gilliland's testimony here that Mr. O'Ham read the card to him; and Mr.

[fol. 1130] Davis' testimony that he was there, and he identified the card. The card is in evidence.

TRIAL EXAMINER: No, it is not.

MR. COWHERD: It is not?

TRIAL EXAMINER: No, it is not.

MR. COWHERD: Well, I offer General Counsel's Exhibit 6(t).

TRIAL EXAMINER: It was withheld pending the—

MR. COWHERD: Well, it clears up—

TRIAL EXAMINER: You attempted to introduce through Mr. O'Ham; no, wait a minute, through Mr. Gilliland.

MR. COWHERD: Yes.

TRIAL EXAMINER: Through Mr. Gilliland, that's right.

MR. COWHERD: I didn't know whether it was read to him or not.

TRIAL EXAMINER: He testified that O'Ham read it to him.

MR. COWHERD: Well, all right. At this time, I offer General Counsel's Exhibit 6(t) being the card of Roy T. Gilliland into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Mr. Davis, is any of the writing on this card yours? A No, sir.

[fol. 1131] TRIAL EXAMINER: May I see that transcript again?

No, the transcript is what I want to see. I want to see the index only as to whether it was marked received in evidence. I don't think it was. All right. I am sorry. Go ahead, Mr. Hamlin.

Q (By Mr. Hamlin) Did Mr. Gilliland put the date on it? A I think he did.

Q Or did someone else? A I think he did.

Q You did not? A No, sir.

Q Now, Mr. Gilliland, is illiterate, is he not? A I don't think so.

Q He cannot read, can he? A I think he can read limitedly. I don't think that he could read and understand some of the language on that card.

Q You have testified, have you not, that you told Mr. Gilliland that his Employer might do something to him just because you had stepped in to see him? A He had that fear.

Q Well, did you not testify that you told him that? A I told him that in the event that his Employer took some discrimnatory action against him that he would have a representative at no cost in matters concerning the National Labor Relations Board.

[fol. 1132] Q If his Employer did something wrong, you would protect him provided he signed this card? A I told him that he would have a representative if he signed the card. If he didn't sign it, that he wouldn't have.

Q In that event, if he did not sign the card, he would not have your protection? A He would not have a representative. No protection.

Q You didn't use the word "protection"? A I did not.

Q At any rate, you told him that you would not help him unless he signed this card? A I told him that I would not be obligated to.

Q And you told this man that this card would remain secret? A I told him that I would not divulge it to his Employer.

Q Or in any manner that would cause it to come to the attention of his Employer? A No, I didn't say that.

MR. HAMLIN: We object.

MR. WILLIAMSON: Mr. Examiner, I would like to state at this time that General Counsel, with respect to this card intends to rely on the testimony of Mr. Davis and feels that he will not rely on Mr. Gilliland's testimony about George O'Ham.

TRIAL EXAMINER: Well, what am I to do with Mr. Gilliand's testimony? He was your witness when you called him.

[fol. 1133] MR. WILLIAMSON: Well, I realize that he was our witness and we are not meaning to impeach him, but nevertheless we do have the right to attempt to show what the actual state of facts involved in the thing was and prove our case; and whatever Mr. Gilliland may have said when he got up there, why, you will have to evaluate within the totality of the circumstances. But he

did identify his card. We only feel that he was mistaken in his testimony about—

TRIAL EXAMINER: Well, I would like to have him back here. Can you get him back, Gilliland?

MR. WILLIAMSON: Yes, sir.

TRIAL EXAMINER: Well, you can see the dilema I am in here. Here is your own witness that says that the card was read to him by another man, and now this witness comes in and says he read it to him.

MR. WILLIAMSON: All right, Mr. Examiner, we will make every effort to—

TRIAL EXAMINER: I should think you would without any urging on my part to get this matter straightened out.

MR. WILLIAMSON: Well, sir, I certainly wanted to tell you the testimony that we were relying on.

TRIAL EXAMINER: Well. I don't understand that statement of that nature. Both of these people are your witnesses. I don't think that you can pick out one at this stage of the game and say, "We are relying on this witness and not on the other one."

[fol. 1134] MR. WILLIAMSON: Mr. Examiner, it is well known that even if—General Counsel has a right to show a certain state of the facts—even though that may have an effect of temporarily impeaching one of his witnesses; but if the facts are so, they are that way; and the General Counsel has the right to show it despite this.

TRIAL EXAMINER: I know, but after all, you are impeaching—

MR. WILLIAMSON: Only in one particular.

TRIAL EXAMINER: It is Gilliland's card and you are now asking me to disregard his testimony.

MR. WILLIAMSON: In one particular.

TRIAL EXAMINER: In the most important particular. Anyhow, you can do as you please about it. I will receive the card. As to what effect, I am going to give to it.

MR. WILLIAMSON: Do you want him back tomorrow?

TRIAL EXAMINER: That is up to you. You are trying your case. You do what you think is right and necessary.

* * * *

FURTHER DIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Davis, do you know an employee named John Leroy Jacobs? A Yes.

Q Did you approach him about signing a union au-
[fol. 1135] thorization card? A Yes, sir.

Q Did you read the card to him or did he read it himself? A I read it to him.

TRIAL EXAMINER: Excuse me, I didn't get that. Who are you talking about now?

MR. COWHERD: John Leroy Jacobs.

TRIAL EXAMINER: Yes.

MR. COWHERD: 6(s).

TRIAL EXAMINER: Thank you.

MR. COWHERD: I offer General Counsel's Exhibit 6(s) into evidence.

* * * *

[fol. 1138] Q (By Mr. Cowherd) Mr. Davis, do you know a person named Norman Smith? A I do.

Q All right.

[fol. 1139] MR. COWHERD: Let the record show that I am referring to General Counsel's Exhibit 6(q).

Q (By Mr. Cowherd) Did you approach Mr. Smith about signing a union authorization card? A I did.

Q Were you present when he signed the card? A Yes, sir.

Q Did you or did you not read the card to him? A I did.

Q Was this before or after he signed it? A Before.

MR. COWHERD: I offer General Counsel's Exhibit 6(q) into evidence.

VOIR DIRE EXAMINATION

Q (By Mr. Hamlin) Where did this take place? A At his home.

Q Was there anyone else present? A Yes, sir.

Q Who was? A His wife.

Q Anyone else? A I don't recall that there was.

Q Who filled out the card? A I think his wife did.

Q Who signed his name to it? A I think she did.

[fol. 1140] Q You don't remember for sure which one signed it? A I think she did.

Q Who put the date on it? A I don't recall. I may have.

Q Is that date in your handwriting? A No, sir.

Q Then you don't know who dated it? A I think it was dated by the same person that signed the card.

Q Mr. Smith is an illiterate, is he not? A Not to my knowledge.

TRIAL EXAMINER: That phrase.

MR. HAMLIN: All right, sir.

TRIAL EXAMINER: You are getting me a little confused. If you will define an illiterate for me, then I will know what it means.

MR. HAMLIN: All right.

Q (By Mr. Hamlin) Can Mr. Smith read? A I don't know to what extent, I don't think that he could understand the card and I read it to him.

MR. HAMLIN: All right, sir, that's all. We object.

TRIAL EXAMINER: Well, I will receive it, but there again, but there again by my notes I am not exactly sure what the status of the prior testimony was as to the card. Frankly, my notes say that the wife is to be called. Now I don't recall what exactly brought that on.

* * * *

[fol. 1154] TED DAVIS

resumed the stand and testified further as follows:

FURTHER REDIRECT EXAMINATION

Q (By Mr. Cowherd) Mr. Davis, do you know James H. Benson; do you know an employee by the name of James H. Benson?

TRIAL EXAMINER: Benson?

MR. COWHERD: Mr. Examiner, I am referring to General Counsel's Exhibit 6(a)(9).

TRIAL EXAMINER: All right.

Q (By Mr. Cowherd) Mr. Davis, did you go to an organizational campaign—have occasion to contact Mr. Benson regarding the signing of a union card? A I did.

Q Did you go alone to his home? A No, sir.

Q Who was with you? A Mr. Brown, Napoleon Brown.

Q And when you got to his home, who was present [fol. 1155] during the conversation? A Mr. James Benson, James Randle, Mr. Benson's wife.

Q Was Mr. Brown present? A Yes, Mr. Brown was present also.

Q Did you have a discussion with Mr. Benson about the signing of a union card? A Yes, we did.

Q Did Mr. Benson sign a union card in your presence? A Yes, sir, he did.

Q Did he read the card before he signed it?

MR. HAMLIN: Objection.

Q (By Mr. Cowherd) Do you know whether or not he read the card?

TRIAL EXAMINER: He may answer.

A No, he didn't.

Q (By Mr. Cowherd) Did someone read the card to him? A Yes.

Q Who was that person? A I did.

Q Did this take place before or after he signed the card? A Before.

Q Would you relate what conversation to the best of your recollection took place during the signing of this card? A We had put on quite an extensive search for Mr. Benson and after finding him, we asked him if he were employed at General Steel and he said he was; and [fol. 1156] about this time, we also found out from him that his stepson lived with him and was also employed at General Steel; he called his stepson out and we continued talking about the union, and the Upholsterers' International Union there representing the people there at General Steel; he told us about his previous union activity; that he had been a member of the union at another place and had actually been involved in a strike; and he thought that if they needed a union, that he was willing and wanted the Upholsterers' International Union to represent him at General Steel.

Q Could you tell what you told him; do you remember what you told him about signing the union card? A I

told him that we would expect and hope to get 65 percent of the people signed to cards at which time we would write the company a letter requesting recognition, and that it had been experience over the years that 99 times out a 100 that the company would immediately write us a letter stating that they did not believe that we represented a majority of their employees; and for us to follow the procedures set by the National Labor Relations Board to obtain an election, an NLRB election at which time the people would be called on to vote for the Union; and the reason that we were almost insistent on getting 65 percent to 70 percent of the people signed to cards that we had learned that in the course of a campaign running to an election, that we [fol. 1157] had to go into an election, that we would lose ten to fifteen percent of the people due to various causes of people being discharged, or brought over, or persuaded by the company to vote against the union, and that would leave us just a bare majority after losing ten to fifteen percent with sixty-five to seventy percent of the people signed.

Q Now after Mr. Benson signed the card, what did he do with it? A He give it back to me.

Q I show you General Counsel's Exhibit marked 6(a) (9) and ask you if this is the card that Mr. Benson returned to you? A Yes, it is.

* * * *

[fol. 1160] Q (By Mr. Cowherd) Mr. Davis, you said in response to Mr. Hamlin's questions, that generally the conversation is the same. I wonder if you could illustrate the point that you generally cover in conversations with employees about signing union cards, what points do you seek to express to them?

MR. HAMLIN: We object unless he has a recollection of what he said in a specific instance.

MR. COWHERD: I believe, Mr. Examiner, that Mr. Hamlin has opened up the field on what he talks to all employees throughout three campaigns, the one preceding this one, and the one—and this one, and the subsequent one.

MR. HAMLIN: Mr. Davis asserted that. I was inquiring about what he said to this person and how he

knew and his reply was that generally pretty much that way.

TRIAL EXAMINER: The objection is overruled. He may answer.

MR. HAMLIN: Exception.

A I usually go into talk to an employee about a union with first finding out if they work for a company; and then I point out the advantages of unionization; the advantages of joining together for one common cause; I point out to them that we are asking employees to sign cards authorizing us to represent them, or me to represent [fol. 1161] them in matters concerning wages, hours, and conditions of employment, that in doing so until such time as it was determined that there wouldn't be any chance at all of them not having a union that I would be obligated to represent them in all matters arising at the plant concerning their wages, hours, and conditions of employment; and that if they didn't choose to sign a card that I would not be obligated to represent them.

I further pointed out that in all cases, first, when we got the cards signed, when we got what we determined a sufficient number, we would write the company a letter requesting recognition; I also pointed out to them that we act under the law; so that by the Act the Government only required us to get 30 percent of the people signed, of cards to petition for an election, which we were not interested in; that we were interested in representing the people; therefore, we felt that we had to have sixty-five to seventy percent of the people where we would be able to write the company asking for recognition; which I would expect; and that had been the practice in about 99 cases out of a 100 that the companies refused recognition; at which time we did petition for an election; and we would go to a secret ballot election with their Employer and none of the supervisors would be permitted to be in the voting area or know how they voted;

[fol. 1162] where there were would be observers both for the company and for the union; that they would give their name; and the observers would check their name off the list to prevent, and this was done to prevent a person or persons from coming in and voting more than one time, or

people voting that had no business in voting; after they had done this, that the Board Agent in charge of the election would give them a ballot; and they would go into a booth by themselves, mark their ballot; fold it; and bring it back out; and drop it into the box in front of the Board Agent conducting the election.

* * * *

[fol. 1181] MR. WILLIAMSON: In his cross-examination of Mr. Davis, Mr. Hamlin cross-examined him with reference to the fact that he had filed a Petition, and his request for recognition very nearly simultaneously; and I think that we are entitled to show the experience that Mr. Davis has had, which might be one possible explanation for that procedure.

TRIAL EXAMINER: Yes, I think that I will allow him to answer.

MR. COWHERD: Do you want the question again?

MR. HAMLIN: I still have an objection.

TRIAL EXAMINER: Yes.

MR. COWHERD: Do you want the question again?

THE WITNESS: No.

MR. COWHERD: All right, go ahead.

THE WITNESS: It has been my experience that I have never been recognized on a letter requesting recognition in the Carolinas, and never have but one time in all of my organizing efforts.

MR. COWHERD: I have no further questions.

MR. DAVIS: In view of the testimony, I would like to put another question again to Mr. Davis.

[fol. 1182]

FURTHER RECROSS EXAMINATION

Q (By Mr. Hamlin) How many cards did you file with the Labor Board in support of this petition and purporting to be employees working at General Steel and Crown Flex?

MR. COWHERD: Objection.

TRIAL EXAMINER: He may answer if he knows.

Did you do the filing? Did you leave the cards with the Board?

THE WITNESS: No, sir.

Q (By Mr. Hamlin) How many cards were filed with the Board in support of this petition? A To my best recollection, 152.

Q Well, that is pretty good recollection. A I hope.

* * * *

JERRY L. FURR

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Jerry L. Furr, 420 South Road.

[fol. 1183] DIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Furr, are you working for General Steel or were you working for General Steel in August of last year? A Yes, sir.

Q And what was your job at that time? A Shipping Clerk.

Q Mr. Furr, I show you what I have marked as General Counsel's Exhibit 6(a) (103).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (103) for identification.)

Q (By Mr. Williamson) And ask you if you can identify that card? A Yes, sir.

* * * *

Q (By Mr. Williamson) Can you identify that card? A Yes, sir.

Q Is that your signature that appears on the card? A Yes, sir.

Q And did you fill out all of the card? A Yes, sir.

Q And did you place the date on the card? A Yes, sir.

* * * *

[fol. 1184] Q At the time you wrote that date, was it the correct date? A I am not sure. I hope it was. I think it was.

Q All right, sir, what is that? A 8-11.

Q And what month is the eighth month? A August.

Q All right, sir. Did you read this card before you signed it? A Yes.

* * * *

[fol. 1186] (By Mr. Hamlin)

Q Did Mr. Davis tell you that he was getting cards signed just to get an election and that you could vote either way?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: He may answer.

MR. WILLIAMSON: It is a double question. Mr. Examiner.

TRIAL EXAMINER: Yes, it is a double question. I think that you ought to separate it.

Q (By Mr. Hamlin) Did Mr. Davis tell you that the purpose of getting the cards signed was just to get an election in the plant? A Yes.

* * * *

[fol. 1187]

FURTHER REDIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Furr, I want you to think back if you would to your conversation with Mr. Davis at the time that you signed your card and just tell us if you would, sir, everything that you remember at this time about the conversation between yourself and Mr. Davis, just start at the beginning. A I don't remember too much about it really; I didn't think much about it after I signed it; I do remember him saying to sign a card to get an election at the plant. It was about 8:30 at night, and I was sleepy and tired; and I didn't want to think much about it.

Q So that now you could not give us an account of the conversation between yourself and Mr. Davis? A Not all of it, no.

Q Very well. Tell us all that you remember at this time. A Well, we sat there at the kitchen table, and anyway he asked me did I think would a union help; or something like that; I don't know how it went; I don't even remember; but I know he just asked me would I sign a card, did I want to sign a card; and at that time I said I would; he said that they were getting cards to get an election at the plant.

* * * *

[fol. 1190] TED B. DAVIS

resumed the stand and testified further as follows:

DIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Davis, you just heard Mr. Furr's testimony here in this courtroom? A Yes.

Q And were you present during the whole testimony? A Yes.

[fol. 1191] Q Do you yourself remember the conversation between yourself and Mr. Furr the night that he signed his union card? A A part of it, yes.

Q All right, could you relate to us the part that you remember. A I was met by him at the door; and I stated that, stated to him, "Long time, no see"; he was a hard fellow to catch up with; that I was beginning to think that I wasn't going to find him; and I stated to him that, he invited me in; and we went into his kitchen; as he testified; and I stated to him that I was back on a campaign at General Steel; and asked him if he was still interested in having the Union represent him since we had some activity prior to that; and he said that he was; and I told him that we were making very good headway toward getting a majority for representation; asked him if he would care to sign a card to help get the union into the plant out there to have it represent him; and he said he would and signed a card.

Q Did you at any time discuss the question of an election with Mr. Furr? A I think possibly I may have, to my recollection, told him that I didn't think that the company would recognize us when we requested recognition; and we would most likely have to go to an election.

Q Sir, can you remember anything else that there may have been any conversation between you on the subject of [fol. 1192] an election? A No, I can't say that I do.

Q Did you ever at any time make the statement to Mr. Furr that you wanted him to sign a union card just so that they could have an election in the plant? A No.

* * * *

[fol. 1194] TRIAL EXAMINER: I would like to ask one additional question though. In this particular campaign, did you tell any employee who you asked to sign a card such as has been offered in evidence here that the purpose of that card was only to get an election?

[fol. 1195] THE WITNESS: No, sireee.

TRIAL EXAMINER: Did you ever in any campaign where you used cards similar to these cards which only authorized the Union involved to represent the employee as collective bargaining agent, did you in any other campaign ever tell an employee that its purpose was only to get an election?

THE WITNESS: No, sir.

* * * *

[fol. 1198] NAPOLEON BROWN

was called as a witness by and on behalf of the General Counsel and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: State your name and address.

THE WITNESS: Napoleon Brown, 806 George Place, High Point, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Brown, what is your position? A I am International Representative of the Upholsterers' International Union. I am sometimes called an organizer.

Q All right, sir, how long have you been with the Upholsterers' International? A About ten years.

Q And have you been organizing for them that same length of time? A Yes.

Q Have you ever been involved in any organizing campaign at the General Steel Company? A Yes, sir.
[fol. 1199] Q And at Crown Flex? A Yes, sir.
Q Can you tell us approximately when that campaign first started, Mr. Brown? A To the best of my knowledge, I believe it was June of 1964.
Q Did you participate in signing up employees for the Union in that campaign? A Yes, sir, I did.
Q Would you tell us aproximately how many employees that were involved in signing up? A I didn't sign up too many people at General Steel. I would say maybe 25 and maybe 30.
Q All right, sir. Do you know an employee by the name of Elmer Cornett? A Yes, sir, I do.
Q Have you ever had occasion to talk to Mr. Cornett about the union? A Yes, sir, I did.
Q Can you tell us when you had any conversation with him about this matter? A About the date? About the time?
Q Whenever you had any conversations with him? A I believe it was sometime in the month of July, 1964.
Q All right, sir, did you have one or several conversations.
[fol. 1200] Q All right, sir, during the time that you were talking to Mr. Cornett on those occasions, did you ever ask him to sign an authorization card? A Yes, sir I did.
Q Do you know whether or not he did so? A Yes.
Q Did he? A Yes, sir.
Q All right, sir, I show you what I have marked as General Counsel's Exhibit 6(a) (106).

(The document above-referred to was marked General Counsel's Exhibit No. 6(a) (106) for identification.)

Q (By Mr. Williamson) And I will ask you if you can identify that card, sir. A Yes, sir, I can.
Q What is that card? A That is the membership card for the Upholsterers' International Union.
Q Whose is the writing that appears thereon? A Mr. Cornett's.

Q Did Mr. Cornett put that writing on there in your presence? A Yes, he did.

Q Can you tell us where you were when this hap-
[fol. 1201] pened? A We were sitting in his living room in his home.

Q All right, sir, showing you the card again, how much of it is filled out by Mr. Cornett? A Mr. Cornett, I put General Steel on there and I put the date.

Q All right. A He put the rest.

Q All right, sir, the signature thereon is his? A That's right, it's his.

Q Do you know whether or not Mr. Cornett read this card?

MR. HAMLIN: Objection.

TRIAL EXAMINER: He may answer.

A Yes, he read the card.

* * * *

[fol. 1202] A (By Mr. Williamson) Well, he held the card up. He did not read it out aloud. He held the card up and I was assuming that he was reading the card.

Q Now, Mr. Brown, on the occasion that Mr. Cornett signed this card, just relate, if you would, as much of the conversation with him that you can remember at the present time. A I told him that we were in the process of organizing the workers at General Steel; and of course, I told him at this point that we did have a majority; and after we got approximately 65 to 70 percent, we would ask the company for recognition by mail; and as I recall, this was near the end of the signing of the cards before we asked for recognition.

* * * *

Q All right, sir, did he ask you any questions about the secrecy of the card when you talked to him? A No, sir, he did not.

* * * *

[fol. 1206] Q (By Mr. Williamson) Do you know a Mr. William Billings? A Yes, sir, I do.

Q Have you ever had occasion to talk with Mr. Billings about the subject of the union? A Yes, sir, I did.

* * * *

Q Can you tell us approximately when this conversation was? A It was either in late July or the first of August, 1964?

Q All right, sir, did you have one or several conversations with him? A At that time only one.

Q All right, sir, have you ever had any occasion to request Mr. Billings to sign an authorization card? A Yes, sir.

A And was that during this conversation? A Yes, sir.

Q I show you what I have had marked General Counsel's 6(a) (107) and ask you if you can identify that card. A Yes, sir, I can.

(The documents above-referred to was marked General Counsel's Exhibit No. 6(a) (107) for identification.)

Q What is that? A That is the membership card for the Upholsterers' International Union.

Q Who wrote the name that appears thereon? A A fellow worker, Frank Small was with me.

Q All right, sir, did Mr. Billings have any conversation with Mr. Small about this matter before he signed [fol. 1208] this card? A (continuing) Mr. Small went with me to locate Mr. Billings at his home, and he wasn't at home; he happened to be at his girl friend's house; and so we drove over to his girl friend's house; and he came out; and he came out; was standing in back of his car; and of course, Mr. Small had discussed this thing with him previously.

[fol. 1209] MR. HAMLIN: Object.

TRIAL EXAMINER: Sustained.

THE WITNESS: And I told him that I was a Representative of the Upholsterers' International Union; that we were engaged in an organizational campaign at General Steel; and if he was interested in participating; I showed him the card; and he said, "I can't read too good"; and so he gave me the card back and had me to read the card to him.

Q (By Mr. Williamson) Does it indicate on this card the language that you read to him? A I read the first

paragraph, "I do hereby designate and authorize the Upholsterers' International Union of North America, AFL-CIO, and its Representatives to act as my representative for the purpose of collective bargaining with respect to rates of pay, wages, hours, or employment and other conditions of employment."

Q All right, sir, what happened after you read that portion of the card? A He asked Frank Small would he sign it for him.

Q All right, sir, go ahead. A And, of course, the reason that he asked Frank to sign it for him—

* * * * *

[fol. 1210] MR. HAMLIN: Objection.

TRIAL EXAMINER: Yes.

What did he say to Mr. Small or anyone else present?

Q Have you ever requested Mr. Bodiford to sign a card for the union? A Yes, sir, I did.

Q Do you know whether or not he has signed such a [fol. 1221] card? A Yes, sir.

Q I show you what I have had marked as General Counsel's Exhibit 6(a)(3) and ask you if you can identify that card, sir. A Yes.

Q Whose is the writing that appears thereon? A Jack Bodiford.

Q Did he sign the card himself? A Yes, sir.

Q Was this in your presence? A Yes, sir.

Q Do you know whether or not he read the card before he signed it?

MR. HAMLIN: Objection.

TRIAL EXAMINER: You may answer that yes or no. Do you know whether he read it or not?

THE WITNESS: I read it.

Q (By Mr. Williamson) All right, sir, how did you come to read it to him? A He said that he couldn't read too well and I read the card to him.

Q Will you tell us which portion of the card that you read to him? A It is the first paragraph. "I do hereby designate and authorize the Upholsterers' International Union of North America, AFL-CIO, and its Representative to act as my representative for the purpose of col-

lective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment."

[fol. 1222] Q All right, sir, at the time that you talked to Mr. Bodiford about the union and got him to sign this card, as well as you can remember, what conversation, if any, you had with Mr. Bodiford? A Well, I introduced myself to him as a representative of the Upholsterers' International Union and told him my purpose in stopping was to get him to sign the card if he was interested in becoming a member of the Upholsterers' International Union; and he asked me did we have many employees signed up, and I told him that we had quite a few at this particular time; and he said that some of the fellows had discussed this with him; and he thought that it was good; that it was a good thing; and so I gave him the card and read the card to him; and he signed it.

* * * *

[fol. 1225] Q (By Mr. Williamson) Mr. Brown, do you know an employee by the name of Claude Mitchem? A Yes, sir.

Q Have you ever had occasion to have any conversations with Mr. Mitchem about the union? A Yes, sir, I did.

Q Do you remember about when this was? A Sometime in July, I believe, of 1964.

MR. COWHERD: This is General Counsel's Exhibit 6(a)(84).

Q (By Mr. Williamson) Did you talk with Mr. Mitchem once or several times? A I only spoke with him once.

Q All right, sir, where did you speak with him? A Parked in front of his trailer.

Q Do you remember where his trailer was? A It was on Tyre Road, I don't remember the number.

[fol. 1226] Q All right, sir, now, tell us if you would as close as you remember the conversation between yourself and Mr. Mitchem that day? A Well, I first introduced myself to him and he came out; in fact, he was out in the yard doing something; I believe he was mowing the

grass or something; I believe. When I came up, I believe he was mowing the grass.

Q Was there anyone else around? A Yes. George Orr was with me.

Q Go ahead. A He came out, and he said in the back of the automobile and I first introduced myself to him and I told him that I was engaged in an organizing campaign at General Steel; and asked was he interested; and of course, I said, "I believe so"; and I talked to him about the signing the membership card, and he did.

Q All right, sir, I show you what I have marked as General Counsel's Exhibit 6(a)(84) and ask you if you can identify that card, sir. A Yes, I can.

Q What is that card? A It is a membership card for the Upholsterer's International Union, AFL-CIO.

Q Whose is the writing that appears thereupon? A Mr. Claude Mitchem.

Q Did Mr. Mitchem put that writing on there in your [fol. 1227] presence? A Yes, he did.

Q How much of the card was written by Mr. Mitchem? A He filled out the whole card.

Q Do you know whether or not Mr. Mitchem read the card right after his signing it?

MR. HAMLIN: Objection.

TRIAL EXAMINER: He may answer.

THE WITNESS: He asked Mr. Small to sign the card for him.

Q (By Mr. Williamson) All right, sir, go ahead. A And I asked him was there any particular reason that he wanted Mr. Small to fill the card out, and he said, his explanation was that he couldn't write too well; and so Mr. Small signed it for him.

Q All right, sir, let me ask you this, Mr. Brown, how much of the writing on that card was done by Mr. Small, as far as you know? A All of this except this Exhibit Number.

Q Now during the time that you were talking with Mr. Billings there in the car, was there anything said about an election? A I don't believe that anything was said about an election.

Q Was there anything said about the secrecy of this card? A I don't recall anything being said about the card being secret.

* * * *

[fol. 1220] Q (By Mr. Williamson) Mr. Brown, do you know an employee named Jimmy Bodiford? A Yes, sir, I do.

Q Have you ever had occasion to have a conversation with Mr. Bodiford on the subject of unions or unionism? A Yes.

Q Do you remember approximately when this occurred? A I believe it was July of 1964.

MR. HAMLIN: May we have a card number?

MR. WILLIAMSON: 6(a)(3)..

Q (By Mr. Williamson) Did you talk with Mr. Bodiford once or several times? A Only once.

Q All right, sir, where did you talk with him? A It was on English Road, about the 600 block of English Road.

A I read the card to him.

Q (By Mr. Williamson) All right, sir. Read for us, if you would, sir, the whatever portion of the card that it was that you read to him? A "I do hereby"—

TRIAL EXAMINER: There is only one paragraph there, isn't there?

MR. WILLIAMSON: Well, sir, they might say that the testimony isn't clear as to which portion of the card that he read to him, and I think that we ought to put it in.

TRIAL EXAMINER: All right.

Q (By Mr. Williamson) Go ahead, Mr. Brown. A "I do hereby designate and authorize the Upholsterers' International Union of North America, AFL-CIO, and its representative, to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours, or employment and other conditions of employment."

[fol. 1228] Q Did Mr. Mitchem have any questions about the card when you presented it to him? A Not as I can recall.

Q Did you ever have any discussion with Mr. Mitchem at that time when he signed the card about an election? A I don't recall anything being said about an election.

* * * *

[fol. 1231]

FURTHER REDIRECT EXAMINATION

Q (By Mr. Williamson) Mr. Brown, do you know an employee by the name of Thomas Ray Haire? A Yes, sir, I do.

Q During your organizational campaign at General Steel, did you ever have occasion to speak with him about [fol. 1232] the union? A I did.

Q Do you remember approximately when that was, sir? A It was in late July to the best of my knowledge.

Q Was there anyone else with you when you talked with Mr. Haire? A Yes.

Q Who was that? A John Harold Holt (Holder).

Q All right, sir, do you remember when you talked with Mr. Haire? A At his home.

Q Now tell us as best you remember the conversation between you and Mr. Haire on that occasion? A Well, he came out and then got in the back seat of the automobile, and I introduced myself to him as being a representative of the Upholsterers' International Union and I told him that the purpose of my visit there was to discuss this matter with him and get him to sign a membership card if he desired to be represented.

Q Go ahead? A In doing so, I showed him the card, and he asked me would I read the card to him because he couldn't read too well.

Q All right, sir, did you read the card to him? A Yes, sir, I did.

[fol. 1233] Q All right, sir, I show you what has been marked and I believe received into evidence as General Counsel's Exhibit 6(a)(93) and ask you if you can identify that card, sir. A Yes, I can.

Q What is that card? A That is a membership card from the Upholsterers' International Union.

Q Sir, whose writing appears thereon? A This is his signature.

Q All right, sir, did he sign this in your presence? A Yes, he did.

Q Now I believe you said that you read the card to him. Which portion of the card did you read to him? A This first paragraph.

Q And is that the same paragraph which you previously read several times in connection with other cards? A Yes, sir.

Q Do you remember anything else that was said between you and Mr. Haire out there in connection with his card when he signed it? A I believe that that was about the extent of the conversation.

Q Was there anything said about an election? A I don't recall anything being said about an election.

* * * *

[fol. 1245] Q (By Mr. Williamson) Now, Mr. Brown, during the campaign here at General Steel and Crown Flex, about how many employees would you say that you signed up? A Approximately 30.

Q Did you ever at any time in signing up employees in this campaign tell an employee he was to sign a card just for the purpose of getting an election at the plant? A No, sir.

Q During the time that you have been working for the Upholsterers' International Union, Mr. Brown, how many union campaigns at various plants have you participated in? A I would say from approximately eight to nine a year.

Q And how many years have you been with the Upholsterers' International?

[fol. 1246] Q And did you sign up employees in those campaigns? A Yes, sir.

Q Did you ever on any other—

MR. HAMLIN: Objection to the pursuit of that.

TRIAL EXAMINER: You may proceed.

Q (By Mr. Williamson) Did you ever in any of these other campaigns that you have participated in tell an em-

ployee that he was to sign a card just for the purpose of having an election at the particular plant?

MR. HAMLIN: Objection.

A No, sir.

* * * *

[fol. 1247] Q (By Mr. Williamson) Mr. Brown, have you ever participated in any campaign as a representative of the Upholsterers' International Union in which you did not request recognition of the Employer in the campaign.

[fol. 1248] A It could have been a very few when I first worked, when I first went to work for the Upholsterers' in Virginia that we didn't ask for recognition but it has been some time ago.

* * * *

[fol. 1249] Q (By Mr. Williamson) During the campaign, Mr. Brown, did you ever tell any employee that if he didn't sign a card now he would have to pay his initiation fee at a later date? A No, sir.

* * * *

[fol. 1250] Q (By Mr. Williamson) Mr. Brown, when you got these cards up to the Regional Office, what did you do with them? A I gave them to one of the ladies in the Regional Office.

Q What date was this, sir? A It was on the 14th of August.

Q Do you remember what time of day it was? A To the best of my knowledge, it was around maybe ten o'clock in the morning.

[fol. 1251] Q Did you do anything with reference to petitioning while you were in the Regional Office at that time? A Well, the petition had already been made out; I submitted the petition along with the lists in alphabetical order with the cards.

Q All right, sir, were you accompanied by anyone when you went up to the Regional Office on that occasion? A Yes, I was.

Q Who was that, sir? A Mr. Davis.

Q Mr. Brown, you have heard all of the testimony in this proceeding of the authorization cards? A Yes.

Q Do you remember when it has been testified that a card was dated by one of the organizers in the campaign?

TRIAL EXAMINER: I don't know whether the witness understands that. I don't understand—

Q (By Mr. Williamson) Do you recall hearing any testimony where it has been testified that an organizer put the date on an authorization card? A Yes.

MR. WILLIAMSON: We have no further questions of this witness.

TRIAL EXAMINER: When you brought the cards to which Counsel has referred to the Board's Regional Office, you say you handed them to the girl or young lady there?

[fol. 1252] THE WITNESS: Yes, I did.

TRIAL EXAMINER: Did you see what she did with them?

THE WITNESS: No, sir, I didn't because I left but I gave them to her.

* * * *

[fol. 1405] FRANK D. HOFFMAN, JR.

was called as a witness by and on behalf of the Respondent and, after having been first duly called and duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Frank D. Hoffman, Jr., 1173 Sweetbriar Road, High Point, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Hamlin) Mr. Hoffman, did you have any connection with General Steel Products and Crown Flex at the time of the union campaign election last year? A Yes, sir.

Q What was that? A I was Executive Vice-President of both firms.

Q Now are you connected with either company at the [fol. 1406] present time? A No, sir.

Q What are you doing now? A I operate my own business, a furniture company; a manufacturer of upholstered furniture.

Q And when did you terminate your connection with the Respondents in this case? A May 1 of this year.

Q At the time of the union campaign last summer, were you the operating head in High Point of these companies? A Yes.

Q What products are made by these companies? A General Steel Products makes and made at that time mechanical furniture fixtures for the furniture industry and Crown Flex made and makes at this time an insulator pad for the furniture industry primarily.

Q About when, if you know, did you become aware that a union organizing campaign was taking place in either of these companies in 1964?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: He may answer.

A Well, I heard some talk about it since about June of 1964, but to no great extent; and of course, I had heard some talk about for two or three years prior to that time. I know in '62 and I think in '63 I heard some talk about an organization campaign going on at that time; and so for all of two or three years I heard some talk about a campaign.

[fol. 1407] Q You refer to a campaign in '62 and '63. About what period was that, did that cover? A Well, to the best of my memory on it, it was in the summer, early summer of '62.

MR. WILLIAMSON: Mr. Examiner, I object to this line. I don't see the relevancy.

MR. HAMLIN: I think we well show it.

Q (By Mr. Hamlin) And continuing until when? A Until '63, the middle part of '63, the late summer.

Q Was that campaign by this same union? A I don't know for sure but I did see some cards that had, similar to these cards that some of the employees brought to me.

Q Now, moving into 1964, you became aware, did you say, in approximately June that there was some real effort being made? A Yes, sir.

Q All right, sir, then calling your attention to a time in late July, 1964, did you write any letter with regard to this matter? A Yes, sir, it became very obvious to me the latter part of July that there was, that they were putting on a strong campaign; my foremen so instructed me and some of the employees had told me that they had

been asked by union organizers asking them to sign authorization cards; and so it became obvious in the latter part of July that they were putting on a very strong campaign.

[fol. 1408] Q Now in July, you refer to a letter. I show you a copy of the letter that you sent to employees in July? A Yes, sir.

TRIAL EXAMINER: I don't know whether it is going to mean anything, but this ought to be marked for identification.

MR. HAMLIN: Oh, yes, may we have this letter dated July 11, 1964, addressed to "Our Fellow Employees" and signed Frank D. Huffman, Jr., General Steel Products, Inc. marked as Respondent's 16. I will withdraw that and substitute copies.

TRIAL EXAMINER: Respondent's 16.

(The document above-referred to was marked Respondent's Exhibit No. 16 for identification.)

MR. COWHERD: Could it possibly be that we would have an objection?

TRIAL EXAMINER: I was going to ask. Is that part of the Representation? I know that a number have been attached to the Directive's Findings.

MR. HAMLIN: I was thinking that that was omitted, that was my reason for making this part of the record, for marking it.

MR. COWHERD: What's the date?

THE WITNESS: July 31.

[fol. 1409] MR. COWHERD: Is the date on that letter?

THE WITNESS: Yes, sir. What is the date on that, Mr. Hamlin?

MR. HAMLIN: July 31.

Q (By Mr. Hamlin) Mr. Huffman, after this letter was put out, and moving now to the middle of August, 1964, did you receive a letter from the Upholsterers' Union? A Yes, sir.

MR. HAMLIN: We stipulated that letter, did we not?

TRIAL EXAMINER: The demand letter?

MR. HAMLIN: Yes.

TRIAL EXAMINER: That's in the record.

MR. COWHERD: You stipulated that in your Answer.

MR. HAMLIN: I don't want to mark it now. I want him to be able to refer to it.

TRIAL EXAMINER: Well, I will give you a number. It is General Counsel's 2. That's the Union demand of August 13, and the Company reply is General Counsel's 3, dated August 26.

MR. HAMLIN: May we have those?

TRIAL EXAMINER: Here they are.

Q (By Mr. Hamlin) I refer you to General Counsel's Exhibit 2 in this case, and ask you if you received—

MR. HAMLIN: We stipulated that you received that letter.

Q (By Mr. Hamlin) I ask you when you received [fol. 1410] this. A August 14, '64.

Q August 14, 1964? A Yes, sir.

Q Now what day of the week was that? A Friday, I think.

Q Mr. Huffman, following the receipt of that letter and on the following Monday, did you do anything with regard to it? A Yes, sir, I read the letter, of course, and then went to see our attorney, Mr. Martin.

Q When did you see Mr. Martin? A I think it was Saturday morning, the 15th of August. Of course, I discussed the letter with him.

TRIAL EXAMINER: I didn't hear that.

THE WITNESS: I discussed the letter that I received from the Union with Mr. Martin.

Q (By Mr. Hamlin) Directing your attention to the Monday following of the next week, was there any foremen's meeting? A Yes, sir, I called a foreman's meeting Monday, the 17th of August.

Q And what took place there? A I told them that I had received this letter from the Union requesting recognition, and I asked them at that time how they felt about the employees as to whether they wanted a union to represent them or not, and of course, they said they didn't know.

[fol. 1411] MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Yes, as to what they said, the objection is sustained.

(By Mr. Hamlin) All right, continue.

Q (By Mr. Hamlin) All right, continue. A And I asked them at that time if they would go out into the plant and in their department and study the department and try to find out in their department the majority wanted the union to represent them; and I told them that I didn't want them to go out and interrogate the people or in any was threaten them, or anything like that.

MR. WILLIAMSON: Object to it as self-serving.

TRIAL EXAMINER: The objection is overruled.

THE WITNESS: And then we would report back later and analyze their findings, and then try to decide whether a majority of the people wanted the Union to represent them. And that plus some safety talk is about all we did at that particular meeting.

Q (By Mr. Hamlin) Now were there later meetings at which this thing was discussed? A Yes, we had another meeting Wednesday of that week; Wednesday was our usual meeting, foremen's meeting, supervisors meeting day; we discussed it again; and I asked each foreman how many people or what percentage of their department wanted a union to represent them; and they each told me—

MR. WILLIAMSON: Objection.

[fol. 1412] TRIAL EXAMINER: Sustained.

Q (By Mr. Hamlin) All right, sir, did you make any investigation of your own as to this question? A Yes, sir, I talked with many, many employees myself about how they felt about the Union.

Q Now this inquiry or investigation that we are discussing by yourself and the foremen, how long did that continue? A I think it was about ten days, approximately a week or ten days, I don't know for sure.

Q Did you receive from your foremen their opinions as to how they felt their department stood? A Yes, sir.

Q Based upon these opinions, did you draw a conclusion yourself about it, and go ahead and describe it.

MR. WILLIAMSON: Object to any conclusion here based on any investigation by the foremen. If he wants to testify about what he figured out himself in his own investigation, that's all right. That is just a way of coming in the back door what he can't get in the front door.

TRIAL EXAMINER: No, not necessarily. I think I will allow him to testify as to what his final conclusion was with respect to this demand by the union. What was your conclusion?

THE WITNESS: My conclusion was that about 30 percent were for the Union or wanted the Union to represent them and about 70 per cent did not want the Union to represent them. That was not only from the investigation of the foremen but from my own personal investigation. After I wrote the letter of July 31 a couple of weeks prior to, after that I mean, a lot of employees came to me and said that they did not—

[fol. 1413] MR. WILLIAMSON: Objection.

MR. HAMLIN: I will ask him that question.

Q (By Mr. Hamlin) Had employees come to you and made any statements with regard to the Union during this period?

TRIAL EXAMINER: He may answer that yes or not.

A Yes, sir.

Q (By Mr. Hamlin) And what statements were made to you?

MR. WILLIAMSON: Objection.

TRIAL EXAMINER: Are you going to call these people who made these statements?

MR. HAMLIN: I don't know that he will remember who they were, sir.

TRIAL EXAMINER: Well, in other words, you are going to rely on statements of witnesses whose names he doesn't recall?

MR. HAMLIN: In certain instances we may do so, he talked to numerous people, sir, and drew his conclusions. He is relying on information gathered in that fashion.

TRIAL EXAMINER: Yes.

MR. HAMLIN: He can't recall the names.

[fol. 1414] TRIAL EXAMINER: Do you recall any of the employees, the names of any of the employees who talked with you?

THE WITNESS: Yes, sir, I can remember a few.

TRIAL EXAMINER: Could you name them, please.

THE WITNESS: Yes, sir, one was this Lester Allen, the elderly fellow that was; no; Lester Allen; and a fellow named Floyd Harris; and a fellow named Gene Jones.

MR. WIILIAMSON: Mr. Examiner, we object to those last two names and ask that they be stricken. I am not sure—I am pretty sure as a matter of fact that they are not relying on the cards signed by either one of these people.

TRIAL EXAMINER: That doesn't make any difference.

MR. WILLIAMSON: Sir, I think that it does make a difference.

TRIAL EXAMINER: Well, go on, can you name any more.

THE WITNESS: I could possibly with some thought, sir, if I could get a chance to go over the employee list; I am sure—

TRIAL EXAMINER: Could you do that? Because I would like to know.

THE WITNESS: Let me see a list of employees.

TRIAL EXAMINER: Would you like to look at my list?

MR. WILLIAMSON: Does your list have on it, sir, a marking indicating the name of the person who has testified that he signed a card here?

TRIAL EXAMINER: Yes, I have the card number opposite the name of those who did testify. If you don't want him to use it—

[fol. 1415] MR. WILLIAMSON: I don't want him to use it.

TRIAL EXAMINER: Give him another list, please.

Well, wait a minute, why not use the list that is in evidence? There are two lists, 4(a) and (b).

THE WITNESS: Clarence J. Jones. This fellow I remember him, Ollie D. Reagan, he said he was neither for me or for the Union.

MR. WILLIAMSON: Objection.
THE WITNESS: He told me that.
MR. WILLIAMSON: Move to strike.
TRIAL EXAMINER: I will let him answer that question. You may answer.
THE WITNESS: He told me that he was neither for the Union nor for the Company either, that he was completely neutral, I remember that; he didn't want to get involved either way.
MR. WILLIAMSON: I move to strike the answer.
TRIAL EXAMINER: Motion denied.
THE WITNESS: Johnny Gibson, Johnny M. Gibson called me at home one night and said that he had signed a Union card but that—
MR. WILLIAMSON: Object to what he said.
THE WITNESS: He told me.
[fol. 1416] TRIAL EXAMINER: What did he tell you about the Union?
THE WITNESS: He told me that he was not for the Union although he had signed a Union card.
TRIAL EXAMINER: All right.
MR. WILLIAMSON: Move to strike.
TRIAL EXAMINER: Motion denied.
MR. COWHERD: This is a telephone conversation, no foundation.
TRIAL EXAMINER: Well, do you want to interrogate him about the foundation? You said that this was during a telephone conversation?
THE WITNESS: Yes, sir. I have no doubt that it was this person calling me.
TRIAL EXAMINER: Well, they want to question you about the foundation.
MR. WILLIAMSON: Mr. Examiner, this is not our witness, and it is not our place to lay foundations for hearsay telephone conversations.
TRIAL EXAMINER: It is not a hearsay telephone conversation. He had a right to find out, Respondent had a right to find out from its employees whether or not they were in favor of the Union.
MR. WILLIAMSON: Yes, sir.

TRIAL EXAMINER: Now there is no better way of finding out than to ask the employees.

[fol. 1417] MR. WILLIAMSON: I have already agreed, sir, that he can testify as to what he did in reliance on what he is told. I do so that he can't testify about what he was told because it is hearsay. If they want to get that up there, get these witnesses here, and let's cross-examine them.

TRIAL EXAMINER: No, you may call those witnesses if you wish. Objection overruled. Go on.

THE WITNESS: About the telephone conversation, that was all. That was Johnny Gibson.

TRIAL EXAMINER: Incidentally, as you go along here, also tell us if you can whether these employees are still working at the plant. It will save a considerable amount of time.

THE WITNESS: I wouldn't know possibly at this date, Mr. Examiner, because I haven't been there since May 1, but I would know back to May 1.

TRIAL EXAMINER: All right.

THE WITNESS: Troy McGhee told me that he was not for the Union.

Henry Thompson told me that he was not for the Union.

There are possibly others as I go down this list, but I can't remember all of them; but some of them were outstanding for some reason or the other, and I can't remember them all.

Reagan, Irwin Reagon told me that he was not for the Union.

Helen Causey said that she was not for the Union.

[fol. 1418] Toby Cunningham told me that he was not for the Union.

Fred Rosenau said he was not for the Union.

Eugene Jones, Thomas E. Jones on the list here. Clyde Mangum told me that he was not for the Union. Jesse Stanley told me he was not for the Union.

Q (By Mr. Hamlin) Who was that? A Jesse Stanley. Murray Brim, Jerry Furr told me that he was not for the Union. Rudy Remirez. Clyde Everhard told me that he was not for the Union. And Lester Allen, I had

mentioned him before, told me that he was not for the Union.

Donald Collins told me that he was not for the Union. Tommy Austin, Kenneth Von Cannon. Charles L. Thomas. Dan Beeson. Arnold Fuller. We are down to Crown Flex.

TRIAL EXAMINER: How is that?

THE WITNESS: We are in the Crown Flex group now. Robert L. Bowman, Jr. Earl Welborn; and Douglas R. Beeson; and I would like to qualify that one if I may; if it is all right.

TRIAL EXAMINER: Go ahead.

THE WITNESS: I heard, a fellow told me, it is hearsay I know but he had asked Gene Jones to sign a Union card, and so I called him in the office and asked him about it; and at that time I asked him if he was for the Union, and he said, no; and I asked him if he had asked Gene Jones to sign a Union card; and he said, no. And there are possibly others, are on here but I can't; I am sure that there are others on here; I am sure that there are others on here.

[fol. 1419] Q (By Mr. Hamlin) Following this inquiry, investigation that we have been discussing, did you have any further conversation with Mr. Martin, and did you authorize him to write a letter to the Union? A Yes, sir, I did. After I had formed my opinion as to how many people they had for and against the Union, I went to see Mr. Martin and told him that I felt like they had about thirty percent of the people that wanted a Union; and about seventy percent that didn't. And that with that percentage figure that we certainly shouldn't recognize the Union.

Q Did you authorize him to write the letter which appears in the file.

TRIAL EXAMINER: I think that you have been into that.

Q (By Mr. Hamlin) Now, Mr. Huffman, after this letter was written to the Union by Mr. Martin, I believe that is dated August 26.

TRIAL EXAMINER: Incidentally, he said something about a letter of July 31.

MR. HAMLIN: Yes, sir, that has been marked.
TRIAL EXAMINER: That is the other letter?
MR. HAMLIN: Yes, sir.
TRIAL EXAMINER: All right.
Q (By Mr. Hamlin) When with reference to that was this large, red poster put up that has been marked, that has been placed in evidence as General Counsel's [fol. 1420] Exhibit 5. About when was that put up? A I take it you are referring to the large one with the red marks across the corner?
Q Yes. A I think it was around the first of September.
MR. WILLIAMSON: That is GC 5.
Q (continuing) Either the last of August or the first of September.
Q (By Mr. Hamlin) And did you afterwards write any letters to employees? A Yes, sir.
MR. HAMLIN: For the record, Mr. Examiner, this large poster to which we refer, in the transcript it appears as Appendix "C" to General Counsel's Exhibit 1-z-1, is that not correct?
TRIAL EXAMINER: Well, I assume that this is a copy of it.
MR. HAMLIN: That's right.
TRIAL EXAMINER: I don't know.
MR. WILLIAMSON: It is.
MR. HAMLIN: I am referring now to Appendix (d).
TRIAL EXAMINER: Yes, I have got this.
MR. HAMLIN: In the same exhibit, a letter dated October 28, 1964, and addressed to: "My Fellow Employees". Did you send such a letter, Mr. Huffman?
[fol. 1421] THE WITNESS: Yes, sir.
TRIAL EXAMINER: Now this as I understand it, is Appendix "D" to the Regional Director's Supplemental Decision and Direction of Election?
MR. HAMLIN: Yes.
TRIAL EXAMINER: All right.
MR. HAMLIN: Which is Exhibit 1(z)(1).
TRIAL EXAMINER: Yes.
MR. HAMLIN: And Appendix "E" to the same exhibit, Mr. Huffman, do you have that before you?

THE WITNESS: Yes, sir.

Q (By Mr. Hamlin) Being a letter dated November 3, 1964. Did you send a letter like that to the employees? A Yes, sir.

Q Mr. Huffman, about the time that these letters were sent out or during this time, did you make any speeches? A Yes, sir.

Q To the Employees? A Yes, sir.

MR. WILLIAMSON: Sir, if he is going to testify about "speech", I don't want him sitting there reading the contents of that letter while he is testifying about it.

Q (By Mr. Hamlin) Would you go ahead and describe in general how those speeches were constructed.

[fol. 1422] A Yes, sir I made these speeches from these letters or copies of these letters; and there were some added speech in the speeches that came about from comment and questions from the group of employees to whom I made the speech or speeches. And so the speeches were based on these two letters that I sent out to the employees with added questions from the group of employees.

Q During the course of either of these speeches, did you make a statement that you could negotiate, and negotiate, and negotiate, and did not have to sign a thing? A No, sir, I did not say that.

Q Can you tell us anything you recall having said on the subject of negotiations. A The—I can refer to the letter, but the best my memory serves me, there is a paragraph in the letter that says something about negotiating for a contract with the union people

TRIAL EXAMINER: I think the question was, tell us as best you can what you said about negotiations.

THE WITNESS: That is what I was going to say, sir; I said whatever that paragraph said, and I was going to add this to it; when I was in the process of saying what is in this paragraph, somebody said. from the group of people that I was speaking, asked me, "Well, will you negotiate a contract with the Union?

[fol. 1423] And I said, "Of course, I will negotiate. I will negotiate in good faith, and if we agree, we will have a contract" or something to that extent. But I did not say that I "would negotiate, negotiate, and negotiate." Now the words

I just said may not be the words, but in substance that is what I did say.

Q (By Mr. Hamlin) Did you read these entire letters in the course of these speeches? A Yes, sir.

MR. WILLIAMSON: Object to the leading.

TRIAL EXAMINER: Well, he has answered the question. It is leading but he has answered it. Do you mean that you read the letter verbatim?

THE WITNESS: I read it, and then we had these side comments.

TRIAL EXAMINER: I know but did you read the letter?

THE WITNESS: Yes, sir, I read the letter.

TRIAL EXAMINER: Both letters?

THE WITNESS: Both letters, yes, sir.

TRIAL EXAMINER: All right.

Q (By Mr. Hamlin) And in the course of this, there were some comments? A Yes, sir, quite a bit.

MR. HAMLIN: May I go off the record for a moment?

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

[fol. 1424)] TRIAL EXAMINER: On the record.

MR. HAMLIN: John Henry Edmonds on Page 124 of the transcript refers to this language, "Negotiate, negotiate, and negotiate" and he added the words "And he did not have to sign a thing."

On Page 137, the Witness Hutchins referred to the words, "Negotiate, repeated four times.

On Page 162—

TRIAL EXAMINER: Well, I don't see that there is any necessity to repeat that.

MR. HAMLIN: I think that it is identical enough so that I though it might be a convenience to you.

Q (By Mr. Hamlin) In the course of these speeches, was there anything said by you about strikes other than what appears in these letters?

MR. WILLIAMSON: Object to the leading.

TRIAL EXAMINER: He may answer that yes or no.

A Repeat the question.

Q (By Mr. Hamlin) On the subject of strikes, was there anything said about strikes by you in these speeches beyond what appears in the letters? A There could possibly have been in answer to some questions that a group of employees or one employee asked about it when I said something about a strike.

[fol. 1425] Q Do you recall any particular thing you said in response to anything? A Well, I said that on the North Carolina Right-To-Work Law, my understanding of it, that if any employee went out on strike we had the right to replace him.

Q Did you at any time say that a person going out on strike would be fired for that or anything else to that effect? A No, sir.

Q Was there any reference by yourself or from the audience to a strike that Bottoms-Fiske or Fitch Furniture? A Yes, sir.

Q Had? A Yes, sir.

Q What do you recall about that? A There was some comment about both firms from the group. I don't remember the names of the people but some of them said that they had lived in Thomasville and lost their homes and went greatly in debt because of the strike that Thomasville Furniture had had; and they were saying it, and I did agree with them, because I remember the strike they had over there; I don't remember the cause but I remember that they had a strike that lasted quite some time; and someone mentioned Bottom-Fiske, about the violence that they had over there; and I concurred with that because I had heard [fol. 1426] of the same violence and to work each day, and so I did know that they had a very long strike there; and what happened or anything I don't know but some of the people in the group did say something about that; and I concurred with it; and motioned my head as they were talking.

Q Did you at any time make the statement that if they went out on strike they would have no more job? A Not in that language.

Q What did you tell them about the consequence, or the possible consequence? A Well, as I said a moment ago, that if they went out on strike that we would have the right

to replace them; and then there would be the possibility of them losing their jobs.

Q All right.

TRIAL EXAMINER: Has the date of these speeches been fixed?

MR. HAMLIN: Well, not in this testimony. It may be in others.

Q (By Mr. Hamlin) Can you fix the dates when these speeches were made with reference to the letters or otherwise?

TRIAL EXAMINER: First, how many speeches were there?

THE WITNESS: Two, sir. There were just prior to the dates on the letters because I mailed the letters out to the people shortly after I made the speeches; it may be a day or very shortly afterward; and I told the people at the time I made the speech that I would mail this thing, letter [fol. 1427] to them and that they would receive it in the very near future. We had a lot of people there that could not read, sir, and that was one of the reasons for reading the letters to them.

MR. WILLIAMSON: Which letter?

THE WITNESS: There are two letters that we are talking about, October 28, I think, and November 3.

TRIAL EXAMINER: These two exhibits here, Appendix "D" is one; Appendix "D" and "E".

THE WITNESS: And so the speeches were just prior to these letters.

MR. WILLIAMSON: The speeches were prior to the letters.

THE WITNESS: That's right, yes.

TRIAL EXAMINER: "D" and "E" to the Regional Director's Decision which I understand is General Counsel 1(z).

Q (By Mr. Hamlin) Mr. Huffman, did you make a speech 24 hours before the election approximately that? A No, sir.

Q The day before the election? A I think I made one the morning of—I don't remember; it seems like I made one the morning of November 3.

Q Was there one made on the morning of November 5, the day before the election? A I don't remember. I could have.

Q Mr. Huffman, did you ever say that you were not going to work with the Union in the plant, or anything [fol. 1428] like that? A No, sir. I was asked, Mr. Hamlin, during the speech some question like that, and I think I answered in the form that a Union would, that a Union in the plant would be a detriment to me, or something along that line.

Q Did you state in any of these speeches that, referring to the Finch strike that people could not get a job for participating in the Union or anything to that effect? A No, sir.

* * * *

[fol. 1432] Q (By Mr. Hamlin) Mr. Huffman, you have described that a union campaign took place in 1962 and 1963. When the compaign occurred in 1964, were there still working for these companies any of the employees who had been working for them during the earlier campaign of 1962 and 1963?

MR. WILLIAMSON: Objection.

A Yes, sir.

MR. WILLIAMSON: It is not relevant.

TRIAL EXAMINER: Oh, I don't see that it is relevant. I don't see that it is helpful or harmful either way. I assume that some of them were.

MR. HAMLIN: I will explain the basis of that now.

TRIAL EXAMINER: Well, it is in now. It is in the record.

MR. HAMLIN: We wish to renew an earlier motion. [fol. 1433] You will recall that we served a subpoena for the additional authorization cards on file in the Regional Office and which were not used in this proceeding. We have now shown the earlier campaign a year before. We have shown by the documents examiner that it is not possible to establish by handwriting analysis the age of the dates on these cards. This subpoena, one of its purposes was to ask for these other cards as a test of whether or not there had been dating, updating of cards of people who might no longer be with the company. We can't test that with the

cards that are in evidence because those people are still with the company, but if the remaining cards disclose dates, bear dates after the man left, we say that that would impeach all of the cards; and we assert that these cards also have a bearing on the validity of the demand, the good faith of the union in making the demand; its knowledge or lack of knowledge as to whether it had a majority or not. That is the reason why I brought out that testimony. We would like to renew our motion for the production of those documents; and I would like to make an Offer of Proof just, an Offer of Proof based on what I have just said, an Offer of Proof that numerous cards were filed for employees who no longer worked for either company; and also to prove whatever the cards may show with regard to the dating with reference to whether, with reference to when the man terminated his employment with his employer.

TRIAL EXAMINER: Cards that were not used?

[fol. 1434] MR. HAMLIN: Cards that were not used, yes.

TRIAL EXAMINER: Do you want to be heard?

MR. WILLIAMSON: Unless you want any more discussion. We would desist this motion.

TRIAL EXAMINER: All right, I will adhere to the earlier ruling.

Q (By Mr. Hamlin) Were there people working for General Steel or Crown Flex during the earlier campaign who were no longer there during the second campaign? A Yes, sir. I would like to qualify that just a little, Mr. Hamlin. I could verify that with company records. I don't remember their names at the moment.

* * * *

[fol. 1435] CROSS EXAMINATION

Q (By Mr. Cowherd) Mr. Huffman, you say that you talked to the emloyees as to whether they were for or against the union? A Yes, sir, some of them.

[fol. 1436] Q And when was this that you talked with him? A This was the latter part of August.

Q Do you remember the date? A It was over a couple weeks, ten day, two weeks period of time.

Q You are not specific of the dates though? A No, sir, I couldn't name the dates.

Q Well, when did you begin talking to them? A Well, I started talking, well, some of them approached me in the latter part of July, as I said earlier, and told me that people had been to their homes and asked them to sign a card, an authorization card; and I talked with a number of them in the latter part of July that approached me and told me that a man was coming to their homes.

Q This was just casual, correct? A I wouldn't say it was casual exactly; they went to the trouble of coming to me in my office and told me that a Union organizer—

Q My question is this, when did you start soliciting the employees as to whether they— A Monday, August 14; that is Monday the 17th I think is the first day that I made a strong definite effort to find out.

Q I show you General Counsel's Exhibit 4(a) and 4(b) and I ask you if you can run down that list; let me ask you this; you had just talked to these employees as to whether or not they had signed a union card, is that cor-
[fol. 1437] rect? A Which employees?

Q The employees at General Steel, the ones that you talked with? A Yes, the ones that I talked with about it.

Q Now—

MR. HAMLIN: I object if that is reference to his former testimony. He didn't testify that he talked to them about whether they signed.

MR. COWHERD: He answered the question.

MR. HAMLIN: He said that he had talked to them about whether they were for it.

Q (By Mr. Cowherd) Now I ask you if you would run down that list again and point out the people that you talked to? A From approaching me or me approaching them?

Q After the 17th of August? A I couldn't do that, Mr. Cowherd.

TRIAL EXAMINER: It all occurred on or after that, didn't it?

THE WITNESS: No, sir, it is possible that some of these people I mentioned approached me before August 14, and I couldn't pick out the ones that did.

TRIAL EXAMINER: All right: I thought you said before that it was all between Monday, August 17, and ten days or two weeks thereafter.

[fol. 1438] THE WITNESS: No, sir, as I told Mr. Cowherd, some of them approached me in the latter part of July and told me that the organizers had been to their home.

MR. COWHERD: All right, sir.

Q (By Mr. Cowherd) Would you go down that list and name again the employees that you talked to. A All right. Floyd Harris, Clarence Jones, Douglas Beeson, Johnny Gibson is the one who made the phone call; Troy McGhee.

Q Now did these eople that you have gone over, that you have just called, did you ask them if they signed a card? A No, sir, I didn't ask any of them if they signed a card. Some of them told me that they had signed cards, but that is not the way I investigated their feelings for the Union. I asked them if they were either for it or against it, or, "How do you feel about it?"

Q Did you ask them if they were for it or against it? A It is possible that either I asked them that or how did they feel about the union.

Q All right, what did Floyd Harris answer, what was his answer? A Floyd Harris aproached me and said that Napoleon Brown and some other fellow had come to his house one evening to ask him to sign an authorization card; and this is when he aproached me; and said he approached him a number of times; and finally he had to [fol. 1439] tell him to get off his property; that he didn't want anything to do with the union.

Q All right, how about Mr. C. J. Jones? A Mr. Jones told me that he had no sympathy for the union, that he had heard of union troubles that they had, had, and he had no sympathy for them.

Q All right, how about Mr. Johnny Gibson? A Now, Mr. Cowherd, don't hold me exactly to these words because I can't tell you verbatim what they told me.

Q All right, I am not going to hold you to just—I realize that it is a long time ago, and it is kind of hard to bring this back, but to the best of your recollection. A Yes, that is all I can do.

Q Johnny Gibson. A Johnny Gibson called me at home, at night on the telephone and told me that he had signed a union card but he was upset about it, and he was not for the union.

Q All right, sir, how about Mr. Troy McGhee? A Troy McGhee told me that he was not for the union and he would not vote for the union.

Q All right, sir, how about Mr. Douglas Beeson? A Douglas Beeson, I asked him how he felt about the union, this conversation in my office, and he said that he wasn't for it.

Q All right, sir, I believe that is all that you have [fol. 1439a] covered so far. Continue on down the list and pick out the ones that you talked to. A Before I start this, maybe I can save some time.

Q Well. A We might as well go ahead. Where did I stop?

Q The last one was— A Gibson?

Q I believe it was, sir. A All right.

Q It was either Johnny Gibson or Troy McGhee. A Troy McGhee. Henry Thompson.

Q What was his reply? A His reply was that he had no sympathy for the union.

Q All right, sir. A Another name that pops into my mind now that didn't come to my mind a while ago; George Crabtree; he told me that he was not for the union. I don't think that I gave you that name earlier.

Q No. I don't believe you did. What was his reply? A He said that he had no sympathy for the Union.

Q What about Reagan, what did he say? A Basically the same thing; that is what I started to say a few minutes ago; all of these people said generally the same thing.

Q They all replied in some negative form? A Some [fol. 1439b] form indicating that they had no sympathy for the Union, or that they would not vote for the Union.

Q Some kind of a negative answer? A That's right, concerning the Union.

* * * *

[fol. 1439(c)] TRIAL EXAMINER: When you say the "composite", do you mean that you read both speeches again?

THE WITNESS: No, sir, I didn't read them the last time. I used them to compare to refresh my memory on the things that I said before. This was shortly before the election. But I said basically the same thing in the last speech that I said in the two previous speeches.

Q (By Mr. Cowherd) Did you record the speech? A No, sir.

Q Did you have any notes, did anybody take dictation? A No, sir.

* * * *

[fol. 1439(i)] Q (By Mr. Cowherd) After you made this investigation as to the percentage of employees for or against the union, what was it again that you did with this information? A I discussed it with our attorney, Mr. Martin.

Q What was the result? A I answered the letter back to the union that I didn't think that the majority of the employees in the plant wanted the union. That is what it was in substance.

Q Mr. Huffman, these people that you read off here from General Counsel's Exhibits 4(a) and (b), did you tell Mr. Martin these names? A No, that was the first time he has heard these names.

* * * *

[fol. 1440] TRIAL EXAMINER: I would like to ask a few questions.

EXAMINATION

Q (By the Trial Examiner) Did I understand that you were Executive Vice-President of both Respondent [fol. 1441] companies? A Yes, sir.

Q You were but no longer? A No, sir.

Q Do you have any connection with either Respondent company now? A No, sir, none whatsoever.

Q Are the Respondent companies subsidiaries of some holding company? A Yes, sir, it is not a holding company; it is an operating corporation in Chicago, the Seng Company.

Q Do you have any interest in that corporation? A No, sir.

Q Now at the time that you talked to these, I didn't keep track of these people, that you said told you that they weren't interested in the union or didn't care to join the union, where did those interviews take place? A Various places, sir; some came to my office; I saw some in the lunch cafeteria; some down in the department where these people worked. I usually make daily inspections of most of the departments; and I usually say "Hello" to these people. I would like to tell you a little bit about that, sir, if it will help you understand this a little better. I knew these people, I think it is unusual. I think I am a little closer or a little closer to them than most Executive Vice-Presidents. I started this company, when I say I started, I purchased the company with some other [fol. 1442] people when it was a very small company with approximately 30 employees; and I worked alongside a lot of these people as we expanded.

I was in a superintendent's capacity, even a foreman's capacity, and I knew a lot of these people on a very friendly basis. I have visited with them in their homes; and they have visited with me in my home; and that is the reason, these people would approach me; they were close to me, they would call me, "Frank"; they never called me "Mr. Huffman"; and I would call them by their first name; and that is the reason that these people would come to me; I think, and tell me how they felt about these things; more so possibly than they would have with other companies.

MR. WILLIAMSON: We, of course, object to this speculation and conclusionary statements on the record.

THE WITNESS: I just wanted to tell you what the background was.

TRIAL EXAMINER: About how many, about what percentage of this total number that you talked to, how many of them did you talk to in your office?

THE WITNESS: I guess, sir; it would be a guess, sir.

TRIAL EXAMINER: Your best estimate. What percentage of the number?

THE WITNESS: I don't know how many I named.

Q (By the Trial Examiner) I didn't keep track.

[fol. 1443] MR. WILLIAMSON: He named 27 of them and then one additional one.

THE WITNESS: Well, I would say in percentage, abount ten percent or something like that; many, many more people, employees approached me than the ones I named. If I had a lot of time to study, I could possibly talk to the people gain. I could possibly take—this is the first time that I have tried to do this, sir; when he asked me the question here then. I hadn't even though about it when I got on the witness stand. And so may, many of the employees came to me and told me how they felt about the union without me going to them and asking them. anything about it; and they have called me at home; I can't remember the names of the others; they have called me at home.

[fol. 1445] RECROSS EXAMINATION

Q (By Mr. Cowherd) You didn't help them to prepare this case? A Who?

Q Mr. Martin and Mr. Hamlin? A Why, yes, sir.

Q And it is your testimony that you didn't tell them the names of these employees? A That is correct, sir. I did not.

Q You say that you are pretty good friends with these employees, is that correct? A That's right. I think so.

Q But you didn't want them to join the union, did you? A To be honest, no, sir.

Q You are pretty much against the Union? A Not generally, no, sir. I made a statement in one of the speeches; somebody asked me that same thing; during some of the speeches that I made to the people; and I told them in the speech that the union had helped a lot of people in this country particularly in the cotton mills; that they had raised the standard of living, and the wages as well; but I told them that since I was giving them things that I was giving them that I didn't think that the Union could do them any good.

Q Was that in the letters that you wrote to them? A No, sir. That was from question asked, "Was I against the Union or did I dislike the Union"; and that is the

way I answered the question, during one of my speeches; and I did read the letter.

* * * *

[fol. 1447] BOBBY SIMPSON

was called as a witness by and on behalf of the Respondent and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address, please.

THE WITNESS: Bobby Simpson, 241 Koontz Avenue, Thomasvillt, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Hamlin) Mr. Simpson, where do you work? A General Steel Products.

Q And what is your job there? A At present in sales.

* * * *

[fol. 1450] Q (By Mr. Hamlin) Mr. Simpson, at any time before the election did you make any statement to Mr. James R. Hutchins or in his presence? A I did in his presence.

[fol. 1451] Q That if the Union came in that "a lot of people would not buy our product because the union"— A No, sir.

Q Did you make that statement? A No, sir.

Q Did you say anything like that? A No, sir.

Q At that time, did you make any statement that "if we left and went somewhere else that it would be hard to find a job because of working for a union outfit", or anything to that effect? A I might a statement to that effect, sir, but not exactly as stated.

Q Go ahead and state what you said as well as you remember it. A Well, I had the complete group of the shipping department all together talking with them, and I told them at that time that people in this area did not recognize the union.

TRIAL EXAMINER: That the people in what?

THE WITNESS: In this area did not recognize the union and that some of them, there was a possibility of some of them holding against hiring people that were associated with the union.

* * * *

[fol. 1515] RICHARD K. DAVIS, SR.

was called as a witness by and on behalf of the Respondent and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us your full name and address.

THE WITNESS: Richard K. Davis, Senior, Route 5, High Point, Box 195 N.

DIRECT EXAMINATION

Q (By Mr. Hamlin) Mr. Davis, are you at present connected with General Steel or Crown Flex? A No, sir.

Q How long since you have worked there or have you ever worked there? A I have. I don't remember the exact date of termination.

Q Mr. Davis, at the time of the election, what position did you hold with the company? A I was a foreman in the spring up department.

* * * *

[fol. 1518] Q Mr. Heaton has described a conversation which he says occurred two or three weeks before the election when he and Lucas were working at the springing table in which he states that you asked them how they were going to vote; and they claimed to have replied to you, "Yes"; and then it is said you replied to them, "Well, if you do, I will fire you" and laughed and walked off. Now do you remember any such occurrence, or did any such occurrence happen? A Well, it is very possible that I said this. I don't remember it, but these two boys, when I was with them, I said what I wanted to; are the type of fellows I said what I—

MR. WILLIAMSON: Object to the "type of fellow".

[fol. 1519] TRIAL EXAMINER: Yes.

THE WITNESS: I probably said it because I knew them well enough; the statement said "I laughed and walked off"; more than likely I did because I said anything I wanted to to them usually; and we kidded around all the time; and so I probably said it.

* * * *

[fol. 1550] TOMMY PARRISH

was called as a witness by and on behalf of the Respondent and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Will you take a chair, and give us your full name and address.

THE WITNESS: Walter Thomas Parrish, 2202 Plainview Drive, High Point, North Carolina.

DIRECT EXAMINATION

Q (By Mr. Hamlin) Mr. Parrish, what is your job? A Foreman.

Q Where? A General Steel.

* * * *

[fol. 1557] Q Mr. Parrish, on the morning of the elec-
[fol. 1558] tion, did you state to William F. Poore, Jr., "Well, boys, we are going to rub this thing out here today, you boys don't need a union, it will do you more harm than good." Did you say that or anything similar to that on the morning of election day? A Not on the morning of election day.

Q Had you said anything like that? A I had said, I had told William that I thought that we would be better off with the union; better off without the union than we would be with the union; but it was not on the day of the election, but I had been told that there was a 24-hour period that we were not supposed to talk about the union; and so I didn't talk out the union during that 24 hours. It could havt been maybe the day before that, or so.

* * * *

[fol. 1597] ERNEST LEE CURRY

was called as a witness by and on behalf of the Respondent and after having been first duly sworn was examined and testified as follows:

TRIAL EXAMINER: Give us your name and address:

THE WITNESS: Ernest Lee Curry, 311 Moore Street, Thomasville.

DIRECT EXAMINATION

Q (By Mr. Hamlin) Mr. Curry, who do you work for? A I work for Bob Maxwell.

Q What company? A Crown Flex.

* * * *

[fol. 1601] Q Mr. Curry, Mr. Howard Slate has testified in this proceeding that sometime in July you came to his machine and asked him if a man had been by to see him, a union representative.

MR. COWHERD: I believe you could do better from the record.

MR. HAMLIN: I am reading to him verbatim; I would be glad to dig it out.

TRIAL EXAMINER: Go ahead.

Q (By Mr. Hamlin) Continuing Mr. Slate's testimony, "I asked if he was talking about a man from the union and told him no, the man had not been by to see me, he did not say anything more about the union, not to me."

Was there any conversation with Mr. Slate, or anything like that that you recall? A Yes, sir, I remember asking him that. I talked with Slate a lot.

* * * *

[fol. 1602] Q Did you ever in the month of July ask Mr. Moss how he felt about it?

TRIAL EXAMINER: Felt about what?

MR. HAMLIN: I am asking if in the month he asked Mr. Moss if he had heard anything about the union.

A I may have, sir, but I don't remember whether I did or not. Like I say, I went around to all of them.

* * * *

[fol. 1614]

ROBERT HAROLD LEWIS, SENIOR

was called as a witness by and on behalf of the Respondent, and after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: Give us you full name and address, please.

THE WITNESS: Robert Harold Lewis, Senior, 1202 Forest Avenue, High Point.

DIRECT EXAMINATION

Q (By Mr. Hamlin) Mr. Lewis, what is your position with the Crown Flex? A I am Assistant Foreman under Mr. Curry in Crown Flex.

* * * *

[fol. 1618] Q Mr. Lewis, Mr. William G. Moss has testified that in the latter part of July you said that you heard the union was back out there again and that if anyone was going to try to get me to join or anything like that not to have anything to do with it. Did you have such a conversation with Mr. Moss any time in July? A I had a conversation like that but I don't remember it being with Mr. Moss in particular.

Q Mr. Moss' brother testified that you said that if Mr. Hoffman found out that anybody would have anything to do with it he would be fired. Did you ever say anything like that to Mr. Moss or to anyone else? A Mr. Moss come to me and says, "If we were to join the union, do you think that Frank Huffman would fire us?"

I said, "I am sure he wouldn't." I said, "Mr. Huffman has the right to fire you or me or anybody else with good reason because of the union or not." And that is all the conversation we had about that. That is all the conversation that I had with him that I remember.

* * * *

[fol. 1716] JAMES E. RIGGSBEE

was called as a witness by and on behalf of the Respondent and, after having been first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: All right, sir, now give us your full name and address, please.

THE WITNESS: James E. Riggsbee, Route 2, Sophia.

DIRECT EXAMINATION

Q (By Mr. Hamlin) Mr. Riggsbee, who do you work for? A General Steel Products, Inc.

Q How long have you been with them? A Well, I don't know exactly, eight or nine years.

Q What is your job with your company at the present time? A I was scheduling production, I am doing that.

Q What job did you have last summer during the union campaign? A I was foreman of the bed assembly.

* * * *

[fol. 1757] Mr. Peterson says, "Jim Riggsbee came out of the office and came out on the line and was talking to [fol. 1758] one of the girls, Nellie, and he called four or five of us fellows over and told us that he had just come from the office; and Frank said that the union was coming in; and that if it did come in that a nigger would be the head of it; he was putting in ten new machines on that line, and if the union did come in, the niggers would be the operators of it."

Now do you remember any such conversation, and if so, will you recite what actually occurred? A I remember the conversation. I remember it well.

Q What happened? A I was going by, there were three or four of them standing in a bunch although the single line was stopped; they weren't runnin anything.

Q Where had you come from? A I had come out of the tool room.

Q The tool room? A Working' on some parts for a machine.

Q All right. Had you come from Mr. Huffman's office. A No, sir.

Q Go ahead and state what occurred. A Well, Nellie talked to me first; she said that; Nellie said "they"—

Q Now who was Nellie talking to? A She was talking to me. There was Zeb Laws, Sam Snow, and Peterson, Stanley; and she says, "They are going to hire a nigger to take Peterson's place, ain't that right?"

[fol. 1759] I said, "Yes, they are going to get ten new machines and ten new niggers to run them." It was all a joke.

* * * *

[fol. 1773] TRIAL EXAMINER: Were there any Negroes employed in the plant at that time?

THE WITNESS: I don't know. There might have been one in the shipping department, I don't know.

* * * *

[fol. 1830] NAPOLEAN BROWN

* * * *

[fol. 1833] MR. WILLIAMSON: Mr. Brown, I want you to look through 130 authorization cards I am handing you, sir, go through there and count for us, if you would sir, how many of those cards that you believe you signed.

THE WITNESS: You mean dated?

TRIAL EXAMINER: Yes, that you dated.

I think the record should show that it took the witness about nine minutes to examine the cards and count them.

MR. WILLIAMSON: We have nothing further.

CROSS EXAMINATION

Q (By Mr. Hamlin) Mr. Brown, would you read into the record the exhibit number of the cards which you [fol. 1834] dated. A Yes, sir.

6(g).

TRIAL EXAMINER: All right, go on.

THE WITNESS: 6(l); 6(j); 6(c); well, maybe that is—

MR. HAMLIN: I think it would be better whoever read, wrote the numbers to read off the numbers.

TRIAL EXAMINER: Starting over.

MR. WILLIAMSON: Yes.

TRIAL EXAMINER: All right.

MR. WILLIAMSON: GC 6(l); 6(j); 6(h); 6(g); 6(k); 6(o); 6(q); 6(s); 6(a)(5); 6(a)(7); 6(a)(11); 6(a)(12); 6(a)(19); 6(a)(20); 6(a)(25); 6(a)(33); 6(a)(37);

TRIAL EXAMINER: Well, you don't have to repeat 6(a) for every one of them.

MR. WILLIAMSON: Everything should be 6(a).

TRIAL EXAMINER: Everything is 6(a), isn't it?

MR. WILLIAMSON: Yes.

TRIAL EXAMINER: All right.

MR. WILLIAMSON: 40; 41; 46; 47; 51; 54; 55; 57; 58; 61; 62; 63; 68; 69; 70; 71; 72; 73; 74; 80; 85; 87; 91; 92; 93; 94; 96; 97; 98; 99; 100; and 106.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10,543

GENERAL STEEL PRODUCTS, INC., and CROWN FLEX OF NORTH CAROLINA, INC., PETITIONERS

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Argued January 11, 1968. Decided June 28, 1968.)

Before HAYNSWORTH, Chief Judge, and BOREMAN and WINTER, Circuit Judges.

* * * *

PER CURIAM:

Petitioners, General Steel Products and Crown Flex of North Carolina, found by the Board to constitute a single employer within the meaning of the National Labor Relations Act,[1] seek review of an order of the National Labor Relations Board.[2] The order is predicated upon the Board's findings that the employer illegally coerced its employees in the exercise of their rights under the Act and had no good faith doubt as to the majority status of the union when it refused to recognize it as the authorized bargaining representative of a unit of its employees. We deny enforcement of those portions of the order dependent upon the latter finding.

The Upholsterers' International Union of North America, AFL-CIO attempted to organize the Company's employees. By letter, the union advised the company that it held signed authorization cards from a majority of the

[1] 29 U.S.C.A. § 151 *et seq.*

[2] 157 NLRB No. 59.

company's employees and requested recognition and a bargaining meeting. The Board found that at that time the union held valid cards from 120 of 207 employees in the unit in question. The company refused to recognize the union, stating its disbelief in the union's claimed majority status. In the meantime, the union filed a petition with the Board for a representation election. The election was held and the union was defeated.

The Board found that during the union's campaign the company engaged in coercive activity in violation of § 8 (a) (1) of the Act. Substantial evidence exists on the whole record to support this finding, and we enforce those portions of the order directing the company to cease and desist from coercing its employees and to post appropriate notices. Accepting the Board's findings, however, the violations of § 8(a) (1) as found by the Board were not so extensive or pervasive as to prevent the conduct of a valid secret election.[3]

The Board further found that the company's refusal to bargain with the union upon request was not motivated by a good faith doubt as to majority status and constituted a violation of §§ 8(a) (5) and (1) of the Act. In several recent cases we have set forth in sufficient detail the reasons such a finding cannot stand in a typical case of this sort.[4] Accordingly, we deny enforcement of those portions of the order directing the company to cease and desist from refusing to bargain with the union and to bargain with the union upon request.

Enforcement granted in part and denied in part.

---

[3] Whether or not the election actually held was properly held invalid, we do not decide, but the § 8(a) (1) violations found to have occurred were not so pervasive that available remedies were not reasonably calculated to assure a free exercise of the employees' choice by secret ballot rather than by resort to a count of questionable cards.

[4] Crawford Mfg. Co. v. NLRB, 4 Cir., 386 F.2d 367, cert. denied 36 L W 3040, ____ U.S. ____; NLRB v. S.S. Logan Packing Co., 4 Cir., 386 F.2d 562; NLRB v. Sehon Stevenson Co., Inc., 4 Cir., 386 F.2d 551; NLRB v. Heck's Inc., 4 Cir., ____ F.2d ____ (Decided this day); NLRB v. Gissel Packing Co., Inc., 4 Cir., ____ F.2d ____ (Decided this day).

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10,543

GENERAL STEEL PRODUCTS, INC., and
CROWN FLEX OF NORTH CAROLINA, INC., PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

THIS CAUSE came on to be heard upon the petition of General Steel Products, Inc., and Crown Flex of North Carolina, Inc., to review and set aside or modify a certain order issued against it by the National Labor Relations Board on the 11th day of March, 1966, in proceedings before the said Board entitled "General Steel Products, Inc., and Crown Flex of North Carolina, Inc., and Upholsterers' International Union of North America, AFL-CIO", numbered 11-CA-2491, 11-CA-2613, and 11-RC-2022; upon the answer of the National Labor Relations Board and cross-petition for enforcement of said order, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the order of the National Labor Relations Board be, and it is hereby, enforced with respect to the violations of § 8(a)(1) of the National Labor Relations Act; that enforcement is denied as to those portions of the order directing the company to cease and desist from refusing to bargain with the union and to bargain with the union upon request, and that the said General Steel Products, Inc., and Crown Flex of North Carolina, Inc., abide by and perform the directions of the

Board in said order as so enforced contained, in accordance with the opinion of the Court filed herein.

/s/ Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Filed, Jun. 28, 1968, Samuel W. Phillips, Clerk

A True Copy Teste:
Samuel W. Phillips, Clerk

By /s/ Margaret L. Davis
Deputy Clerk

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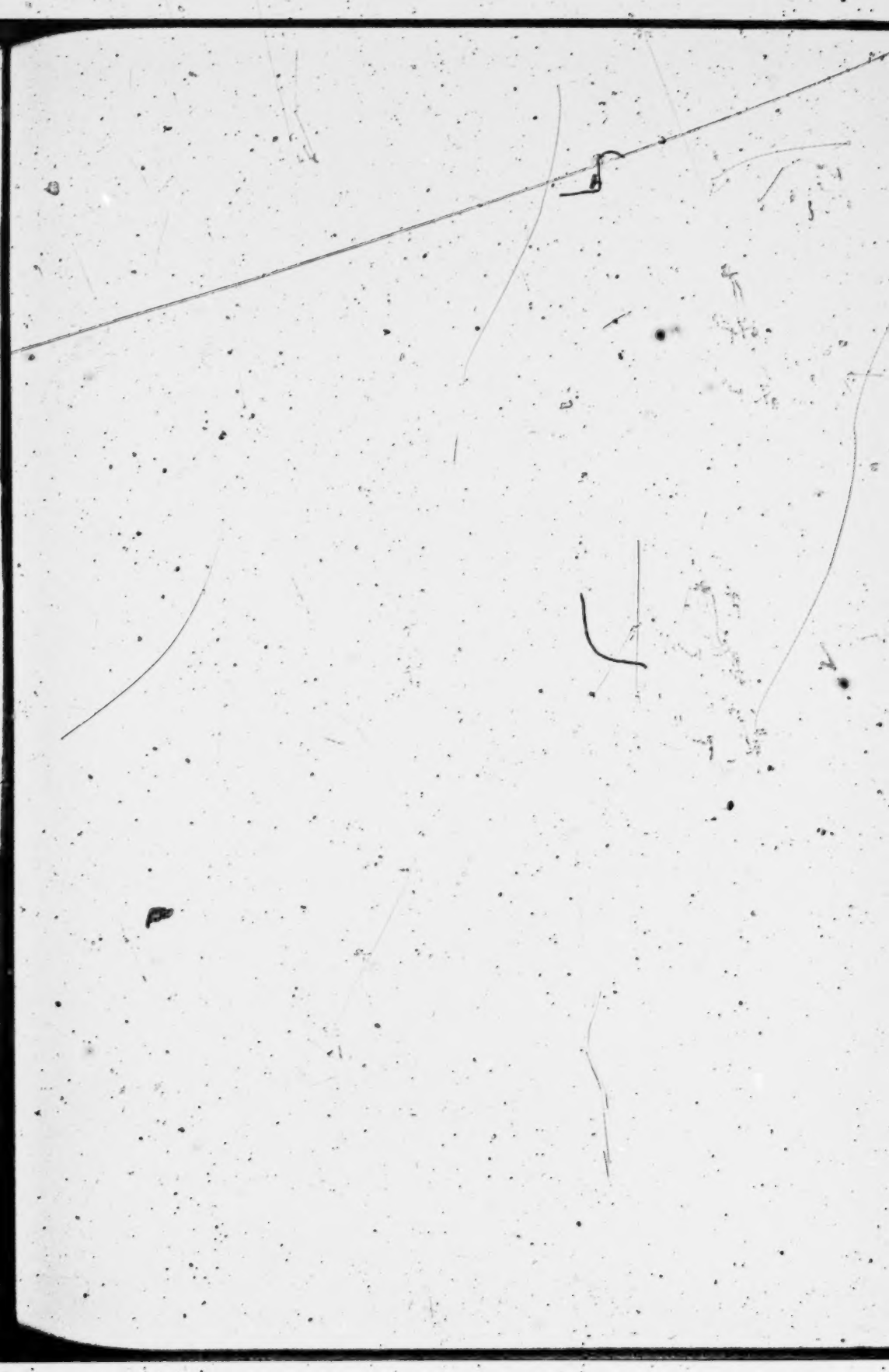

(1)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES COURT OF APPEALS
For the First Circuit

[Caption Omitted in Printing]

RELEVANT DOCKET ENTRIES

Jan. 22, 1968 - Petition for enforcement filed and case docketed. Notice mailed to respondent.

Jan. 24, 1968 - Appearances of Edward J. Simerka, Eldred A. Gentry and Stanley, Smoyer & Schwartz for respondent, filed.

Jan. 29, 1968 - Notice, service acknowledged returned and filed.

Jan. 31, 1968 - Appearance of Marcel Mallet-Prevost attorney for petitioner filed.

Feb. 28, 1968 - Answer filed by respondent. Notice mailed to petitioner. Certified list filed.

March 4, 1968 - Notice, service acknowledged returned and filed.

March 11, 1968 - Stipulation for Joint appendix approved (Aldrich, Ch. J.) and filed.

April 15, 1968 - Joint motion re form and time of filing briefs approved (Aldrich, Ch. J.) and filed. Brief and record appendix of petitioner filed by leave of Court.

April 16, 1968 - Transcript and two xerox copies thereof and one set of original exhibits filed by leave of Court.

April 29, 1968 - Assigned for hearing, May, 1968, session.

May 2, 1968 - Record appendix to respondent's brief filed.

May 3, 1968 - Respondent's brief filed.

May 8, 1968 - Appearance of Peter M. Giesey attorney for petitioner filed.

May 8, 1968 - Heard before Aldrich, McEntee and Coffin, JJ.

July 3, 1968 - Decree: The order of the National Labor Relations Board of May 2, 1967, is hereby affirmed and enforced. Opinion of the Court by McEntee, Circuit Judge.

Sept. 9, 1968 - Certified copy of record appendices, designated portions of transcript and proceedings in Court of Appeals to Supreme Court.

Oct. 2, 1968 - Notice of filing petition for certiorari (9/28/68) filed.

EXCERPTS FROM PROCEEDINGS IN BOARD NOS. 1-CA-8266 & 1-RC-8713

[1]

Before the
NATIONAL LABOR RELATIONS BOARD
First Region

In the matter of
The Sinclair Company
and
General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees, Local No. 404, an Affiliate of International Brotherhood of Teamsters

Case Nos:
1-CA-8266
1-RC-8713

Courtroom
Third Floor
U.S. Post Office Building.
Springfield, Mass.

Tuesday, 4 October, 1966

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

Louis Libbin, Esq., Trial Examiner.

APPEARANCES:

Perry Panos, Esq., J.F. Kennedy Federal Building, Boston, Mass., appearing on behalf of Counsel for the General Counsel.

Frederick C. Cohen, Esq., J.F. Kennedy Federal Building, Boston, Mass., appearing on behalf of Counsel for the General Counsel.

Carmin Napoli, President & Business Representative, 549 Chestnut St., Springfield, Mass., appearing on behalf of Local No. 404, the Charging Party.

[2]

Edward J. Simerka, Esq., Stanley, Smoyer & Schwartz, 1270 Union Commerce Building, Cleveland, Ohio, appearing on behalf of The Sinclair Company, the Respondent.

David H. Sinclair, President, Sixty Appleton St., Holyoke, Mass., appearing on behalf of The Sinclair Company, the Respondent.

[4]

PROCEEDINGS

TRIAL EXAMINER LIBBIN: All right. The hearing will come to order. This is a formal hearing before the National Labor Relations Board in the matter of the Sinclair Company, Case Nos. 1-CA-8266 and 1-RC-8713. The Trial Examiner conducting this hearing is Louis Libbin. Will counsel and other representatives for the parties please state their appearances for the record.

MR. PANOS: Perry G. Panos and Frederick C. Cohen, Counsel for the General Counsel, John F. Kennedy Federal Building, Cambridge and New Sudbury Streets, Boston, Mass.

TRIAL EXAMINER: All right. For the Respondent.

MR. SIMERKA: Edward J. Simerka, Stanley, Smoyer & Schwartz, 1270 Union Commerce Building, Cleveland, Ohio and David H. Sinclair, President of the Sinclair Company, sixty Appelton Street, Springfield or rather Holyoke, Mass.

TRIAL EXAMINER: Are there any other appearances?

MR. NAPOLI: Carmin Napoli, Teamsters Local No. 404, 549 Chestnut Street, Springfield, Mass.

TRIAL EXAMINER: What is your position, your title?

MR. NAPOLI: President and Business Representative.

TRIAL EXAMINER: All right. Mr. Panos, are you ready to proceed?

MR. PANOS: Yes, sir. Mr. Trial Examiner, I have marked for identification the formal papers as General Counsel's [5] exhibit 1(a) through 1(t). General Counsel's Exhibit 1(t) being the Index and Description of the formal documents. I have shown them to the parties and I would like to offer them into evidence as General Counsel's exhibit 1(a) through 1(t).

TRIAL EXAMINER: Is there any objection?

MR. SIMERKA: No objection from the respondents.

TRIAL EXAMINER: All right. They will be received.

(The documents above-referred to, were marked General Counsel's exhibits 1(a) through 1(t) and were received in evidence.)

* * * * *

[6] TRIAL EXAMINER: All right. The motion is granted.

MR. PANOS: I have marked as General Counsel's exhibit number two for identification an authorization card of one Oscar Niesner, N-I-E-S-N-E-R.

MR. SIMERKA: Mr. Panos, before we commence with that the Respondent has a motion that he would like to make at this time. The Respondent moves to strike from the Complaint paragraph 9, 10, 11, 12 and 15 which deal with the allegations of the refusal to bargain by the respondent. Paragraph nine alleges that—

TRIAL EXAMINER: I have read the Complaint so I am familiar with the allegations.

MR. SIMERKA: Well, I won't repeat them. These allegations on the refusal to bargain charge which is alleged in paragraph fifteen which alleges that, "By the actions described in paragraph 12, 13 and 14 Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act." Paragraph thirteen alleges generally interference, restraint and coercion and paragraph fourteen alleges with more particularity claims of interference with restraint and coercion, however, nowhere in the Complaint is there any allegation that we, the Respondent did not have a good faith doubt that the union represented a majority of its employees in an appropriate unit. Now, the Board has made—

* * * * *

[9] TRIAL EXAMINER: I will deny your motion

* * * * *

[12] MR. PANOS: As I was stating previously, I have marked as General Counsel's exhibit number two for identification an authorization card which has the signature of Oscar Neisner, N-E-I-S-N-E-R. Prior to the opening of the hearing Counsel for the General Counsel and Counsel for the Respondent had a meeting with reference to Mr. Neisner and I understand that he is home and ill and unable to attend this hearing and I wish to submit a stipulation that General Counsel's exhibit number two be received into evidence as the signed authorization card by Mr. Neisner from the date appearing thereon July 6, 1965.

TRIAL EXAMINER: You so stipulate, Mr. Simerka?

MR. SIMERKA: Yes, the company will so stipulate.

TRIAL EXAMINER: All right. It may be received pursuant to the stipulation.

(The document above-referred to, was marked G.C. 2 and was received in evidence.)

[13] MR. PANOS: Also in an attempt to shorten the length of this hearing, Mr. Trial Examiner, the Counsel for the

General Counsel and the Counsel for the Respondent met yesterday and worked out some stipulations with respect to the introduction of documents that are relevant to this case and I would like to mark them and introduce them into evidence.

TRIAL EXAMINER: All right.

MR. PANOS: As General Counsel's exhibit number three, a letter dated July 3, 1965 and signed by Robert Williams President of the Wire Weavers Trade Division, International Brotherhood of Teamsters.

TRIAL EXAMINER: Addressed to whom?

MR. PANOS: Just Dear Sir. I will explain the letter, after I have marked the next exhibit, Mr. Trial Examiner.

TRIAL EXAMINER: All right.

MR. PANOS: As General Counsel's exhibit number four for identification is a blank authorization card or a representation card for Local 404 of the Teamsters.

(The documents above-referred to, were marked G.C. 3 & 4 for identification.)

MR. PANOS: I would like to propose the following stipulation along with the introduction of General Counsel's exhibit number three and General Counsel's exhibit number four for identification, that a copy of this letter with the card as reflected in General Counsel's exhibit number four [14] was sent to the employees in the involved hearing on or about July 3, 1965.

MR. SIMERKA: The company will so stipulate.

TRIAL EXAMINER: All right. All parties so stipulate. You are now offering General Counsel's exhibits three and four.

MR. PANOS: I have offered General Counsel's exhibit three and four into evidence.

TRIAL EXAMINER: All right. Is there any objection to that. I take it there is not.

MR. SIMERKA: No objection.

TRIAL EXAMINER: All right. They may be received.

(The documents above-referred to, heretofore marked G.C. 3 & 4 were received in evidence.)

MR. PANOS: General Counsel's exhibit number five for identification is a list of fourteen names and the stipulation is proposed that these fourteen individuals comprised the total work force of the unit as alleged in the paragraph eight of the Complaint; namely, these were all of the journeymen wire weavers employed at least during the period from July, the first part of July, July 6, 1965, up to the date of the election, December 9, 1965.

TRIAL EXAMINER: You so stipulate?

MR. SIMERKA: I am not so sure about what Mr. Panos says with regard to the unit, we will stipulate that the names of the employees appearing on General Counsel's exhibit [15] number five, were employed by the company as weavers as of July 6, 1965 but that the same individuals were also employed on September 20th and also on November 8th and also on December 9th, 1965.

TRIAL EXAMINER: And that they were the only journeymen weavers employed by the company during those periods.

MR. SIMERKA: Yes, we will stipulate to that.

TRIAL EXAMINER: Does that cover it?

MR. PANOS: Yes.

TRIAL EXAMINER: All right. Now, pursuant to that stipulation are you now offering G.C. 5?

MR. PANOS: Yes, I offer that.

MR. SIMERKA: No objection.

TRIAL EXAMINER: There being no objection that may be received.

(The document above-referred to, was marked G.C. 5 and was received into evidence.)

MR. PANOS: General Counsel's exhibit number six for identification is a one page letter sent by Gary A. Brunault and Richard Bougie to Fellow Employees. I offer this with the following stipulation–

TRIAL EXAMINER: What is the date on it?

MR. PANOS: This was sent sometime between October 29, 1965 and November 2, 1965 and that stipulation is being offered–

[16] MR. SIMERKA: Will you also stipulate that enclosed or attached to the letter was a blank authorization card which was identical with the blank authorization card which has been received as General Counsel's exhibit number four.

MR. PANOS: I don't have that information, but we have no objection to including that in the stipulation that there was a card submitted with this letter.

TRIAL EXAMINER: All right, with that stipulation then are you offering G.C. 6?

MR. PANOS: Yes, I offer G.C. 6.

MR. SIMERKA: Oh, no objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 6 and was received in evidence.)

MR. PANOS: General Counsel's exhibit number seven for identification is a one page letter dated August 20, 1965 and addressed to Mr. Calvin McCoy from V.J. Einhart and I would like to offer this into evidence.

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 7 and was received in evidence.)

MR. PANOS: With the further stipulation, Mr. Trial Examiner, to identify Mr. Calvin McCoy is an attorney

practicing in the Cleveland, Ohio area representing the International [17] Brotherhood of Teamsters.

MR. SIMERKA: We will agree to that stipulation.

TRIAL EXAMINER: All right. The parties so stipulate.

MR. PANOS: General Counsel's exhibit number eight for identification is a one page letter dated September 22, 1966; that is, this year, 1966 addressed to whom it may concern from Calvin McCoy. This letter was given to me by respondent's counsel to explain General Counsel's exhibit number seven which is the letter written by Mr. Einhart to Mr. McCoy and the letter of Mr. Einhart was in response to a conversation between Mr. McCoy and Mr. Einhart and this statement, although not a deposition, just a signed statement by Mr. McCoy, based on the information that the respondent has with the conversation with Mr. Einhart, the further stipulation that the last sentence of that letter which states, "I only represented Local No. 859, of course, at the time above indicated" it is the understanding of Counsel for the General Counsel and Counsel for the respondent that the respondent is not contending that the request for recognition was for Local 859 but that this statement was only an explanation by Mr. McCoy that he was counsel for that Local in the Cleveland area and that the request that he made on behalf of the International Brotherhood of Teamsters and that the respondent is not contending that this was a request for that particular local but that the inclusion of the statement was for the purpose [18] of having Mr. McCoy identify that he was and he is an attorney for that Local, is that correct, sir?

MR. SIMERKA: Yes, the respondent agrees.

TRIAL EXAMINER: You join in that stipulation?

MR. SIMERKA: Yes, I will join in the stipulation.

MR. PANOS: I would like to offer G.C. 8 with those additions.

MR. SIMERKA: No objection.

TRIAL EXAMINER: There being no objection it may be received.

(The document above-referred to, was marked G.C. 8 and was received in evidence.)

MR. PANOS: General Counsel's exhibit number nine is a letter, a two page letter from Carmin P. Napoli, President and Business Representative of Local 404 of the Teamsters to David H. Sinclair, President of the Sinclair Company dated September 20, 1965. It is offered into evidence with the stipulation that it was sent to the company on that date and received by the company.

MR. SIMERKA: Yes, the company will stipulate.

TRIAL EXAMINER: All right. There being no objection it may be received.

(The document above-referred to, was marked G.C. 9 and was received in evidence.)

MR. PANOS: General Counsel's exhibit number ten for [19] identification is a one page letter dated September 24, 1965 from Carmin P. Napoli to David H. Sinclair—

* * * * *

MR. PANOS: As having been sent to the company on or about the date appearing.

TRIAL EXAMINER: Any objection?

MR. SIMERKA: No objection.

TRIAL EXAMINER: All right. It may be received.

(The document above-referred to, was marked G.C. 10 and was received in evidence.)

MR. PANOS: General Counsel's exhibit number eleven for identification is a one page letter dated September 28, 1965 sent by David H. Sinclair to Teamsters Local 404 Attention Carmin P. Napoli, President and it is offered into evidence

with the stipulation that it was sent to the union on or about that date and received by the union.

TRIAL EXAMINER: Any objection?

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 11 and was received in evidence.)

MR. PANOS: General Counsel's exhibit number twelve for identification is a two page letter dated October 11, 1965 [20] and sent by Carmin P. Napoli, President and Business Representative of Teamsters Local 404 to David H. Sinclair President of the Sinclair Company and it is offered into evidence with the stipulation that it was sent to the company on or about the date appearing and received by the company.

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 12 and was received in evidence.)

MR. PANOS: General Counsel's exhibit number thirteen for identification is a one page letter dated October 21, 1965 and sent by David H. Sinclair, President of the Sinclair Company to Teamsters Local Union 404, Attention Carmin P. Napoli and it is offered into evidence with the stipulation that it was sent on or about the date appearing on the letter and received by the union.

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 13 and received in evidence.)

MR. PANOS: General Counsel's exhibit number fourteen for identification is a letter dated November 2, 1965, a

three page letter signed by David H. Sinclair, President of the Sinclair Company and addressed to all employees. It is offered into evidence with the stipulation that it was [21] sent to the employees of the Sinclair Company on or about the date appearing thereon

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 14 and received in evidence.)

MR. PANOS: General Counsel's exhibit number fifteen for identification is a two page document dated November 5, 1965 and addressed to all employees and it is signed by the Sinclair Company by David H. Sinclair, President and it is offered into evidence with the stipulation that this letter was sent to all employees on or about the date appearing there on.

MR. SIMERKA: Oh, no objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 15 and was received in evidence.)

MR. PANOS: General Counsel's exhibit number sixteen (a) for identification is a one page letter dated November 22, 1965 and addressed to all employees and it is signed by David H. Sinclair, President of the Sinclair Company. General Counsel's exhibit number sixteen (b) for identification is a book entitled "The Enemy Within" by Bob Kennedy. That exhibit 16(b) was given the same number because General Counsel's exhibit number 16(a) identifies the book as having been sent [22] along with this letter and General Counsel's exhibits 16(a) and 16(b) are offered into evidence with the stipulation it was sent to the employees on or about the date appearing on the letter.

MR. SIMERKA: No objection.

TRIAL EXAMINER: They may be received.

(The documents above-referred to, were marked G.C. 16(a) and 16(b) and were received in evidence.)

* * *

MR. PANOS: General Counsel's exhibit number seventeen for identification is a two page letter dated November 30, 1965 addressed to all weavers and signed by David H. Sinclair and it is offered into evidence as General Counsel's exhibit number seventeen with the stipulation it was sent to the employees on or about the date appearing thereon.

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 17 and was received in evidence.)

[23] MR. PANOS: General Counsel's exhibit number eighteen for identification is a three page letter dated December 1, 1965 addressed to all wire weavers and signed by David H. Sinclair, President of the Sinclair Company with—it is offered as General Counsel's exhibit number eighteen with the stipulation that it was sent to all wire weavers on or about the date appearing thereon as received by them.

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 18 and was received in evidence.)

MR. PANOS: General Counsel's exhibit number nineteen for identification is a pamphlet with pictures thereon dated on the first page December 7, 1965. The first page reads "Let's look at the record." and it is signed by David H. Sinclair, President of the Sinclair Company and addressed

to all wire weavers. It has a cartoon on the first page and it has four sides to it and it has pictures on the back. It is offered as General Counsel's exhibit number nineteen with the stipulation that it was sent to the wire weavers on or about December 8, 1965 and was received by them.

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 19 and was received in evidence.)

[24] MR. PANOS: General Counsel's exhibit number twenty for identification is a one page document with writing on both sides and the writing says, "Put your X on the Right." On the other side it says, "I wonder where the dues loot goes?" and it is offered into evidence as General Counsel's exhibit number twenty with the stipulation that it was handed to the wire weaver employees on December 8, 1965 by the President David H. Sinclair at the meeting on that date.

MR. SIMERKA: The company will so stipulate.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 20 and was received in evidence.)

MR. PANOS: General Counsel's exhibit number twenty-one for identification is a pamphlet with writing on four sides addressed to all wire weavers and signed by David H. Sinclair, President of the Sinclair Company and it is undated. It is offered as General Counsel's exhibit number twenty-one with the stipulation that it was sent to the wire weavers during the period two to three weeks before the election of December 9, 1965

MR. SIMERKA: The company will so stipulate.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 21 and was received in evidence.)

MR. PANOS: General Counsel's exhibit number twenty-two [25] for identification is a paper back book entitled, "Hoffa, Ten Angels Swearing." It also says an authorized biography by Jim Clay. There are 182 pages and it is offered into evidence as General Counsel's exhibit number twenty-two with the stipulation that copies of this book were passed out to employees during the organizing campaign in November 1965 prior to the election of December 9, 1965.

TRIAL EXAMINER: By whom were they passed out.

MR. PANOS: By the union representatives, I believe.

TRIAL EXAMINER: Any objections?

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 22 and was received in evidence.)

* * * * *

[26] MR. PANOS: Mr. Trial Examiner, while we were off the record the parties got together with respect to a stipulation on the authorization card of Carl W. Hass which has been marked for identification as General Counsel's exhibit number twenty-three and it is offered as General Counsel's exhibit number twenty-three into evidence and it is an authorization card dated July 8, 1965 and the respondent agreed to stipulate that this is the authorization card of Carl Hass which was signed on or about that date and we offer it into evidence.

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 23 and was received in evidence.)

* * * * *

[28] MR. COHEN: General Counsel calls Raymond St. Germain.

RAYMOND ST. GERMAIN

* * * * *

TRIAL EXAMINER: Try to speak up loudly. Keep your voice up so we can all hear you. Give your full name and address to the reporter.

THE WITNESS: Raymond St. Germain, twenty-eight Evon Street, Willimansett.

TRIAL EXAMINER: Spell your last name?

THE WITNESS: S-T., G-E-R-M-A-I-N.

TRIAL EXAMINER: All right.

DIRECT EXAMINATION

Q. [By Mr. Cohen] Mr. St. Germain, have you ever been employed by the Sinclair Company at its plant in Holyoke, Massachusetts? A. Yes.

Q. And how long had you worked there? A. Approximately fifteen years.

Q. And when did you leave the plant? A. I—

Q. Approximately? A. It was in May, I believe.

[29] Q. Of this year? A. Yes.

Q. And what department did you work in? A. The weavers.

Q. Did you sign a union authorization card for General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees, Local 404?. A. Yes.

Q. I show you what is marked as General Counsel's exhibit number twenty-four, is that your signature appearing thereon? A. Yes.

Q. And did you sign that card on or about the date that's noted on the card? A. Yes, I did.

TRIAL EXAMINER: What is the date on there?

MR. COHEN: July 8, 1965.

Q. [By Mr. Cohen] Do you recall—

MR. COHEN: General Counsel offers G.C. number 24 into evidence at this time.

MR. SIMERKA: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 24 and was received in evidence.)

* * * * *

[34] MR. COHEN: General Counsel calls Howard Neill.

HOWARD NEILL

* * * * *

DIRECT EXAMINATION

Q. [By Mr. Cohen] Are you employed by the Sinclair Company at its plant in Holyoke, Massachusetts? A. Yes.

Q. You are here pursuant to a subpoena sent to you by the General Counsel? A. Right.

Q. How long have you worked there at the Sinclair Company? A. Approximately twenty-seven years.

Q. And in what department do you work? [35] A. The weave shed.

Q. Did you sign a union authorization card for Teamsters Local 404? A. Yes.

Q. I show you what has been marked for identification as General Counsel's exhibit number twenty-five and I ask you if that is your signature on the card? A. Yes, that is my signature on the card.

Q. And did you sign the card on or about the date appearing on the card, July 9, 1965? A. I think so, around in there.

MR. COHEN: General Counsel offers G.C. 25 into the record.

MR. SIMERKA: I would like to ask some questions on Voir Dire.

TRIAL EXAMINER: All right.

* * * * *

[36] THE WITNESS: Yes, sir.

MR. SIMERKA: You wrote the date?

THE WITNESS: Yes, I wrote the date on it.

MR. SIMERKA: And it indicates on the reverse side that it was mailed July 9th.

THE WITNESS: Yes.

MR. SIMERKA: Did you mail it?

THE WITNESS: Yes, I mailed it.

* * * * *

TRIAL EXAMINER: You have any objection to the card?

MR. SIMERKA: No.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 25 and was received into evidence.)

* * * * *

[37] Q. [By Mr. Simerka] Here is a document marked General Counsel's exhibit number twenty-two, have you received one of those prior to the election? A. Yes, I have the book.

* * * * *

[38] MR. COHEN: General Counsel calls Ernest Geissler.

ERNEST GEISSLER

* * * * *

[39] TRIAL EXAMINER: Be seated. Give your name and address to the reporter.

THE WITNESS: Ernest Geissler, four Caron Drive, South Hadley.

DIRECT EXAMINATION

Q. [By Mr. Cohen] Are you presently employed by the Sinclair Company at its plant in Holyoke, Massachusetts? A. I am.

Q. And are you here pursuant to a subpoena from the General Counsel? A. I am.

Q. How long have you worked at the Holyoke plant of Sinclair? A. Since 1939.

Q. What Department do you work? A. The weave shop.

Q. Did you sign a union authorization card for Teamsters Local 404? A. I did.

Q. I show you this card which is marked General Counsel's exhibit number 26, is this your signature appearing thereon? A. That is my signature.

Q. And did you sign this card on or about the date that is listed on here July 9, 1965? A. I did.

[40] Q. Did you fill in this card? A. I filled it in.

MR. COHEN: General Counsel offers G.C. number 26 into the record.

MR. SIMERKA: Again some questions on Voir Dire.

TRIAL EXAMINER: Let me say that on Voir Dire you may question if you are questioning the authenticity of the signature and the date, anything further should be on cross examination.

MR. SIMERKA: This is your signature?

THE WITNESS: It is.

MR. SIMERKA: The date appearing on the top did you fill that in?

THE WITNESS: I did.

MR. SIMERKA: Some of this is writing and some of it is printing, is that your printing?

THE WITNESS: That is my printing and my writing.

* * * * *

[41] MR. SIMERKA: No objection as to authenticity.

TRIAL EXAMINER: All right. I will receive it in evidence.

(The document above-referred to, was marked G.C. 26 and was received in evidence.)

* * *

CROSS EXAMINATION

Q. (By Mr. Simerka.) I show you a document which has been marked as General Counsel's exhibit number three, have you seen that before? A. Yes, I have.

Q. Where and when? A. At home.

Q. You received a copy of this at home? A. I did.

Q. Did the authorization card that you signed come with the letter? A. That I don't know.

Q. You don't recall? [42] A. I don't recall.

Q. Where did you sign the card? A. At home.

Q. You signed this at home? A. I did.

Q. Was anyone with you at the time? A. My wife.

Q. And no one else? A. No one else.

Q. You said you dated it July 8th and it shows a post mark date of July 8th? A. That is correct.

Q. Did you mail it? A. I mailed it.

* * * * *

[63] MARCEL SIKORSKI

* * * * *

DIRECT EXAMINATION

Q. [By Mr. Cohen] Mr. Sikorski, are you presently employed by the Sinclair Company at its plant in Holyoke, Massachusetts? A. That is correct.

Q. Are you here pursuant to a subpoena from the General Counsel? A. Yes.

Q. How long have you worked at the Sinclair plant? [64] A. About fifteen years.

Q. And in what department did you work? A. Weave shed.

Q. Did you sign a union authorization card for Teamster Local Union 404? A. I did.

Q. I show you what has been marked for identification as General Counsel exhibit number twenty-seven, is this your signature appearing on this card? A. Yes, it is.

Q. Did you sign the card about the date that is listed on the top, July 8, 1965? A. That is right.

Q. And this is your writing on the card, did you fill in the card? A. Yes.

MR. COHEN: I offer this into the record.

MR. SIMERKA: Where did you sign this card?

THE WITNESS: At home.

MR. SIMERKA: Where did you receive it?

THE WITNESS: I received it at home.

MR. SIMERKA: You received it at home?

THE WITNESS: Yes.

MR. SIMERKA: Did somebody bring it to your house?

THE WITNESS: I got it from the mailbox, it came through [65] the mail.

MR. SIMERKA: Through the mail?

THE WITNESS: That is correct.

[65] MR. SIMERKA: How many days before you signed it had you received it?

THE WITNESS: Well, I believe I read what it said on the card there and I signed it, I think that day, but I think I delayed sending it.

MR. SIMERKA: On the back it shows it was mailed July 8th. Did you mail it on the same day that you signed it?

THE WITNESS: I don't know. I couldn't have.

MR. SIMERKA: Well, you're not sure whether you mailed it on the same day?

THE WITNESS: Not exactly sure.

MR. SIMERKA: You think you delayed it?

THE WITNESS: I think I delayed one day.

MR. SIMERKA: You sure that you filled in the date?

THE WITNESS: I think I filled in the date.

MR. SIMERKA: You are not sure whether you filled it in?

THE WITNESS: Well, it is a possibility that my sister may have printed some of this in here, but I think that I printed that there. Sometimes she prints out some of these things for me.

MR. SIMERKA: Well, is this your printing?

[66] THE WITNESS: Well, I think that's my printing right there.

MR. SIMERKA: Well the E herein Pearl is different from the E in wire.

THE WITNESS: Well, I know when I made out that card my sister and mother were present.

MR. SIMERKA: Your sister and mother were present?

THE WITNESS: Yes.

MR. SIMERKA: I see. This was at your home?

THE WITNESS: At my home.

TRIAL EXAMINER: Any objection?

MR. SIMERKA: No objection, sir.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 27 for identification, and was received in evidence.)

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[68] MR. COHEN: General Counsel calls Mr. Cleland.

THOMAS CLELAND

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DIRECT EXAMINATION

Q. [By Mr. Cohen] Mr. Cleland, are you presently employed by the Sinclair Company at its plant in Holyoke, Massachusetts? A. I am.

Q. Are you here pursuant to a subpoena from the General Counsel? A. I am.

Q. How long have you worked for the Company? A. Thirty-three years.

[69] Q. In what department do you work? A. The weaving department.

Q. Did you sign a union authorization card for Teamsters Local 404? A. I did

Q. I show you what has been marked as General Counsel's exhibit number twenty-eight, is that your signature appearing on that card? A. Yes, sir.

Q. And did you sign the card on or about the date appearing on top of that card, July 7, 1965? A. Yes, sir.

Q. Is that your writing throughout this card? A. It is.

MR. COHEN: General Counsel offers exhibit number twenty-eight into the record.

MR. SIMERKA: You testified that this was your signature on the card?

THE WITNESS: Yes.

MR. SIMERKA: You signed the card voluntarily?

THE WITNESS: Yes, sir.

MR. SIMERKA: Where?

THE WITNESS: In my home.

MR. SIMERKA: How did you get possession of the card?

THE WITNESS: Pardon?

[70] MR. SIMERKA: How did you get the card?

THE WITNESS: Through the mail.

MR. SIMERKA: Was anyone present when you signed it?

THE WITNESS: No, my wife was in the house but in another part of the house.

* * *

TRIAL EXAMINER: You have any objection to the offer of the card?

MR. SIMERKA: No objection.

TRIAL EXAMINER: All right. It may be received.

(The document above-referred to, was marked G.C. 28 and was received in evidence.)

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[71] MR. COHEN: General Counsel calls William Dean.

WILLIAM DEAN

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[72] DIRECT EXAMINATION

Q. [By Mr. Cohen] Mr. Dean, are you employed by the Sinclair Company at its plant in Holyoke, Massachusetts? A. I am.

Q. Are you here pursuant to a subpoena from the General Counsel? A. I am.

Q. How long have you worked at the company? A. Thirty-one years.

Q. What department do you work in? A. Wire weaving.

Q. Did you sign a union authorization card for Teamsters Local 404? A. Yes, sir, I did.

Q. I show you what has been marked as General Counsel's exhibit number twenty-nine, is that your signature appearing on this card? [73] A. Yes, it is.

Q. And did you sign this card on or about the date appearing on the card, July 8, 1965? A. I signed it probably a week or so after I got it.

Q. Would that be approximately the date that is listed on this card? A. Yes. The exact date, the same date I signed it.

Q. And this is your writing throughout the card? A. Yes.

MR. COHEN: General Counsel offers G.C. number 29 into the record.

MR. SIMERKA: Mr. Dean, is your writing and printing on this card?

THE WITNESS: Yes.

MR. SIMERKA: You printed your name here and signed it down here?

THE WITNESS: Correct.

MR. SIMERKA: And this is your writing here where it is dated?

THE WITNESS: Yes.

MR. SIMERKA: Where did you receive this card?

THE WITNESS: At home.

MR. SIMERKA: Through the mail or how?

THE WITNESS: Through the mail.

MR. SIMERKA: It came to you through the mail?

[74] THE WITNESS: Yes, sir.

MR. SIMERKA: Where did you sign it?

THE WITNESS: At home.

MR. SIMERKA: Was any one present?

THE WITNESS: My wife.

MR. SIMERKA: What did you do with it after signing it?

THE WITNESS: Well, I didn't mail it right away. I put it on the bureau to think the thing over a little while and when I came home the next day my wife had had my son drop it in the mailbox.

MR. SIMERKA: Had you instructed your wife to mail it for you?

THE WITNESS: No.

MR. SIMERKA: You put it on the bureau so you could think about it a little more?

THE WITNESS: Yes.

MR. SIMERKA: Respondent objects.

TRIAL EXAMINER: On what grounds?

MR. SIMERKA: That the employee Mr. Dean did not voluntarily mail this card or deliver it to the union for the purpose of representation.

TRIAL EXAMINER: Mr. Cohen?

MR. COHEN: I think I may be able to clarify that.

Q. [By Mr. Cohen] Did you do anything to revoke your [75] authorization on that card, to withdraw the card? A. No.

Q. Did you try to get the card back? A. No.

MR. COHEN: No further questions.

TRIAL EXAMINER: I will overrule your objection. It may be received.

(The document above-referred to, was marked G.C. 29 and was received in evidence.)

* * *

CROSS EXAMINATION

Q. By Mr. Simerka.) When the card came to you, did you receive just the card or was there anything else with it? A. There was a letter with it.

Q. I show you General Counsel's exhibit number three have you seen that letter? A. I think that was the one that came with it.

Q. You think that was the one? A. I think.

Q. Can you be more definite? A. It was too long ago and I am not sure now.

Q. Well– [76] A. I would say that this is the one.

Q. You would say this was the letter you received, a copy of this letter you received along with the card?

TRIAL EXAMINER: You have to answer out loud instead of shaking your head. Your answer was yes?

THE WITNESS: Yes.

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MR. COHEN: General Counsel calls Gary Brunault.

GARY BRUNAULT

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[77] DIRECT EXAMINATION

Q. [By Mr. Panos] Were you ever employed by the Sinclair Company at its plant in Holyoke, Mass.? A. I was.

Q. And how long had you worked there? A. Approximately fifteen years.

Q. When did you last work there approximately? A. About six months ago.

Q. What department did you work in? A. The wire weaving department.

Q. Were you a wire weaver? A. Yes.

Q. Mr. Brunault, did you sign a union authorization card for Local 404 of the Teamsters? A. Yes, I did.

Q. I show you what has been marked as General Counsel's exhibit number thirty for identification, and I ask you to inspect the card and tell us if that is your signature that appears thereon? A. Yes, sir.

[78] Q. Did you fill out the card? A. Yes, I did.

Q. What did you do with the card after you filled it out? A. I probably put it in my pocket. I was going to mail it in.

Q. And how long after you signed it did you mail it in? A. Oh, probably a few days.

Q. I direct your attention to the side opposite to your signature, would you look at the date, the mailing stamp and tell us if that would refresh your memory as to when you mailed it? A. October.

Q. No, the postal stamp and not the National Labor Relations Board stamp? A. July 9th. It was on or about July 9th.

Q. What was on or about July 7th or 8th? A. When I signed it and mailed it in.

* * *

Q. To the best of your recollection, Mr. Brunault, when did [79] you sign that card? A. Around the 8th.

Q. The 8th of what month? A. July.

Q. 1965? A. That is right.

Q. And where were you when you filled out the card? A. Home.

MR. PANOS: I offer G.C. 30 for identification into evidence as General Counsel's exhibit number thirty.

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[82] (The document above-referred to, was marked G.C. 30 and was received in evidence.)

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[87] MR. COHEN: General Counsel calls Viateur Goulet.

VIATEUR GOULET

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DIRECT EXAMINATION

Q. [By Mr. Cohen] Mr. Goulet, have you ever been employed by the Sinclair Company at its plant in Holyoke, Massachusetts? A. Yes, sir.

[88] Q. And how long had you worked there? A. About five years with my two years in the service altogether.

Q. And when did you leave the company? A. About the last part of April of this year.

Q. What department did you work in while you were there? A. The weaving department. Not all of the time, but I worked upstairs for a while and then I finished in the weaving department.

Q. Did you work in the weaving department during November and December of 1965? A. Yes.

Q. Did you sign a union authorization card for General Teamsters, Chauffeurs and Warehousemen, Local 404? A. I did.

Q. I show you what has been marked as General Counsel's exhibit number thirty-one, is that your signature appearing on the card? A. Sure.

Q. Did you sign the card on the date here July 7, 1965? A. Yes, I did.

Q. Did you fill in the card yourself? A. Yes.

Q. Is this your writing? A. Yes, that's my writing, the whole thing.

[89] MR. COHEN: General Counsel offers G.C. number thirty-one into the record.

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[91] (The document above-referred to, was marked G.C. 31 and was received in evidence.)

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[92] MR. PANOS: At this time we would like to call David Sinclair to the Stand.

TRIAL EXAMINER: All right, Mr. Sinclair.

DAVID H. SINCLAIR

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[93] DIRECT EXAMINATION

Q. [By Mr. Panos] What is your position with the Company, Mr. Sinclair? A. I am the President of the Sinclair Company.

Q. And you have been present here since the opening of this hearing today? A. Yes

Q. Are you the David Sinclair that was mentioned with respect to certain correspondence and leaflets that were sent in connection with this case? A. Yes.

Q. The same David Sinclair? A. Yes.

Q. When did it first come to your attention that the union was attempting to organize your employees? A. One of my employees handed me the letter along with a union application card that he had received.

Q. I show you General Counsel's exhibit number three and can you tell us if that is the letter that the employees handed you? A. Yes, this is the letter.

Q. And did he give it to you on or about July third? A. I can't remember exactly the date but it was the early part of July.

Q. I hand you General Counsel's exhibit number four, which [94] is a copy of a union authorization card, is that a copy similar to the card that the employee gave you? A. Yes.

Q. And did he tell you that he received that card with the letter? A. Yes.

Q. And when did it first come to your attention, Mr. Sinclair, that the Teamsters Union had requested the Sinclair Company to recognize them as collective bargaining representatives? A. I had a call from Cleveland that apparently a Mr. McCoy who I knew nothing of had contacted an attorney in Cleveland who at that time did not represent me in any way asking for recognition for my employees. I thought this was rather strange.

Q: You thought what was rather strange, Mr. Sinclair? A. That a request should go to Cleveland for recognition of my employees in my plant which was in Holyoke. I have been approached by no one in Holyoke at all.

Q. I see. Well, isn't it a fact, Mr. Sinclair, that the parent company of the Sinclair Company is located in Cleveland, Ohio? A. Yes.

Q. What is the name of that firm? A. The Lindsey Wire Weaving Company.

[95] Q. And the attorney that was contacted in Cleveland is an attorney for the Lindsey Wire Company? A. Their firm represented Lindsey, yes.

Q. And that is the law firm that presently represents you here today? A. That is correct.

Q. And that is the law firm that represented and gave you counsel in connection with the union campaign from that time on? A. That is correct.

Q. Who made the decision to refuse the request for recognition as conveyed to attorney Einhart in Cleveland by Mr. McCoy who made that decision to refuse to recognize the union? A. I made that decision in consultation with some of the officers of Lindsey Wire Weaving Company.

Q. And what was that decision based on? A. Well, they had requested recognition of eighty-seven people and eighty-three or rather eighty-seven people would include about everyone in my organization with the exception perhaps of very top management.

Q. Was there any other reason why you refused to recognize the union as bargaining representative? A. I didn't feel that with this number that was involved that they were representing my company and I didn't even feel that they could know a great deal of my company, never [96] mind representing them.

Q. As a matter of fact, Mr. Sinclair, it had come to your attention, as you have testified previously, that the Teamsters union had sent a letter together with an authorization card to your employees, isn't that correct? A. That's correct.

Q. And this came to your attention a few days either on July third or a few days after that? A. That's correct.

Q. So as far as you knew at that time the union was canvassing your employees, they were sending them union cards? A. That is correct.

Q. Was there only one employee that came up to you with the card? A. No, there were several at the time. I took the first card and letter that was handed to me and people said, "Do you have a copy of this?" and I did and I said, "Yes, I do."

Q. And approximately how many employees came up to you to give you a copy of the union card together with the letter during July of 1965? A. Ten or twelve perhaps.

Q. Mr. Sinclair, I show you General Counsel's exhibit number nine, I would like you to look at it please which is a letter dated September 20th and sent by Teamsters Local

404 [97] to the Sinclair Company. Did you receive that letter on or after September 20, 1965? A. Yes.

Q. You replied to that letter, did you not, Mr. Sinclair? A. Yes.

Q. I show you General Counsel's exhibit number eleven, is that the letter that you sent in reply to the union's request or to the union's letter of September 20th? A. Yes.

Q. Now, I direct your attention to the fourth paragraph in General Counsel's exhibit number nine which is the union's letter to the company which reads as follows, "Should you have any doubt as to our representing a majority of your employees in the above described bargaining unit, we will be more than willing to submit the signed authorization cards of your employees to a neutral party, mutually agreed upon and to allow the third party to compare these cards with your present payroll." What, if any, position did you take with respect to that request by the union? A. Well, I was not at all sure that they represented a majority of the employees because I didn't actually know exactly what they were talking about as far as the bargaining unit is concerned.

Q. Well, they have described the bargaining unit in their letter of September 20th, did they not? A. They described it as journeyman-wireweavers and [98] apprentices. Again you must realize a request for some eighty-seven people earlier which I couldn't figure as a unit and anyone familiar with our company at that time would know that we had no apprentices and in our employ we do have a good many other people working in connection, if you will with the wire cloth end of our business of which the weave shop is one area. I didn't know whether they were talking when they mentioned apprentices, whether they were talking other people that were associated with the wireweavers in producing wire cloth.

Q. Well, you later agreed to an election among your journeyman-wireweavers, did you not? A. Yes.

Q. You certainly knew at that time who these people knew at that time who these people were? A. At that time the number was listed as fourteen. I didn't have any such number listed here. At that time I had fourteen wireweavers.

Q. You agreed to apprentice-wireweavers, did you not? A. I agreed to an election for journeymen and apprentice wireweavers as specified and the number is approximately fourteen.

Q. And in the Union's letter of September 20th they stated that they represented a majority of your journeyman-wireweavers and apprentices? A. They didn't specify a number and I was confused because [99] of the apprentices, we had no apprentices.

Q. So if you had no apprentices then the only thing left that this union was asking for was the wireweavers, isn't that right? A. Not as far as I am concerned because I didn't know what they might be categorizing as apprentices. This could be a good many other people in our plant.

Q. You certainly knew who were your wireweavers at that time? A. Yes.

Q. And in fact you had fourteen journeyman-wireweavers as of September 20th? A. Correct.

Q. And is it your position, I take it then that you did not submit to a card check to dispell any doubt you had as to the union's majority only because of the question of apprentices raised some doubt in your mind? A. The question of appropriate bargaining unit. I did not know who they might be including in this.

Q. Would you tell us once again. Maybe I don't understand why it is that you did not agree to a card check to see whether the union in fact had a majority of these employees? A. Because I did not know who the might—union might be referring to when they specified wireweavers and apprentices. [100] I did not know who the apprentices might be, therefore, I did not know that this would at all be appropriate bargaining unit, and I did not know who among our employees they may or may not have been talking about.

Q. Now, after receipt of this letter of September 20th, did you make any attempt to find out from the union who they meant by journeymen-wireweavers and apprentices? A. No.

Q. You did not. At the time that you sent your letter of September 28th, if it had come to your attention that the Teamsters Local 404 were actively attempting to organize your employees, is that correct? A. I am sorry I missed a few words that you said.

Q. At the time that you sent out your letter of September 28th in refusing to recognize the union at that time had it come to your attention that the Teamsters Local 404 were attempting to organize your employees? A. Yes.

Q. As a matter of fact, Mr. Sinclair, isn't it a fact that sometime in July of 1965 you spoke to the wireweavers the journeymen-wireweavers of the wire weaving department, did you not? A. Yes.

Q. You talked to them about the union, didn't you? A. Yes.

[101] Q. And approximately how long did you talk to this group of wire weavers? A. Ten or twelve minutes.

TRIAL EXAMINER: On that occasion?

THE WITNESS: Ten or twelve minutes.

Q. [By Mr. Panos] You remember when it was in July? A. No, I can't remember the date.

Q. But it was— A. It would have been I would think the fairly early part of July.

Q. Do you remember telling the wire weavers that you were going to be blunt with them because you knew that the union organizing campaign started in their department? A. Yes.

Q. You said that and can you—did you also in this talk with the employees mention the name of the Lindsey Wire Company? A. Yes.

Q. And did you also in this talk with the wire weavers say to them that if the company had to negotiate with the Teamsters union that the Sinclair Company would negotiate down and not up? A. No.

Q. Did you say anything like that? A. Yes.

[102] Q. Would you tell us what you said? A. I told them that there were inequitities in our method of compensating or paying the weaving group and that I had been concerned with this for a long time and that if I was involved with negotiations I would certainly correct this and by correcting these it would mean that I would negotiate down in the instances where these things would correct themselves in that direction as well as up in other directions.

Q. What, if anything, was said about a strike to the wire weaving employees during that time in July? A. I told them that I was disappointed in their seeking a union because they had union experience that the last union we had had dealings with in our wire weaving group had had a strike of a good many weeks duration and that most of the people there could well remember that it had almost put our company out of business at that point and that I was disappointed to see that some of what I considered to be lessons of the past weren't living with them any more.

Q. Did you tell them that their craft was a small craft? A. Yes.

Q. Did you tell them it would be difficult to find jobs as it is not like finding a job as a machinist? A. Yes.

Q. Did you tell them that many of the wire weavers don't [103] have the education which would make it difficult for them to find another job? A. Yes.

Q. Did you tell them that many of them were getting too old to go out and find new jobs? A. Yes.

Q. Did you tell them that the last strike nearly made the Sinclair Company bankrupt? A. Yes.

Q. And did you tell them that ever since then the shop has been running on thin ice? A. Yes.

Q. Did you tell them that the Lindsey Wire Company was not going to pay any money or pour any money into the rat hole or words to that effect? A. I told them that the Lindsey Wire Company had made it clear that it expected a profit from our company and they were not going to pour money in if they had no return.

Q. What, if anything, was said about a rat hole? A. I may have used that expression.

Q. And did you explain to them what situation would arise that would make, that would create atmosphere at the Sinclair Company where it would amount to pouring money into a rat hole. Did you explain what you said to them with respect to that? [104] A. I told them that we had basically been given a second chance in the chance to grow there through our merger with Lindsey and that we had to earn our own way and I hoped that we would be able to reach a point where we would put in new and more modern equipment than we had to make everyone's job better, but that certainly the Lindsey Company was not going to pour money into this if we were not making a profit.

Q. And how would that—did you say anything to them as to how this would be affected if a union came into the plant? A. I told them that we had very sad experience with a union before which they knew of and that I didn't want to get into the position where if a union made unreasonable demands on our company that we couldn't meet that the union would strike us and we would be back in the same situation that we were in in 1952 or '53.

Q. And that was in 1952 or '53 that the union struck the Sinclair Company? A. Yes.

Q. What union was that? A. The American Wire Weavers Protective Association.

Q. And to your knowledge that had no connection with The Teamsters Union, does it? A. Apparently some of the same personnel have carried over. I believe this fellow Williams was connected with that union, although I don't know, it has been a long time since I dealt with them.

[105] Q. Are you saying it was the Teamsters that was involved in the strike of '52 or '53? A. No.

Q. What else, if anything, did you say to the wire weavers during that talk that you had with them in July, in addition to what you have told us? A. I think we have covered the substance pretty well.

Q. Could there have been other things said that you don't recall at this time? A. It is possible, yes.

Q. Mr. Sinclair, aside from the letters that were exchanged between Local 404 of the Teamsters and the Sinclair Company did you have any personal conversations with any representatives of the Teamsters Local 404? A. Mr. Napoli at point, yes.

Q. And when was that, do you recall? A. Yes, we had a meeting at Howard Johnson's in Holyoke where we signed a stipulation for an election.

Q. To refresh your memory was that the November 2nd meeting? A. I believe it was, yes.

Q. Aside from that meeting, did you have any oral conversations with any representatives of the Teamsters Local 404 in 1965 prior to the election? A. No, not that I recall.

Q. So that whatever position taken by you was contained in [106] the letters that were sent to the union in response to the letters that they sent to you, is that correct? A. Yes.

Q. Now, sometime in November of 1965 your company agreed to an election among the journeymen-wireweavers, isn't that correct? A. Yes.

Q. And election was held on December 9th? A. Yes.

Q. So at least at that point it was the company's position that the journeymen-wireweavers was an appropriate bargaining unit? A. Yes.

Q. You agreed to an election? A. Yes.

Q. Now, at that time, did you have any doubt that the union represented a majority of your wireweavers? A. Yes.

Q. And what did you base those doubts on?

TRIAL EXAMINER: You say at that time, what time are you talking about?

MR. PANOS: In November he said that he—sometime in November he had agreed—

TRIAL EXAMINER: You are referring to November?

MR. PANOS: Yes, November.

[107] TRIAL EXAMINER: The time you agreed to the consent election.

Q. [By Mr. Panos] Which was, I believe, it is agreed it was on November 26th and it was signed at least by that time and agreed to an election among the journeymen-wire weavers? A. Yes.

Q. There isn't any question at that time that you agreed to that election among the journeymen-wireweavers, did you have any doubt that the union represented a majority of those employees? A. Yes, I did. I thought we would win the election, I thought we would win the election and we did.

MR. SIMERKA: I object.

THE WITNESS: And we did win.

TRIAL EXAMINER: You press your objection?

MR. SIMERKA: Yes, at that time there is no question or rather no request by the union for recognition; that is, in the unit of journeymen and I think—

MR. PANOS: Let's ask the witness. I will ask the witness that question.

TRIAL EXAMINER: I will overrule the objection.

Q. [By Mr. Panos] Would you answer that question what your doubt was based on? A. I thought in my mind that the union did not represent [108] a majority of this bargaining unit and I was perfectly willing to submit to an election and I won.

Q. And what did you base your position on that the union did not represent a majority of your journeymen-wireweavers? A. Personal feeling. I have known these people a long time.

Q. Sir? A. I have known these people a long time and I have worked with them a long time.

Q. Were you very optimistic that—in other words you had no doubt at all but that the employees were not in favor of the union at this time? A. No.

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THE WITNESS: I wasn't positive that we would win the election if this answers your question. I was confident that we would, but I wasn't positive.

Q. [By Mr. Panos] Mr. Sinclair, I hand you General Counsel's exhibit number thirteen which is a letter that you sent [109] to the Teamsters dated October 21st, is that correct? A. Yes.

Q. You recall that letter? A. Yes.

Q. Now, in that letter there is a statement that you have included and I am quoting the part that I want to draw your attention to, "Authorization cards are unreliable as a means for determining a union's majority status." Was that your position at that time? A. Yes.

Q. Was that always your position in 1965? A. Yes.

Q. As far as you were concerned if a union had a majority of your employees signed up and they had given union authorization cards to the union that this did not satisfy you, you did not recognize them based on that? A. This states here, "NLRB Chairman McCullough has stated that authorization cards are unreliable as a means for determining a union's majority status."

Q. And this is the position that you were taking in 1965 is that correct? A. Yes.

Q. At all times this union's request for recognition if they were basing it on the majority of cards you were concerned you would never recognize them on that basis?

[110] MR. SIMERKA: Objection.

THE WITNESS: There are other reasons here, too.

TRIAL EXAMINER: He is asking you about the card phase at this point assuming everything else was all right.

THE WITNESS: Yes.

Q. [By Mr. Panos] This was your position? A. Yes.

Q. Mr. Sinclair, I hand you General Counsel's exhibit number nineteen, which is a pamphlet dated December 7, 1965. You recall you had that sent to the employees? A. Yes.

Q. Now, I draw your attention to the back side of that pamphlet on the top it says, "Remember when these plants furnished jobs to area people?" and then it states, "Unions furnished no job security here." Who compiled that information for that side of the pamphlet? A. The pictures?

Q. The pictures and the basis for that having been put on like that? A. We had the pictures—they were taken by one of my plant superintendents and this pamphlet was compiled by counsel and myself.

Q. Did you have information that the union caused the closing down of those plants? A. No.

* * * * *

[111] Q. [By Mr. Panos] What was your answer? A. I said no.

Q. Did the union have anything to do to your knowledge to the closing down of the White & Wyckoff Company? A. No.

Q. Did the union or did a union have anything to do with the closing down of Chemical Fine Paper Company? A. I don't believe so, no.

Q. Did a union having anything to do with the closing down of G.E.? A. G.E. was constantly faced with wildcat strikes and other types of strikes in that plant. I have no knowledge of their policy or decision but my feeling would be that, yes a union certainly was evident in their decision to close.

Q. Now, with respect to Crocker-McElwain Company did that company close down in Holyoke? A. Yes, it is part of the Chemical Fine Company, the same company.

Q. Based on information that you had at the time you prepared that pamphlet. Did a union have anything to do with the closing down of that company? A. Not that I know of.

[112] Q. I direct your attention to the C. F. Chirch & Company which is also pictured on that pamphlet, based on any information that you had did a union have anything

to do with the closing down of that company? A. Only hearsay information that I had.

Q. Mr. Sinclair, was it at your suggestion that these five companies were listed on this pamphlet? A. We took pictures of those five companies.

Q. Did you participate in the decision to have these included in this pamphlet? A. Yes.

Q. Mr. Sinclair, I hand you General Counsel's exhibit number fourteen which is a letter dated November 2nd that you sent—did you send a letter like this to your employees on or about that time? A. Yes.

Q. Did you participate in the drafting of this letter? A. Yes.

Q. Now, directing your attention to page two about the fourth or fifth of the way down where it begins, "When we look at all of the facts as they now exist" you have that page two? A. Page two.

Q. Yes, towards the end? A. Yes.

[113] Q. Now, there is a sentence in there, "However, there is nothing that the Teamsters or any other Union can offer you which will in any way increase your job security under the circumstances existing in this plant." Did you participate in putting that or deciding to put that into the letter? A. Yes.

Q. Would you tell us what position or what your position was at that time with respect to the existing circumstances at this plant? A. Well, this plant had just been through several years of rough period of time and we were financially not in good shape.

Q. So it was your position at that time that if the Teamsters or any union came in to represent your employees that the job security of your employees would not be secure, isn't that correct?

* * * * *

Q. [By Mr. Panos] Wasn't that your position at that time? A. No, the Teamsters or any other union can offer

you which will in any way increase your job security. My position was that the Teamsters union representing our people would not in my opinion in any way increase their job security.

Q. Under the circumstances existing at this plant, is that [114] correct? A. That is correct.

Q. So it was your position that under the circumstances existing at the Sinclair Company the presence of the union would not increase the job security of the employees there? A. That is correct.

Q. That was your position? A. That's correct.

Q. And you conveyed this to your employees in this letter? A. Yes.

Q. And did you convey it to your employees in speeches to them? A. Yes. I don't believe that I—well, I can't remember exact statements made but I don't believe that the union representation offers job security.

Q. Now, you have already told us that you talked to the wireweavers sometime in July of 1965? A. Yes.

Q. Did you tell—can you tell us did you hold a second meeting on December 8, 1965 in which you talked with the wireweavers? A. Yes.

Q. And did you convey this position to your employees both in July, 1965 and on December 8, 1965? [115] A. On December 8th I didn't make any such statement. I don't recall making such a statement as this in July, but on December 8th I was very careful about exactly what I said to my people.

TRIAL EXAMINER: Excuse me. You said you did or did not recall making a statement in July like this?

THE WITNESS: I don't recall making any such statement.

Q. [By Mr. Panos] You were more careful in what you said on December 8th than you were in July of '65? A. I didn't want to be in the position of being misquoted.

Q. You were more careful in December 8th than you were in July? A. Yes.

Q. You made two speeches to the wireweavers? A. Yes.

Q. One in July and one on December 8th? A. Yes.

Q. Now, directing your attention to page three of General Counsel's exhibit number fourteen, and I quote from that page, "We are still on thin ice and it just doesn't make sense for us to meet unreasonable union demands which will result in further losses and eventually the necessity of closing the plant." Did you participate in the drafting of that part of this letter? A. Yes.

[116] Q. And did you take that position, did you take that position when you spoke to the employees in July 1965 and on December 8, 1965? A. I certainly spoke of our financial condition.

Q. And did you take that position as set forth on this letter to the employees? A. I indicated that this was on thin ice, but not in those words I don't believe, but that they—we had our financial problems.

Q. And what did you say to the employees, Mr. Sinclair, either in July 1965 or on December 8, 1965 with respect to the necessity of closing the plant? A. Well, I think I told them that I never heard of a company that closed a plant and I didn't intend to close and I never heard of a company that caused a strike and—

Q. What was that? A. A company calling a strike on their employees that the strikes were initiated by unions which they knew and that strikes were not caused by any act of the company or could be caused by the company's inability to accede to union demands and there was only one alternative if we found ourselves in a position where we couldn't agree to their demands that the union's only weapon is to strike.

Q. And what would the company do, Mr. Sinclair, if the union struck? [117] A. I have no idea.

Q. Well, you told them that the plant would be closed, didn't you? A. I told them it could lead, this could lead to the closing of the plant, yes.

Q. As a matter of fact this was repeated to the employees a number of times, the idea of Sinclair Company closing? A. It had almost happened once.

Q. And you repeated this to the employees in 1965 about—before the election many times, did you not? A. Yes.

Q. You were convinced of this? You believed this, didn't you? A. I believed that if our employees under any circumstances went on strike against our company that it might lead to the closing of the plant.

Q. You told them this many times? A. Yes.

Q. Mr. Sinclair, I hand you General Counsel's exhibit number fifteen which is a letter that you sent to the employees on November 5th.

TRIAL EXAMINER: What date?

MR. PANOS: November 5, 1965.

Q. [By Mr. Panos] Do you know when that was mailed to the employees? I notice that it is dated November 5th, [118] you know when it was mailed to them? A. I am not sure whether it was mailed on that date or not. It would have been shortly afterwards.

Q. It could have been shortly afterwards? A. Yes.

Q. And this was put through the United States Mails, it was not handed to them? A. No, it was mailed.

Q. And your best recollection is that it was a few days after November 5th? A. I am not sure of the date, we were having these prepared and mailed.

Q. Dated and then mailed thereafter? A. Yes.

Q. The chances could have been a few days after November 5th? A. It is possible.

Q. Directing your attention to page two of that exhibit which you are holding, November 5th letter, and going down to the middle of that page, I quote "They have no ties with Holyoke or Massachusetts. If a dollar invested here can't earn as much as a dollar invested in Mississippi or Ohio or somewhere else, you can be sure that their

dollars are going to go where they can earn the most pennies." Did you participate in the drafting of that part of the letter? [119] A. Yes.

Q. Can you explain to us what is meant by dollars invested in Mississippi, what connection does that have with the Sinclair Company? A. Well, the Sinclair Company started a plant in Mississippi.

Q. The Sinclair Wire Company? A. It is now the Lindsey Wire, it was the Sinclair Wire Works.

Q. Do I take it the Sinclair Company is a division of Lindsey Wire? A. That is correct.

Q. And at the time that the Sinclair Company became connected with the Lindsey Wire Company was this a merger or an acquisition? Did they acquire the company? A. It was a stock transfer, so they in fact acquired 100 per cent of the Sinclair Company stock.

Q. Aside from the plant here in Holyoke you say there is a plant in Mississippi? A. Yes.

Q. Is that Florence, Mississippi? A. Yes.

Q. Do they do wire weaving there? A. Yes.

Q. And they also have a plant in Ohio? A. They have two plants in Ohio.

[120] Q. Cleveland, Ohio? A. There is one in Cleveland.

Q. Where is the other one? A. There is one in Mentor.

Q. So taking you back now to the letter when you say they have no ties with Holyoke you are referring to the Lindsey Company? A. Yes.

Q. And do I understand this correctly, Mr. Sinclair, that you were telling the employees once again that there was a possibility that the Lindsey Wire Company would close the Holyoke plant? A. No.

MR. SIMERKA: Objection. The sentence speaks for itself.

MR. PANOS: I will withdraw the question.

Q. [By Mr. Panos] Did you discuss this subject with the employees in your talk to them in July 1965 or

December 8, 1965? A. Not this particular subject, the general subject matter if you will was discussed at both times, yes.

Q. Isn't it true, Mr. Sinclair, that in both your talks you told the employees that the Lindsey Wire Company wanted to make a profit here in Holyoke at the Sinclair Company? A. Yes.

[121] Q. Is that correct? A. Yes.

Q. And if they didn't make a profit that they could have this work down in Mississippi or in Ohio? A. If they did or didn't.

Q. If they did not make a profit here they would have the work done in Mississippi or Ohio? A. No, I said there is nothing to prevent them from having their work done in Mississippi or Ohio. I didn't say that they would.

Q. And by the way when you say work you were referring to the wire weaving work? A. Yes.

Q. And in that connection you had told the employees, did you not, that you were operating on thin ice here in Holyoke? A. Yes.

Q. And that this company here in Holyoke could not afford to give any increases or increased benefits? A. No, I didn't say that.

Q. You didn't say that? A. No. I said that our company couldn't accede to unreasonable demands.

Q. And then did you go on to say in this letter, "I know that the Teamsters Union promises you a lot, but what can [122] they deliver except pressure—the threat of a strike." Did you participate in the drafting of that? A. Yes.

Q. And did you also tell the employees in July of 1965 and on December 8, 1965 that the only thing that the Teamsters could deliver is the threat of a strike? A. I don't know if I used any words like that. I have a copy of exactly what I told to my people on December 8th if I may refer to it I can tell you whether I said this or not.

Q. You had a fully prepared speech for December 8th? A. I had very complete notes for this, yes.

Q. Did you talk from notes? A. Yes.

Q. You didn't read a speech, did you? A. No, I talked from notes.

Q. Did you read a speech on July 1965? A. No.

Q. Did you have any notes at that time? A. No.

Q. I am interested in what you said to the employees on both those occasions with respect to the only thing the Teamsters can deliver is the threat of a strike. Did you say anything to that effect to them? A. I don't believe that I said that, no.

[123] Q. Directing your attention, Mr. Sinclair, to General Counsel's exhibit number sixteen, which I hand to you which letter was sent to the employees dated November 22nd, 1965? A. Yes.

Q. Did you participate in the decision to send to your employees the book entitled, "The Enemy Within"? A. Yes.

Q. And did you discuss this book with your employees in your talk to them in July of 1965 and on December 8, 1965? A. I told them in December that I hoped that they had read this. That is all I said.

Q. You told them that you hoped they had read it? A. Yes.

Q. Did you tell them why? A. No. Let me add to that. I feel that I told them that this book outlined the problems of leadership in the Teamsters Union and I hoped that they had read it.

Q. At that time did you have any evidence—withdraw that. Did you have any basis for forming an opinion with respect to the local leadership of Local 404 of the Teamsters at that time? A. No.

MR. SIMERKA: Objection.

TRIAL EXAMINER: Overruled.

Q. (By Mr. Panos.) As far as you were concerned at that [124] time the officials of Local 404 of the Teamsters

were not in any way connected with racketering or hoodlums or anything of that type as brought out in Bob Kennedy's book? A. They were connected with the Teamsters Union.

Q. The International? A. Yes.

Q. Did you have any basis for feeling that the officers of Local 404 here in Springfield were in any way connected with racketering or hoodlums? A. I had made no investigation.

Q. So you had no basis to form any opinion with respect to that?

* * *

THE WITNESS: I feel that the Local is a part of the International and I think the International Teamsters leadership is corrupt.

TRIAL EXAMINER: With respect to the individual persons who were leaders of Local 404 you have any feeling or any knowledge rather aside from the fact that the Local is connected with the International aside from that factor did you have any basis for concluding that individuals of Local 404 were in any way connected with racketering?

THE WITNESS: No.

TRIAL EXAMINER: All right.

[125] Q. (By Mr. Panos.) Now, I direct your attention to General Counsel's exhibit number seventeen, which is the letter dated November 30, 1965 about the middle of the way down on the first page and I quote, "A strike can still close the Holyoke plant, but other plants can pick up the work." Did you participate in the drafting of that part of the letter? A. Yes.

Q. And did you say anything with respect to that in your talk to the employees in July of 1965 and on December 8, 1965? A. Yes, I told them that in our present position with the equipment that we had in Holyoke the weav-

ing production, if you will, in Holyoke was not a necessity to the successful operation of the total company.

Q. If—what, if anything, did you say about the union's relationship to that situation? A. I am not sure.

Q. You told the wire weaving shop was not a necessity as far as the Sinclair Wire Company was concerned the fact of having the wire weaving done in Holyoke by the Sinclair Company was not a necessity as far as the Lindsey Wire Company was concerned? A. I told them again through contract negotiations with a union that our people went on strike I didn't think that [126] the Lindsey organization was going to be concerned about that fact.

Q. And that strike can still close the Holyoke plant you told them that, right? A. A strike could close the Holyoke plant.

Q. You told them this in July and in December of 1965 in addition to what is contained in the letter? A. Yes.

Q. And you did tell them in July and December of 1965 that the other plants would pick up the work? A. No, I don't think I told them that. I think I said as I stated to you that the production of our weaving department and the overall operation was not a necessity assuming that the material would be woven somewhere else.

Q. Because Lindsey has facilities elsewhere? A. Yes.

Q. You told them that? A. Yes.

Q. And in that connection did your also tell them that many of them were old and that it would be difficult for them to get jobs elsewhere? A. I told them they had a skill trade which had limited use and we had several people at this time who were over sixty years old and I think that is a difficult time in life to try and start again.

[127] Q. You told them that? A. Yes.

Q. And did you also tell them that many of them didn't have the education to enable them to find another job? A. I told them that there were people available who were younger and stronger and better educated and were of a less insurance risk. And that they would be competing against these people on the open labor market.

Q. And did you also tell them that Lindsey Wire Company would close the Holyoke plant because wire could be imported from overseas? A. I told them that we were still subject to foreign competition and that it was perfectly conceivable, if any under circumstances that the plant was closed that some of this work could well go to the foreign wire companies that we had to handle foreign wires in the past.

Q. Now, directing your attention to page two of that document of November thirty, the letter on the upper part you state and I quote, "When the company answer is No to the Teamsters Union big demands it can call you out on strike." A strike is a Union's only weapon to enforce its big demands." Did you participate in the drafting of that part of the letter? A. Yes.

Q. Was it your position at that time that the union's only [128] weapon of enforcing contract demands was a strike?

MR. SIMERKA: Objection.

TRIAL EXAMINER: Overruled.

THE WITNESS: No. Contract demands and excessive demands I think are two different things.

Q. (By Mr. Panos.) Was it your position at that time, Mr. Sinclair that a strike is a union's only method to enforce its big demands, is that your position at that time? A. If the union and the company could not meet or reach a negotiated agreement I believe that the only thing the only alternative a union has is to strike.

Q. Let me ask you the question again, was it your position again that a strike is a union's only weapon to enforce its big demands, was that you position?

MR. SIMERKA: Objection.

TRIAL EXAMINER: Well, you can answer that yes or no and then you can explain if you wish. I will overrule the objection.

MR. SIMERKA: I object to the pertinency of this type of question. It is not directed to any statement—

TRIAL EXAMINER: Well, the date is specific and the time he made these speeches to the weavers.

MR. PANOS: That is right.

TRIAL EXAMINER: Can you answer that question was that [129] your position at that time, if you wish you can explain?

THE WITNESS: Yes. I would like to explain.

Q. (By Mr. Panos.) Go ahead? A. By saying that the company and the union had set out bargaining in good faith and when a contract agreement could not be concluded and this happens because generally a company cannot economically meet the demands of the union then the only answer that the union has is to strike or to acceed to a settlement.

Q. And did you communicate this to the wireweavers in your talk to them in July of 1965 and in your talk to them on December 8, 1965? A. I communicated my explanation of that statement.

Q. Did you say to them as you have testified to right now? A. Yes.

Q. Now, during any time, Mr. Sinclair, in 1965 when the Teamsters Local 404 was attempting to organize your wireweavers did the Teamsters ever indicate to you what their demands would be? A. They did not indicate anything directly to me. Their letter stated that was signed by Mr. Williams indicated the settlements that they had been obtaining in their last round of negotiations.

Q. Did they ever indicate at any time any demands that [130] they were prepared to make on the Sinclair Company which you at that time judged to be excessive? A. Local 404 never approached me directly with any demands.

Q. So at the time that you were discussing this with your wireweavers in July of 1965 and December 8, 1965 when you set forth the letter of November 30th, 1965 you at that time had not been confronted with excessive demands

like Teamsters Local 404? A. No, other than what was in Mr. Williams letter.

Q. Was that letter of July third? A. Yes.

Q. Which is General Counsel's exhibit number three? A. Yes.

Q. I hand you General Counsel's exhibit number eighteen which is the letter to the wireweavers that you sent which is dated December 1, 1965, you have that? A. Yes.

Q. Directing your attention to page two, towards the top of the page around the third sentence and I quote, "Is management scared of the Teamser's Goon Squads?" A. Where are you? I see it, all right.

Q. Did you participate in the insertion of that into this letter? A. Yes.

Q. Did you discuss the Teamster's Goon Squads in your [131] talk to the employees in July of 1965 or on December 8, 1965? A. No.

Q. Did you have any basis at the time this statement was included in the December 1, 1965 letter that there were any goon squads connected with Local 404 of the Teamsters? A. No, other than they were associated with the National, no.

Q. And now, going down on the same page and I quote, "We know there is a certain risk to us from the Hoodlum element which controls this Union." Did you participate in the inserting of that in this letter? A. Yes.

Q. Did you discuss the, "Hoodlum element" in your talk in July of 1965 or on December 8, 1965? A. Yes.

Q. And what did you say to them on December 8, 1965 with respect to the hoodlum element? A. Well, I just cited that Dave Beck was convicted criminal and that Jimmy Hoffa was out on bond from a court conviction.

Q. Did you say anything to them at the time with respect to any hoodlum element in Local 404 of the Teamsters here in Springfield? A. No.

Q. At that time that you made these statements to these [132] employees with respect to the hoodlum element that

you included in your letter you had no basis or any foundation to form any judgment of any hoodlum element connected with Local 404 of the Teamsters here in Springfield other than as it referred to the International? A. Connected with the International and it is a part of the organization and I think very definitely—.

TRIAL EXAMINER: Just a minute.

MR. SIMERKA: Objection.

TRIAL EXAMINER: Overruled. Suppose you ask the question again and please listen to the question.

Q. (By Mr. Panos.) Did you have any basis at that time to have any evidence that there was a hoodlum element connected with—directly with Local 404 of the Teamsters? A. No.

Q. Now, directing your attention to that same page about three quarters or four fifths of the way down and I quote, "If the Teamsters Union wins the election, it will be very difficult for you get another election to vote it out." Did you participate in the insertion of that in your letter? A. Yes.

Q. What—was it your position that—withdraw that. Did you convey that position to the employees in the July 1965. and December 8, 1965 meetings? A. No, I don't believe so.

[133] Q. Was it your position at that time that if the Teamsters won the election that the employees under existing rules and regulations as you understood them had no procedure left open to them to have another election to knock the Teamsters out?

MR. SIMERKA: Objection. This statement doesn't say that.

TRIAL EXAMINER: Well, he is asking if that was his position.

MR. SIMERKA: Unless he's asking a question about something communicated I don't think it is material to this case.

MR. PANOS: This was communicated in this letter and I am asking to find out if it is true or not.

MR. SIMERKA: The letter will stand on its own.

MR. PANOS: I think it is relevant to see if this witness has intentionally misrepresented–

TRIAL EXAMINER: I will overrule the objection. You recall the question?

THE WITNESS: If there was any procedure that our employees could take to eliminate the union from representing them.

MR. PANOS: Yes.

THE WITNESS: I was aware of a procedure that as I understand it is most difficult to allow.

[134] Q. And did you discuss this element of the letter with your attorneys? A. Yes.

Q. Did they indicate to you that it is very difficult under existing Board procedures to have another election once a union gets in?

MR. SIMERKA: Objection.

MR. PANOS: I will withdraw that.

Q. (By Mr. Panos.) As a matter of fact, Mr. Sinclair, your attorneys advised you that even though the Teamsters were voted in there is a procedure for the employees to vote the Teamsters out, isn't that right? A. Yes.

Q. And you were aware of this fact at the time that you drafted this letter? A. Yes.

Q. And yet you told the employees that it was difficult to get another election. Did your attorneys advise you that it was difficult?

MR. SIMERKA: Objection.

MR. PANOS: I will withdraw that.

Q. (By Mr. Panos.) On what did you base that statement that it was difficult to get another election?

MR. SIMERKA: Objection. I think the witness has answered that question. He testified that as he understood [135] it was difficult to follow.

TRIAL EXAMINER: The question is what lead him to that understanding. I will overrule the objection.

THE WITNESS: Consultation with counsel, with the personnel manager of my parent company.

Q. (By Mr. Panos.) Is that what you said lead you to believe that it was difficult to have another election once the Teamsters came in? What did they say to you that lead you to tell your employees that it was difficult to get the union in without—rather difficult to get the union out once it got in, what did they say to you about that, sir? A. Well, I can't remember exactly, but they said that the procedure to have another election to take another vote for or against the union representation was most difficult to follow.

Q. Most what? A. Most difficult to follow.

Q. Did they go into details with you, sir? A. Not particularly, no;

Q. Was it on that alone that you inserted this in the letter? A. Yes.

Q. Mr. Sinclair, I hand you General Counsel's exhibit number twenty-one and directing your attention to the second [136] side if I may refer to it as page two, although it is not numbered, on page two under where it reads, "No changes at this time." I will read the following sentence, "During a union organizing campaign an employer is prohibited by law from making any changes in wages or other benefits which could induce any employee to change his mind on how he will vote. Because of this rule, we are unable to discuss wages with other groups of our employees whom the union does not wish to represent at this time." Did you participate in the inserting of that part in the pamphlet? A. Yes.

Q. Did you tell your employees either in July 1965 or on December 8, 1965 that because of the union's campaign for employees other than the wire weaving employees that you were not entitled to any wage increases or other benefits? A. Yes, during this period of time at one point or another all of my employees were involved in this. It was just wire weaving at this time.

Q. Now directing your attention to General Counsel's exhibit number twenty-one you joined in the stipulation, Mr. Sinclair, that this was sent to the employees either the second or third week before the election, isn't that right? A. Yes.

Q. So that this would mean that this pamphlet was sent to [137] them around the second or third week of November, isn't that right? A. Yes.

Q. And the only thing pending before your employees was an election involving the wire weaving employees, isn't that correct? A. Yes.

Q. So at this time that you communicated to your employees for example on December 8th the only group in which the election was pending or was the wire weavers group as far as you were concerned? A. This is true, but at the rate things were changing and who I was dealing with up to that time I wasn't at all sure just how we would end up or with who.

Q. But the only election pending at that time was with the wire weaving employees? A. Yes.

Q. So as far as you knew the organizing effort of that time was with the wire weaving unit? A. Right.

Q. And it was your position as I understand it you communicated to your employees December 8th that while the union was attempting to organize the wire weaving employees that the company would not give any benefits to any other employees, isn't that right?

[138] MR. SIMERKA: Objection.

TRIAL EXAMINER: Overruled.

Q. (By Mr. Panos.) That's what it says in the pamphlet? A. Yes, that's the sentence, yes.

Q. And you said this to your employees in your talks to them? A. No.

Q. That was your position when you gave— A. At the time of mailing of this pamphlet, yes.

Q. Directing your attention to the second paragraph of the upper right hand side of that same page which I will

again quote, "We had no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike." Did you participate in the drafting of that? A. Yes.

Q. Well, the truth of the matter is that the Teamsters Union did not close the wire weaving department back in '52 or 1963 isn't that so? A. That is true.

Q. So that this statement here that we have no doubt that the Teamsters Union can again close the wire weaving department you mean the truth is that the Teamsters if they did close the wire weaving department would be doing it for the first time, isn't that right? [139] A. That is correct, the Teamsters Union would be doing it for the first time.

Q. The Teamsters would again close the wire weaving department is incorrect? A. It is incorrect.

Q. And reading down the last paragraph on that side, "Unions sometimes call strikes as a face saving gesture," Did you participate in the inserting of that part of the paragraph? A. Yes.

Q. Did you discuss this fact with your employees in July 1965 or December 8, 1965? A. No.

Q. There was nothing said during those talks about face saving gestures? A. No.

Q. No, I direct your attention to the sentence on the third page just above the picture of the Sinclair Company where it shows the doors barricaded. "The Teamsters Union is notorious for its picket line violence." Did you participate in inserting that in the pamphlet? A. Pardon?

Q. Did you participate in having that inserted in this pamphlet? A. Yes.

[140] Q. On what did you base that fact? A. Have you read Mr. Kennedy's Book?

TRIAL EXAMINER: Unfortunately you can't ask the questions.

THE WITNESS: I am basing this on my own reading of the newspaper, books and articles.

Q. (By Mr. Panos.) That's what you based it on? A. Yes.

Q. And by the Teamsters Union—withdraw that. Did you discuss this fact with your employees on July 1965 or December 8, 1965? A. I don't recall discussing it at either time.

Q. Did you have any basis at that time to form that judgment with respect to the picket line violence as referred to Local 404 of the Teamsters here in Springfield?

MR. SIMERKA: Objection.

TRIAL EXAMINER: Overruled.

THE WITNESS: Again I haven't referred to Local 404 here, I have no knowledge of Local 404's activities.

Q. (By Mr. Panos.) You have been a part of the Holyoke-Springfield area community for quite sometime, Mr. Sinclair? A. Yes.

Q. At least during the past twenty to twenty-five years? A. Yes.

Q. You have any basis to form a judgment that Local 404 [141] of the Teamsters in that area have ever participated in picket line violence? A. No.

Q. Now, I direct your attention to that picture just under that a picture of a plant I believe with a flag pole saying Sinclair and the doors seem to be barricaded and it says, "The closedest closed shop in town." Did you participate in inserting that in the leaflet? A. Yes.

Q. I see that the flag is at half mast? A. Mourning.

Q. And as a matter of fact, Mr. Sinclair, did you tell your employees many times in July 1965 and on December 8, 1965, that the Sinclair Company would close? A. No.

Q. You mentioned the closing of the plant many times? A. I mentioned the possibility of its being closed if we were struck or subjected to a strike. I told them that the last thing in the world that I wanted was a plant that was closed down and this was my life, too.

Q. Now, this picture that you have inserted here it says nothing there if you were subjected to a strike at all, it has a picture of the company with a flag at half mast which has the Sinclair Company on it and the doors are barricaded and it says, "The closedest closed shop in town." [142] Now, you made a decision to have that inserted in the letter? A. Yes.

Q. You know the result of observing that picture was that the Sinclair Company was closed, is that right? A. No.

Q. It shows the company— A. It is depicted that they are closed.

Q. As being closed? A. Yes.

Q. So you intended that your employees be faced with this picture of having the Sinclair Company showed as being closed down?

MR. SIMERKA: Objection.

MR. PANOS: I will connect it up.

MR. SIMERKA: This speaks for itself.

TRIAL EXAMINER: I will sustain the objection to that.

Q. (By Mr. Panos.) I hand you General Counsel's exhibit number twenty would you look on that side of the exhibit that has the writing on the top, vote right and avoid strikes. Did you participate in drafting the language of that side of the pamphlet? A. Yes.

Q. Particularly the language, "Put your X on the right." and then it says, "No, never called a strike." Did you [143] participate in the words strike there also? A. Yes.

Q. So I take it then, Mr. Sinclair, that in your talks with the employees in July of 1965 and on December 8, 1965 as we have reviewed here in your letters and pamphlets to the employees you repeatedly told them about strikes, is that so?

MR. SIMERKA: Objection.

TRIAL EXAMINER: Overruled.

THE WITNESS: I meant strikes, yes.

Q. (By Mr. Panos.) And you were very much concerned about strikes, isn't that right? A. Very much.

Q. You made it a point to inform the employees with your concern? A. Yes.

Q. And your concern was related to the possibilities of the plant closing because of a strike, isn't that right? A. Yes.

Q. And you communicated this to them many times, isn't that right? A. Yes.

Q. You wanted to make sure that they knew that if there was a strike that the plant could close down? [144] A. It was possible for it to close.

Q. Well, I thought you mentioned this to them many times?

* * *

THE WITNESS: I talked to them as a group twice. Once in July and once in December.

Q. (By Mr. Panos.) And in both of those talks you told them about this idea of the strikes and the plant closing down?

* * *

THE WITNESS: In both of those talks I told them that there was a possibility through a strike that the plant could close.

Q. (By Mr. Panos.) You said this to them many times? A. No, sir, two times.

Q. On those two occasions during each occasion you mentioned that there was a possibility a number of times to them? A. No.

[145] Q. No? A. No.

Q. I hand you General Counsel's exhibit number nineteen, Mr. Sinclair, and I direct your attention to the first page, did you participate in the drafting of that cartoon? A. I didn't draw the cartoon I saw the cartoon after it was drawn and I participated in some discussion as to the general layout of it, yes.

Q. Did you participate in providing some of the details that are shown in this cartoon? A. By actually drawing them or—

Q. For example, let me show you so not to confuse you, there is a toomstone there and it says, "Chemical Fine Paper" did you provide or participate in providing that name? A. Yes.

Q. And I direct your attention to the back side of that pamphlet that has pictures of plants, Chemical Fine Paper is one of the plants that is pictured there? A. Yes.

Q. And to your knowledge did the Teamsters have anything to do with that plant closing down? A. No.

Q. Did any union have anything to do with that plant closing down? [146] A. They were unionized and economically and apparently they couldn't operate and they closed down.

Q. But you did have any objective basis to make a determination that the union had anything to do with the plant closing down?

MR. SIMERKA: Objection. The document does not say that. The question assumes the fact that is not stated in this exhibit.

MR. PANOS: Well, I have heard about all the old sayings a picture is worth a thousand words and I don't believe a few words to explain this would be out of order.

TRIAL EXAMINER: I will overrule the objection. Do you recall the question?

THE WITNESS: That the Teamsters Union—

MR. PANOS: I will repeat it.

Q. (By Mr. Panos.) Did you have any objective basis for making a determination that any union had anything to do with the closing down of the Chemical Fine Paper Company? A. No.

Q. Now, I direct your attention to the portion of the cartoon that has the name White & Wyckoff, that also is a company that is pictured in the back of the pamphlet, is it not? A. Yes.

Q. And the words under that are "So quiet today". Did that [147] plant close down here in Holyoke? A. That closed in Holyoke, yes.

Q. And did you have any objective basis for stating that the union caused the close down of that plant?

* * *

THE WITNESS: No.

Q. (By Mr. Panos.) Now, directing your attention to that portion of the cartoon that has a toomstone with the name of Church and again referring to the back side of the pamphlet it has C. H. & Company. Did that company is that company located in Holyoke? A. They are in Williamansett.

Q. Were they in Holyoke? A. Yes.

Q. Did that close down? A. Yes.

Q. Did you have any objective reason for arriving at the determination that the union had anything to do or caused the close down of that company? A. Yes.

* * *

[148] Q. (By Mr. Panos.) As a matter of fact the C. F. Church Company moved to Palmer, Mass., did it not? A. Yes, and they have a plant in Palmer.

Q. They moved from Williamsett to Palmer approximately how many miles is that, if you know, between Williamsett and Palmer, Mass.? A. Twenty.

Q. So with respect to the C. F. Church Company that plant closed down in Williamsett and moved twenty miles away to Palmer? A. Yes.

Q. Now, with respect to the General Electric Company that is on a toomstone in the cartoon and again I direct your attention to the back side of the pamphlet that has a picture of the G. E. Plant? A. Yes.

Q. Did a union have anything—do you have any objective basis for making a determination that a union caused the close down of the G. E. plant in Holyoke?

MR. SIMERKA: Objection.

TRIAL EXAMINER: Overruled.

THE WITNESS: Yes.

TRIAL EXAMINER: You may have a standing objection to this line.

Q. (By Mr. Panos.) The G. E. Plant in Holyoke did it close [149] down? A. Yes.

Q. And do you have an objective basis for making a determination that a union caused that close down? A. No, I wouldn't say it caused it but it certainly was a participating factor.

TRIAL EXAMINER: You say you thought it was do you have any basis for arriving at that determination?

THE WITNESS: Well, I was aware of a constant labor turmoil that existed in that plant.

Q. (By Mr. Panos.) Were the Teamsters in any way connected with the General Electric plant? A. I don't believe so.

Q. Now, directing your attention to that portion of the cartoon that has two men, one with a pick and one with a shovel digging what appears to be a grave and it says IBT, do you have any knowledge as to what that refers to the IBT? A. That would be the International Brotherhood of Teamsters, yes.

Q. And what, if any basis did you have, Mr. Sinclair, to prepare that portion of the cartoon that shows a wheel barrel with the name Teamsters on it and a gravestone head piece on that wheel barrel with the name of Sinclair Company 1927 and being pushed towards that grave that is being [150] dugged, what did you intend to convey to the employees?

MR. SIMERKA: Objection.

TRIAL EXAMINER: Sustained.

Q. (By Mr. Panos.) Mr. Sinclair, directing your attention to what we may call page one of that General Counsel's

exhibit number nineteen and I quote in the lower right-hand side of that page, "What facts do you have which would lead you to believe that a hoodlum dominated Union, like the Teamsters, can give you real job opportunity at the Sinclair Company?" Did you participate in inserting that in the pamphlet? A. Yes.

Q. Did you have any basis for forming the opinion that Local 404 of the Teamsters was hoodlum dominated? A. I didn't say Local 404 of the Teamsters.

MR. SIMERKA: Objection.

TRIAL EXAMINER: Overruled.

Q. (By Mr. Panos.) You didn't say this. At the time you had no basis for forming the judgment that Local 404 of the Teamsters was hoodlum dominated? A. It is connected with the International.

TRIAL EXAMINER: Aside from its connection?

THE WITNESS: No.

Q. (By Mr. Panos.) Now, directing your attention to the left side of that page and I quote, "The Union doctors [152] gave them bloodletting strikes, restricted production and higher labor costs." You find that? A. No, I'm sorry I am not with you.

Q. About three-quarters of the way down towards the end? A. Yes.

Q. Did you participate in having that inserted in the letter? A. Yes.

Q. Did you have any objective basis for knowing that any unions restricted production? A. Restricted production?

Q. Yes? A. In individual cases, no, not necessarily. We had under unions our experience of restricted production.

Q. Under your union experience? A. Yes.

Q. What date are you referring to? A. Going back now to the late 1940's.

* * *

Q. (By Mr. Panos.) Mr. Sinclair, directing your attention to the third page of that exhibit, the right hand side about [153] three or four inches down and I quote, "Before making your decision, drive past a few of the vacant plants where business died. It will not be a pleasant drive, but it could be a very informative one for you." Did you participate in the inserting of that into the pamphlet? A. Yes.

Q. Did you discuss this subject matter with your employees in July of 1965 and on December 8, 1965? A. I may have in July.

Q. What did you say to them about this subject matter in July? A. The only thing that I can recall of having possibly said was that something to the affect if you don't feel that the plant can go out of business all you have to do is look around Holyoke and see a lot of them out of business.

Q. What if anything was said about the union relation to that? A. Well, this would only be tied in with the event of a strike in the Sinclair Company and the possibility of such a strike closing our plant.

* * *

[160] * * * Q. You have told us that you made two speeches to the wire weavers one in July 1965 and one on December 8, 1965. Aside from those two speeches, Mr. Sinclair, did you have [161] individual conversations with the wire weavers with respect to the union? A. Yes.

Q. And did you have those conversations with them between the period beginning the first part of July 1965 up to the date of the election on December 9, 1965? A. Yes.

Q. I believe we have agreed that there were fourteen wire weavers during that period? A. Yes.

Q. And is it your testimony that you talked to each of them to all of them individually or to part of them individually? A. To part of them individually.

Q. Approximately how many of the fourteen employees did you speak to individually about the union? A. Ten.

Q. And where were you when you spoke to them? Did you talk to them in a certain area? A. In the plant normally in the weave shop where they worked.

Q. And did you discuss with them some of the matters that you discussed with them in your speech to them in July 1965 and when you talked to them on December 8, 1965? A. I discussed essentially the questions that they asked me which included some of these matters that were in my talk to the group in July.

[162] Q. Is it your testimony that your talk to them in July prompted questions in the minds of the employees and they came back to you to talk about the union? A. No, generally when I went down to talk to them I would tell them that I would like to talk about the union and particularly did they have any questions concerning our attitude or my feelings in this matter and this would generally start the conversation.

Q. So you would start the conversation by asking them if they wanted to talk about the union? A. Yes.

Q. And if they said yes you would—what would your next pattern of questions be? A. Do you have any questions about my position or the company's feelings about this? Do you have questions regarding the organization at all. If I can answer them I certainly will.

Q. And I take it that some did ask you questions and that is what prompted the conversation with them? A. Yes.

Q. And you supplied the answers? A. Yes, wherever I could.

Q. Directing your attention now to the speech that you made to the employees on December 8, 1965, Mr. Sinclair, what time of day was that? [163] A. This was in the early afternoon, the very early afternoon, I believe.

Q. Do you recall what time it was approximately? A. I would say 1:30.

Q. And approximately how long did this talk take? A. Five minutes.

Q. Where was this talk given? A. In the weave shop.

Q. You have a day shift and a night shift in the weave department? A. Yes.

Q. And at that time was your talk given to the night shift weavers? A. I put out the word through the foreman

in this department that I was going to talk at that time and anyone who wanted to come in certainly was welcome to come in and that I would like to have them hear what I to say.

Q. What time do the night shift weavers usually start work? A. Well, it varies depending on the number of hours that we are working, usually 3:30 to 4:00 o'clock. I can't recall exactly what the schedule might have been at that time.

Q. Do you recall on December 8th that the night shift wire weavers whether they came in early and heard your speech? [164] A. Some of them I believe did. Mr. Bougie was on the night shift at that time and he came in. I remember his being there.

Q. As a matter of fact they were paid for the time that they came in early, weren't they? A. I can't say.

Q. Is it your testimony that the foreman of the night shift simply told the night weavers if they wanted to come in to come in on their own time? A. There is no foreman of the night shift. There is one foreman in the department and I told him that I was going to have this talk and to let the various people know that. The shift changes while he was still present in the plant.

Q. He was to tell them to come in on their own time if they wanted to come in to come on in? A. As I recall I told him that I was going to give this talk and anyone who wished to come in was certainly welcome to come in. I don't recall anything specific about whose time they would be paid or not paid.

Q. And how many of the wire weavers were present during this talk on December 8th? A. I can't tell.

Q. Approximately? A. There was, I would say, the large majority of them were present. The large active majority if you will. We have [165] some people that were sick at that point.

Q. Would you say that approximately all of the wire weavers that had been working actively working and not on sick leave or absent for other reasons that all of them were present during this talk? A. Yes, the large majority.

Q. And other than yourself was there any other supervisors or supervisory personnel present? A. The foreman was present.

Q. Who is that? A. Armand Gadouas.

Q. And he is the foreman of the weave department? A. Yes.

Q. I believe yesterday you told me that you did not speak from a prepared speech but that you had notes? A. I had very complete notes, yes.

Q. And in this talk to the employees on December 8th, did you tell the wire weavers about corruption in the Teamsters? A. Briefly mentioned Mr. Beck and Mr. Hoffa.

Q. And did you make reference to Bob Kennedy's book that had been passed out to the employees? A. Yes.

Q. And did you make reference to the Senator McClellan labor racketeering committee? A. Yes.

[166] Q. What did you tell them about that? A. I just told them that the article had been written about—that Mr. Kennedy wrote a book and I had hoped that they read the book.

Q. And did you speak to them about Dave Beck and the fact that he was put in jail? A. Yes.

Q. Did you speak to them about Jimmy Hoffa and a jail term that was pending with respect to him? A. A pending possible jail term.

Q. Did you tell them that they never had to deal with this kind? A. Yes.

Q. And what else did you say to them with respect to that subject? A. If I had to I would.

Q. What? A. If I had to I would.

Q. But you told them you didn't want to? A. I didn't say that. I have never dealt with this kind but if I had to I would.

Q. Did you say to them, Mr. Sinclair, that the new ownership, meaning the Lindsey Wire Company had made it clear to you that they were not going to sink a bundle of money in the Sinclair Company for the fun of it? [167] A. Yes.

Q. And did you say to them that the parent company Lindsey Wire Company had stated to you that Sinclair Company must establish on its own? A. Yes.

Q. And did you state to them that if the Sinclair Company operates profitably that we, meaning you and the wire weavers would keep your jobs? A. Yes, words similar to that.

Q. In substance? A. Yes.

Q. Mr. Sinclair, what is the fiscal period for the Sinclair Company? A. It is January first to December 31st.

Q. Calendar year. Did the Sinclair Company operate in the red or the black for the fiscal year 1965?

* * *

[168] THE WITNESS: We made a very small profit in 1965.

Q. (By Mr. Panos.) The company was in the black in 1965? A. Yes.

Q. And did you tell the employees during that speech that the Teamsters will them—will call them out on strike? A. No.

Q. What did you say to them about that? A. I said that if in negotiations unreasonable demands that we couldn't meet it could lead to a strike by the Teamsters Union.

Q. And did you say to them that I don't think our new ownership will lose a minutes sleep whether the union threatens the company with a strike? A. Yes.

Q. The new ownership meaning the Lindsey Wire Company? A. Yes.

Q. The Lindsey Wire Company had made it clear to you that they were looking for profit and not a hole to pour money down? A. Yes.

Q. And did you say to the employees if we have to negotiate with the Teamsters and cannot meet agreement on the contract under which we can make money they would call us out on a strike? A. Who do you mean by they?

[169] Q. The Teamsters? A. If we can't negotiate a contract under which we would make money because of

unreasonable demands it could lead to a strike by the Teamsters.

Q. Did you say to them it didn't make any difference to the Teamsters whether the Sinclair Company stayed in business or not? A. Yes, something similar to that. I didn't feel that it made any difference to the Teamsters.

Q. Whether the Sinclair Company stays in business or closes down? A. Yes.

Q. Or words to that effect? A. Yes.

Q. In this regard did you say to them that the Teamsters have contracts with other companies that would pick up the business? A. I said they certainly might feel that other companies with whom they had contracts could pick up our loss of business.

Q. Excuse me? A. Our loss of business.

Q. So that you told the employees that if the plant closed down as you explained the Teamsters didn't care because they had contracts with other companies and they would pick up the [170] business? A. I would think their attitude must or might be if we did close there were other companies with whom they had contracts that might pick up this lost business.

Q. In this regard did you say they don't care which sheep they shear so long as they get the wool? A. Yes.

Q. Did you say to them it makes a lot of difference to me who is working. I want my job and I suppose that you want your job? A. Yes.

Q. Did you say to them again let's look at the facts, no one admits he's getting older? A. Yes.

Q. Did you say we are all Jack Benny's and are never going to be over thirty-nine but we don't look that way to employer management? A. I said we are all Jack Benny's or something similar to this.

Q. And did you say to them that most companies probably have a large number of applicants who are younger and better experience[d] and certainly a lot better insurance rating than you and I or words to that effect? A. Yes.

Q. They could be hired for less money? [171] A. Yes.

Q. And did you tell them that their experience, meaning the wire weavers experience is limited to a small craft? A. Yes.

Q. Did you say anything else with respect to that? A. No, I don't believe so.

Q. Did you say to them that if the Sinclair Company closes down because of a strike that other plants will pick up the business? A. No, I don't believe so. I think I said if we close because of a strike there was a possibility of other plants picking up our business. I also said there was a possibility that foreign manufacturers might benefit from this.

Q. And in respect to that, did you say maybe three months from now you would be forced to sell foreign wires if the Teamsters Union stops our production? A. Yes.

Q. And you told them you all know that we have handled foreign wires in the past? A. Yes.

Q. And if you did handle foreign wire that would mean there would be less production at the Sinclair Company? A. No.

Q. What do you mean by handling foreign wires? A. It would mean in order to meet the delivery requirements [172] of our customers in the area that we would have to handle these foreign wires in order to meet these customers demands.

Q. I believe you just told me that you had told them that you had to handle foreign wires in the past? A. Yes.

Q. What period were you referring to? A. I was referring to preceding the years just preceding Lindsey Wire acquiring the Sinclair Company.

Q. The company wasn't on strike at that time, was it? A. No.

Q. You handled foreign wires? A. Yes.

Q. Did this mean less hours of work for the employees at the Sinclair Company? A. No.

Q. Well, how would the handling of foreign wires affect the work of the employees in the Sinclair Company? A. How would it?

Q. Yes? A. If the Sinclair Company was operating it would not affect them at all, if the Sinclair Company was closed because of a union strike this would be work that they weren't doing.

Q. So that it was in this respect that you mentioned if the Sinclair Company was closed you could have the wire [173] that was usually made by the wire weavers purchased in foreign markets? A. I would have this possibility.

Q. And you said that you have purchased it in the past? A. Yes.

Q. Did you refer to your letters to them by telling them that I am giving you the facts today and by my mailings to you previously? A. Yes.

Q. And in summing up did you say this is not a rosy picture for you or for me? A. Yes, something like that.

Q. And did you say to them perhaps you feel I am bluffing but I am not or words to that effect? A. Yes, I said you may think that I am bluffing but I am not. I am very serious and very concerned.

Q. And did you conclude by saying to them that to you and your dependents this is one of the most important elections in which you will vote? A. Yes.

Q. And you told them to think over carefully their decision as to how they would vote? A. Yes, and I told them to vote.

Q. Pardon me? A. And I told them to vote.

* * *

[175] CROSS EXAMINATION

Q. (By Mr. Simerka.) Well, Mr. Sinclair, a few minutes ago you were asked whether or not you had made a series of statements in your talks of December 8th? A. Yes.

Q. You said or testified that you had said to the employees that you were serious and that you were concerned? A. Yes.

Q. Did you also in the course of that talk state, "I think you people feel that I have been honest in my dealings with you as my dad was before me." A. Yes.

Q. Did you also say, "I am not concerned with beating a union, I am concerned with our future." A. Yes.

Q. And did you also say in this speech of December 8 1965, "You can and should vote as you think best for yourself in the secrecy of the Labor Board's voting booth." A. Yes.

Q. Mr. Sinclair, you said that early in July of 1965 an employee told you he had received a union authorization [176] card and a letter? A. Yes.

Q. I show you this General Counsel's exhibit number three, is that the letter that was shown to you by the employee? A. Yes, it is.

Q. He furnished you a copy of that? A. Yes.

Q. Now, you stated that the letter—that several other employees, perhaps ten or twelve also asked you whether you had a copy of that letter, General Counsel's exhibit number three? A. Yes.

Q. The employees who were involved in these discussions concerning General Counsel's exhibit number three were these employees of the weave shop? A. There were some, they were throughout the shop.

Q. In other words, some of them were employees of the weave shop and others were not weavers? A. That is correct.

Q. Now, I show you General Counsel's exhibit number eleven, the letter you sent to the Teamsters Union on or about September 28th, is that correct? A. Yes.

Q. Now, you were questioned about your response to the [177] Union on September 28th. I understood your testimony you said that you felt other people in addition to journeymen-weavers, you felt they were connected with the union's recognition request. Will you tell us again what your basis was for rejecting the union's request for recognition? A. Well, we had already been approached in August for recognition of more people than I had working for me in the plant and I didn't feel then that they knew too much about our plant or its operations and this was a request for journeymen and apprentices and we had no apprentices.

Q. That was on September 20th? A. Yes. I felt that there was more interest here perhaps with other people in the weaving department that they were talking about.

Q. Well, in terms of helpers who were they as of the time you received this recognition request in September of 1965? A. We have helpers that assist the weavers in the various operations of setting up and removing cloth and this type of thing.

Q. They were not apprentices? A. No.

* * *

[178] Q. (By Mr. Simerka.) Directing your attention to the statement which is captioned as A in General Counsel's exhibit number eleven in the second paragraph where it starts off, "Your request for recognition is denied (a) because the company has a good faith doubt that Local 404 of the International Brotherhood of Teamsters represents an uncoerced majority of its weaving department employees." A. Yes.

Q. Will you tell us what you meant by the phrase weaving department? A. Well, our weaving department includes weavers, apprentices, if there were any which didn't exist at this time, helpers, mechanics, finishers, seamers. So there is a rather large group that comprises the weaving department.

Q. Well, in addition to the weavers approximately how many additional employees would be involved in the weaving department? A. A dozen.

Q. Now, yesterday you were also asked whether or not you had agreed in November to a unit including journeymen and apprentices and I'm not sure that I have your answer correctly or not, will you answer that again. In November did you agree to a unit including journeymen and apprentices? A. I agreed to a unit of journeymen.

[179] Q. Which excluded all other employees of the weaving department? A. Yes.

Q. In your testimony yesterday you said in one of your talks with the employees, one of the talks with the weavers you told them that they had experience with the union be-

fore and that you did not want to get back to unreasonable demands, is that correct? A. Yes.

Q. What did you have reference to in that regard that they had had experience with the union before? A. Well, they had been represented in prior years preceding our long strike in 1952 by a union. This union negotiated contracts on the national basis for the wire weaving industry. I negotiated these contracts on behalf of my company. I certainly had been presented with unreasonable demands in my opinion by this union. One time when I came back and figured out the demands that the union made on us it was more than two dollars an hour increase between wages and fringes and I considered this unreasonable.

Q. When was this demand made on the company? A. This was in the late 40's.

Q. The union involved at that time was American Wire Weavers Protective Association? A. Yes.

[180] Q. Did you have any information in July 1965 or at any time between July and the election on December 9, 1965 as to what the wire weavers union had done or what its status was? A. Yes, the Wire Weavers Protective Association faded out and the Teamsters seemed to be becoming the representative for this same group that I dealt with before.

Q. When you say they faded out you know if they—do you know whether the Wire Weavers dissolved and affiliated with the Teamsters or what was done? A. I believe they affiliated with the Teamsters. At that point I did not have a union so I wasn't negotiating in anyway directly on anything, but my belief is that they affiliated with the Teamsters.

Q. All right. There was a strike by the wire weavers union at the Sinclair Company about 1952 or 1953, is that correct? A. Yes.

Q. Can you pinpoint the date whether it was '52 or '53? A. It was '52.

Q. The employees who were the weavers in July of 1965 and those who voted in the election in December of 1965

were they members of the wire weavers union back in 1952? A. The majority of them were, yes, sir.

[181] Q. And in 1952 how long did that strike continue? A. It lasted a good many weeks, even months and I was away from the Sinclair Company at the time. I had been recalled into the service, but I am quite sure it lasted twelve or so weeks.

Q. Was the strike over unreasonable demands by the union? A. Yes.

Q. And how did that strike terminate, was a contract executed in 1952? A. I received a letter at that time from my father and brother who were back there saying that they couldn't continue any longer this way and they were going to try and reopen the plant, otherwise the entire business they felt would fail.

Q. Now, yesterday you said—withdraw that. You were questioned with regard to the meeting you had with the employees on December 8th and you stated that you were more careful in connection with that meeting than you—you did not mean by the statement—well, what did you mean by the statement that you were more careful? A. Well, I had had things come back to me concerning my July talk that indicated that people were either misquoting or misunderstood something that I said. I had never in the past talked to my people from a written speech or using notes [182] and I told them as I started this that I was departing from my usual procedure in using notes and that I had certain things that I wanted to say and I wanted to be sure that I said it all and that I did not want to be misquoted.

Q. Mr. Sinclair, you were questioned yesterday with respect to General Counsel's exhibit number twenty-one? A. Yes.

Q. On the first inside page in the second column there is a question concerning the first sentence, the first full paragraph, "We have no doubt that the Teamsters Union can again close the wire weaving department and the entire plant by a strike." A. Yes.

Q. You indicated yesterday that that statement might have been incorrect. Have you read the entire document? A. Yes. I believe yesterday I was asked—

TRIAL EXAMINER: What's your question?

Q. (By Mr. Simerka.) Well, will you tell us now whether or not this statement is an incorrect statement in your opinion? A. No, it is not.

Q. And why not? A. Well, because I was talking earlier about a plant shut down that we had because or caused by a strike and then the sentence goes on, this particular sentence goes on to [183] say, "We have no doubt that the Teamsters Union can again close the wire weaving shop." I think the context of what has been said this is a correct statement.

Q. Now, this particular leaflet was sent out to the employees approximately two to three weeks before the election? A. Yes.

Q. And you were asked yesterday whether or not the only thing pending was an election petition with respect to the weavers. Did you know whether that was the only thing pending with respect to the employees of the Sinclair Company? A. No. This whole situation had been changed so often that I had no idea in what direction the union might choose to move.

Q. Well, there was only one election petition pending at that time, is that correct? A. Yes, sir.

Q. Approximately two to three weeks before the election was actually held? A. Yes.

Q. And that election petition pertained to the weavers only or at least— A. The journeymen-weavers.

Q. Yes. Had the union notified you that it had abandoned [184] or had the unon notified you of its intention to abandon its organizational efforts as far as the other employees in the company were concerned? A. No.

Q. So far as you know there is still an organizational drive pending with respect to the other employees of the company? A. Yes.

Q. Mr. Sinclair, I show you General Counsel's exhibit number nineteen, you were asked a series of questions yesterday as to whether or not you had any objective basis for stating that the union was responsible for closing down the plants that were depicted or pictured on the last page of this document which is General Counsel's exhibit number eleven? Excuse me that is General Counsel's exhibit number nineteen? A. Yes.

Q. Had you at any time ever made the statement that the union was responsible for shuting down these particular plants? A. No.

Q. How long have you been a resident of the Holyoke area? A. I was born there and lived there all my life except for school and service.

Q. All right. Now, on the second page of General Counsel's [185] exhibit number nineteen in the first column are listed a number of companies and the designations of jobs lost. To your knowledge were the employees of these companies organized members of a union? A. Yes, as far as I know they were all organized.

Q. Each of the companies mentioned here? A. Yes.

Q. Are you familiar with the union that was the representative of any of the employees of any of these companies? A. Yes, some of them.

Q. Which ones? A. Well, the paper companies are the Pulp Paper Workers and I am not sure whether that is the correct title and General Electric was the Electrical Workers and I believe the textile companies were AFL affiliated.

Q. Now, in the same column there is a paragraph under the heading, "Many were sick, but the Union doctor came in" a statement with regard to restricted production. You were questioned about that statement yesterday. You said that in your own experience you did have a basis for making that statement that unions sometimes restricted production. Will you tell us what basis in your own experience is in this regard? A. Well, when we had our own union existing in our plant we had the normal things that you would expect to find in a [186] union contract. Many of the

things that we had to deal with was an item of seniority where men would or could demand if you will particular pieces of equipment and we would have to put them on and this caused inefficiencies within our operation because there are varying skills involved among our people and the operation of particular types of equipment requires different skills and physical abilities and this leads to restricted production. I also had people come to me and tell me that some of the union people had told them not to put out as much work as they were capable of producing.

Q. Is there anything else that you can recall off hand? A. No, I don't believe so at this time.

Q. This morning you were questioned on your conversations with individual employees concerning the union. Will you tell us again how the discussions with individual employees would commence concerning this subject matter? A. Yes, I would ask them if they wanted to talk about the union activity and I would like to talk to them and if they have any questions relating to my or the company's position or feelings that I could possibly answer for them.

Q. And some of the employees indicated a willingness to discuss the question; is that it? A. Yes.

Q. And some of them asked questions? [187] A. Some of them did, yes, and some of them did not.

Q. And if they did not? A. I left.

MR. SIMERKA: Nothing further at this time.

REDIRECT EXAMINATION

Q. (By Mr. Panos.) Mr. Sinclair, did I understand you correctly that in answer to a question on cross examination you stated that you never made a statement that the union was responsible for closing down these plants referring to the plants as named on General Counsel's exhibit number nineteen? A. Yes.

Q. You did make that statement? A. Yes.

Q. Well, directing your attention to page two of that General Counsel's exhibit number nineteen on the second page the lower left-hand side, "The union doctors gave them bloodletting strikes, restricted production and higher labor

costs." The result, as you can see as you look around you, was the death of these companies." Now, did you participate in having that put in this statement? A. Yes.

Q. So as a matter of fact, Mr. Sinclair, you have said to your employees that the union was responsible for closing down these plants? [188] A. No, I don't believe so.

Q. Well, you stated that as a result of what the union did this caused the death of these companies? A. I have not said that.

Q. You didn't say that? A. No.

Q. Well, you must admit that you participated in inserting this in that pamphlet, "The result, as you can see as you look around you, was the death of these companies." A. The result refers to these companies having gone out of business. I say some of these companies were already sick and they had problems. The companies needed higher production and better quality to meet stiff competition that they were facing and that the union did not do anything to help them in this regard. They had restrictions, restricted production and caused higher labor costs and the result of all this was the companies went out of business. I do not say the unions put them out of business.

Q. You are testifying here that you never said to your employees in the leaflets on your talks to them that the unions were responsible for closing down plants in Holyoke area, is that your testimony? A. Yes.

Q. And if you have testified that way you want to change that testimony today? [189] A. I don't believe I testified that way yesterday.

TRIAL EXAMINER: The record will show what was testified to yesterday.

Q. (By Mr. Panos.) You mentioned that you didn't have eighty-seven employees working for you back in July or August of 1965. Approximately how many employees did you have working? A. I didn't say that. I said that eighty-seven would include our total personnel with the exception of very top management. I did not say that we didn't have eighty-seven people working for us.

Q. Including all employees at the Sinclair Company, approximately how many did you have in July and August of '65? A. Ninety-three or four.

Q. And what is your best recollection as to approximately how many employees you had in the group that Mr. McCoy was asking for back at that time? A. Sixty-five.

Q. So that you had a total work group of approximately ninety-four total employees and approximately sixty-five employees that he had requested for and because he mentioned eighty-seven this caused you to have doubts as to whether he represented your employees? A. Yes.

[190] Q. Directing your attention to the company letter of September 28th that was sent to the union denying recognition, you know which letter I have in mind? A. Yes, I believe so.

Q. When this was brought to your attention by Mr. Simerka on cross-examination I believe you stated that the reason for your doubting that the union had an appropriate unit was that they had asked for journeymen-weavers and apprentices, is that correct? A. Yes.

Q. And I believe yesterday you made a point of telling me the fact that they had asked for apprentices and this was the basis of your not recognizing the union for that unit? A. I didn't know what was meant by apprentice. We had no apprentices.

Q. You had no apprentices at that time? A. That's correct.

Q. But as a matter of fact in answer to one of Mr. Simerka's questions previously you said that apprentices did not exist at that time? A. That's correct.

Q. You have had apprentices? A. Years back.

Q. So that it was not unusual for your wire weaving [191] department to consist of journeymen-wireweavers and apprentices because this has existed in the past? A. This existed under our former union dealings, yes.

Q. And there is a possibility that you may have apprentices in the future as you had in the past? A. It depends

on whether we have a contract to negotiate. They may request them, yes.

Q. And in your experience with the wire weavers it is not unusual that from the wire weaving department that there will be journeymen wire weavers and apprentice wire weavers? A. I think the situation was changed in our industry since we had apprentices.

Q. But it is not unusual that a wire weaving department have both journeymen wire weavers and apprentice wire weavers? A. It was not in 1952 and in our case there hasn't been any.

Q. As a matter of fact, Mr. Sinclair, some of the wire weavers that you had between the first part of July 1965 up to December of 1965, December 9, 1965 had been apprentices before? A. Yes, they had all served their apprenticeship years ago.

Q. Now, to your knowledge, the American Wire Weavers Protective Association was the labor organization that [192] represented your wire weavers back in 1952? A. Yes.

Q. Then I believe you said they faded out? A. Yes.

Q. And was this after the strike of 1952 that they faded out? A. It was during the period between 1952 and the present time if you will, yes.

Q. I believe you stated on cross-examination that a majority of the wire weavers who were employed by The Sinclair Company between the period July, the first part of July of 1965 and December 9, 1965 that a majority of these wire weavers had been members of the union back in 1952, isn't that so? A. Yes.

Q. So that at the time that the Teamsters Local 404 requested recognition for the wire weavers claiming that they had a majority of these wire weavers that they represented a majority of them, you knew at that time that a majority of your wire weavers had been members of a labor organization back in 1952, isn't that right? A. Yes.

Q. And you knew at that time that this labor organization of 1952 had become affiliated in some way with the Teamsters Organization? [193] A. Yes.

Q. And at that time that you refused to recognize the Teamsters Local 404 for the wire weavers unit, bargaining unit you had knowledge that a majority of these employees had been active members of the previous union back in 1952? A. Yes.

Q. And they had participated in a strike against the Sinclair Company back in 1952? A. Yes.

Q. I believe you stated that it was a twelve to thirteen week strike? A. Yes. I don't think they enjoyed that experience.

MR. PANOS: I move to strike that.

TRIAL EXAMINER: The motion is granted.

Q. (By Mr. Panos.) Now, in November of 1965, Mr. Sinclair, it had come to your attention had it not that the Teamsters Local 404 had withdrawn its election petition, its Board petition with respect to your production and maintenance employees? A. Yes.

Q. They sent you a copy of a telegram, did they not, on the first part of November? A. Yes.

Q. So that during the two to three weeks period before the [194] election of December 9, 1965 the only election petition pending was the election for the journeymen-wire-weavers? A. That is the only petition at that time that I had.

Q. I believe in the last part of November you had participated where the company had executed an agreement to have an election in this bargaining unit? A. With the journeymen.

Q. At that time there was nothing pending with respect to any other employees, was there? A. I have nothing before me. I did not know what the union was planning. They had a good many things pending from July to the election on December 9th.

Q. But they signed or rather they sent you a copy of a telegram notifying you that they were withdrawing their petition with respect to the production and maintenance employees? A. Yes.

Q. I take it that, as I understand it, the speech that you made on December 8th that you had notes but you didn't read a speech? A. I in affect read that. I connected it in a few places where there was no sentence to make a sentence. It was particularly early in this talk where I urged them to vote, but the meat of this was taken directly from the notes.

MR. PANOS: Nothing further.

[195] RECROSS-EXAMINATION

Q. (By Mr. Simerka.) Mr. Sinclair, I show you General Counsel's exhibit number nine which is a letter of September 20th which is the union's request for recognition unit of journeymen and apprentice wireweavers. You said a few minutes ago that the situation has changed in our industry. Did that have anything to do or have any bearing on your decision to refuse the recognition? A. Yes, some bearing.

Q. Well, first of all, can you tell us what has changed in your industry? You said the situation has changed? A. The equipment has been improved over the years to the point that it can be operated without an operator on the equipment. We have done this in our own plant.

Q. Did that have any effect with regard to your opinion as to the appropriateness of the unit? A. Well, I think that the craft or skill if you will of the former journeymen weaver has been reduced considerably. It doesn't require the skills that it once did.

* * *

[196] MR. PANOS: Richard Bougie.

Whereupon,

RICHARD BOUGIE

was called as a witness by and on behalf of the General Counsel and having been first duly sworn, was examined and testified as follows:

* * *

DIRECT EXAMINATION

Q. (By Mr. Panos.) Are you employed by the Sinclair Company at its plant in Holyoke, Massachusetts? A. Yes, I am.

Q. And how long have you worked there? A. About eleven years, eleven and a half years.

Q. And what department do you work in? A. In the weave shop.

Q. Are you a wire weaver? A. Yes I am.

Q. Did you sign a union authorization card for the Teamsters Local 404? A. Yes, I did.

Q. I show you what has been marked as General Counsel's [197] exhibit number thirty-two for identification and I ask you to look at that and tell us if that is your signature that appears thereon? A. Yes, it is.

Q. And did you sign the card on or about the date that appears thereon? A. Yes, I did.

TRIAL EXAMINER: What is that date?

Q. (By Mr. Panos.) Can you tell us what the date is that you signed it? A. July 7, 1965.

Q. And did you fill out the card? A. Yes, I did.

Q. And what did you do with the card after you filled it out? A. I mailed it.

Q. And where were you when you signed the card, Mr. Bougie? A. I was at home.

MR. PANOS: I would like to move the introduction of General Counsel's exhibit number thirty-two for identification into evidence.

MR. SIMERKA: No objection.

[198] TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked G.C. 32 and was received in evidence.)

* * *

[210] MR. PANOS: We have no more witnesses and we rest at this time.

* * *

[211] MR. SIMERKA: Mr. Trial Examiner, I have a group of eight documents which have been marked respondent's exhibits 1 through 8 and respondent desires to offer them with the understanding that the General Counsel has an objection to make to all eight, so if I identified each document it will save time. Respondent's exhibit number one for identification is a letter from the NLRB dated October 13th to the Sinclair Company to which is attached the representation petition in case No. 1-RC-8664 which was filed on October 13th, 1965. Respondent's exhibit number two is the stipulation for certification upon consent election in Case No. 1-RC-8664 signed on November 2, 1965 by David Sinclair on behalf of the Respondent, Carmin Napoli on behalf of the Union and was signed on behalf of the Board by Board Agent Francis V. Paone.

MR. PANOS: I would like to clarify that that stipulation is not or was not signed as approved, that the signature of Francis V. Paone is only in this part of the agreement that states recommended; and it is not approved by any Board Agent or the Regional Director.

MR. SIMERKA: That is correct. It was signed by Mr. Paone on the line that says recommended. This particular [212] exhibit does not have the reverse side reproduced and I offer it with the further stipulation that the reverse side of this document is identical with the same side of the document which has been received in evidence as General Counsel's exhibit number 1(b). Respondent's exhibit number three for identification is a copy of a telegram sent by Carmin P. Napoli, President and Business Representative of the Teamsters Local 404 to Bernard L. Alpert then Regional Director of the National Labor Relations Board and was dated November 5, 1965. Respondent's exhibit number four for identification is a telegram from Carmin P. Napoli, President and Business Representative of Teamsters Local

404 to David H. Sinclair, President of the respondent and it carries no date and we offer the further stipulation that it was actually received by the company on November 5, 1965. Respondent's exhibit number five for identification is a letter dated November 8, 1965, and signed by Bernard L. Alpert, Regional Director of the National Labor Relations Board to General Teamsters, Chauffeurs and Warehousemen and so forth and Local Union No. 404. Respondent's exhibit number six for identification is also a letter from Bernard L. Alpert, Regional Director of the National Labor Relations Board dated November 8, 1965, and it is sent to Mr. Einhart, Esquire and was sent on or about the date shown. Respondents exhibit number seven for identification is also a letter of [213] Bernard L. Alpert, Regional Director of the National Labor Relations Board and the letter is dated November 9, 1965, and it is directed to the Sinclair Company to the attention of David H. Sinclair, President. A further stipulation that it was sent on or about the date shown. Respondent's exhibit number eight for identification is a letter dated October 21, 1965 from David H. Sinclair, president of the respondent to the National Labor Relations Board and attached to the letter is a list of the employees and this letter was sent on or about the date shown. That completes the presentation of the eight exhibits.

TRIAL EXAMINER: You wish to offer respondent's exhibit one through eight into the record.

MR. PANOS: May I be heard?

TRIAL EXAMINER: Yes.

MR. PANOS: Counsel for the General Counsel does not agree or rather does not disagree with the authenticity of these documents some of which are, I think most of them are copies of these documents relevant to a prior representation petition in Case No 1-RC-8664 and we take the position that they are not relevant to this proceeding and we object to the receipt of them into evidence.

* * *

[215] TRIAL EXAMINER: All right. Without at this time ruling on the merits or validity of respondent's defense I will overrule the objection and receive these documents into evidence so as to permit the respondent to protect himself and perfect a record in support of the defenses which he is urging. So I am receiving respondent's exhibit one through eight inclusive.

(The documents above-referred to, were marked Respondent's Exhibits 1 through 8 and were received into evidence.)

MR. SIMERKA: Mr. Trial Examiner, we offer as respondent's exhibit nine a letter which is dated November 5, 1965, and the letter is signed by and sent by Carmin P. Napoli, president and business representative of Teamsters Local 404 [216] to Bernard L. Alpert, Regional Director of the National Labor Relations Board on or about the date indicated.

MR. PANOS: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked Respondent's Ex. 9 and was received in evidence.)

MR. SIMERKA: Respondent offers respondent's exhibit number ten which is a letter dated November 10, 1965 signed by David H. Sinclair, President of the Sinclair Company and directed to Francis V. Paone, Federal Examiner, National Labor Relations Board in connection with case No. 1-RC-8713 and attached is a list of employees.

MR. PANOS: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to was marked Respondent's Ex. 10 and was received in evidence.)

MR. SIMERKA: We offer as respondent's exhibit eleven a letter which is signed by Francis V. Paone, Labor Management Relations, National Labor Relations Board and dated November 22, 1965 and directed to Mr. David Sinclair, President of the Sinclair Company and Mr. Napoli of Local 404 in connection with the case No. 1-RC-8713.

MR. PANOS: We have no objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked Respondent's Ex. 11, and was received in evidence.)

[217] MR. SIMERKA: We offer as respondent's exhibit number twelve a letter signed by Fred W. Green, Jr. and it is directed to the National Labor Relations Board in Case No. 1-RC-8713 and it is dated November 24, 1965.

MR. PANOS: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked Respondent's Ex. 12 and was received in evidence.)

MR. SIMERKA: We offer as respondent's exhibit number thirteen the tally of the ballots furnished to the parties on December 9, 1965 in connection with the election held in Case No. 1-RC-8713.

MR. PANOS: No objection.

TRIAL EXAMINER: It may be received.

(The document above-referred to, was marked Respondent's Ex. 13 and was received in evidence.)

MR. SIMERKA: At this time the Respondent calls Mr. David H. Sinclair.

Whereupon,

DAVID H. SINCLAIR

was called as a witness by and on behalf of the Respondent and having been previously sworn, was examined and testified as follows:

TRIAL EXAMINER: You are still under oath?

THE WITNESS: Yes, sir.

[218] DIRECT EXAMINATION

Q. (By Mr. Simerka.) Mr. Sinclair, you were present during the testimony of Mr. Bougie? A. Yes.

Q. He testified that in July, 1965 when you had a talk with the employees of the weaving department and the finishers were also present. Will you tell us how or rather who was present at your talk to them, the employees, in July of 1965? A. The weavers, the seaming people and the finishing people and helpers.

Q. Did this comprise the entire weaving department? A. I am not sure whether the maintenance mechanics were at that meeting or not. I believe they were in the group when I talked to our machine shop people because they essentially work out of that department. Other than this possibility I would say that comprises the group.

Q. All right. Mr. Bougie testified that you stated to the employees that Lindsey was sure to close if the union came in or some such phrase. Would you tell us whether or not you ever made that statement or any statement? A. I never made such a statement.

Q. Would you tell us from the beginning what you did say to the employees in your talk in July of 1965 to the best of your recollection? A. Yes, the remark of being blunt has been testified to and [219] this is true, this is how I opened my remarks that I wanted to be blunt with them. That I was disappointed that our people who had had prior bad experience under the former union that we dealt with should at this time be considering the possibility of getting into a union situation again. I reviewed with them as I feel I knew that our company had had considerable financial problems for many years and that I did not look forward to the possibility of getting back into a situation where negotiating with a union and having the situation arise where we were presented with demands that we could not meet to settle a contract and that again we would go on strike possibly if the union chose to do so and be back in the same situation as we were in 1952 and had been struggling really with it since that time. I referred to the Lindsey organization and the fact that we were now a part of this organization and I told them that I didn't feel that Lindsey needed the production equipment in our department to meet the total needs of the entire organization as far as production of wire cloth was concerned and that I did not think that the threat of a strike if such occurred in our company was going to worry them as far as the entire organization was concerned. That this did concern me. That I spent my entire working life with this company and

I continued to have great hopes for it as I had had in the past and that here we had the opportunity if we [220] could provide our parent company with evidence that we could make money in this operation that we could be helped in obtaining the capital funds to renew our equipment which although is perfectly functional and able to make a good product was being bypassed because of changes that were occurring in the industry that we served and that it was not the most efficient equipment available and I hoped to do something about it. Certainly if I couldn't make money I felt sure in my own mind that I would be able to do nothing about this. I reviewed with them that any negotiations was a two way street and I know what could be forced to accept in the union proposal any more than the union could in effect be forced to accept anything that I might propose. That there is a situation of pay in our plant which was not correct as far as I was concerned, and I would certainly make this a matter of negotiations that I entered into. This is preliminary the fact that when we reopened our shop after the 1952 strike we experienced—we told all the people if they desire to come back and work in our shop we would certainly be happy to have them and that we would compensate them on the basis of our last offer or agreement to the union as far as we could.

Q. Did you make these statements to the employees in the July talk? A. No, I didn't make these statements as such. I discussed [221] trying to give some background to where this came in.

TRIAL EXAMINER: Let's have the record indicate what you said in the July talk.

THE WITNESS: I discussed the scheduled method that they were paid by and the inequities in this method, that we paid on a piece work basis and that the people with equivalent skills earned different amounts of money.

Q. (By Mr. Simerka.) Was this part of your talk? A. Yes, in many cases in our plant our people earn more than the wire weavers at the Lindsey Wire. This I know and that

I would much prefer to see a level of pay for equivalent skills. This would mean negotiating down in some instances and up in others.

Q. Anything else said in this talk to the employees in July? A. Yes, I talked or said that I did not have a great deal of respect for the Teamsters organization. I had read a great deal about their leadership and I am sure they have and that this was not the kind of an organization that I would like to deal with.

Q. All right. Anything else that you can remember at this time that you said in this talk? A. I think this covers it.

Q. All right. Now, how long have you been associated with the Sinclair Company? [222] A. Well, I went to work full time for the Sinclair Company in 1947 and I worked part time prior to that period.

Q. Was your family connected with the company before you began working there? A. Yes, my father founded the company.

Q. When did he found it? A. In 1925.

Q. After you became associated with the company in 1947 on a full time basis did you have any function with regard to negotiating union contracts? A. Yes.

Q. Will you tell us what those were? A. Yes, our organization or rather the union at that time negotiated their contracts on a national basis and I was the company, our company's representative at these negotiations.

TRIAL EXAMINER: The Union was what?

THE WITNESS: The American Wire Weavers Protective Association.

Q. (By Mr. Simerka.) Were any of these negotiations held in the Springfield or Holyoke area? A. Not at any time while I was doing this work.

Q. Where were such negotiations held? A. Primarily Cleveland, Ohio and New York City.

Q. How many other companies engaged in the wire weaving business were also involved in these negotiations? [223]

A. All with the exception of one that I know of and this was approximately twelve companies.

Q. Then these negotiations in 1952 were with the same union group? A. Yes, I was not present at those. I had been recalled into the service. Up until the point of my recall from 1947–

Q. Do you have an approximate date when the strike commenced in 1952? A. It was in June, the middle of June, I believe. The third week of June.

Q. And you know when the strike terminated? A. In September.

Q. And the termination was as you have indicated on the basis of the company's last offer? A. Yes, again I wasn't here, but I understood that I think my father and brother had written a letter saying that they had to reopen the plant and that they would welcome back anyone who wanted to work for us on the basis of what they had made as a last offer.

Q. All right. Now, after September of 1952 did the Wire Weavers Union represent or did you deal with the Wire Weavers Union with regard to the employees of the wire weaving department? A. No.

Q. Has any other union represented the employees of the [224] wire weaving department from that time in 1952? A. No.

Q. Now, the bargaining unit when you were dealing with the wire weavers union was what? A. It was journeymen-wire weavers and apprentice wire weavers.

Q. And when you had a contract or agreements with the wire weavers union you didn't have apprentices, is that correct? A. Yes.

Q. Now, were there any changes in your operation between 1952 and July of 1965 with respect to the wire weaving department? A. Yes, there had been changes in equipment and some changes in the use of personnel.

Q. With respect to the equipment will you tell us, can you specify what these changes were? A. Yes, I worked myself quite hard to try and put in or automate as much

as possible the function of the weaving loom. We were successful at doing this and we weren't perfect but this was a major change in the equipment itself, the features that were added to this equipment to make it much simplier to operate.

Q. All right. The job functions that were performed by the weavers in 1952—well, start with the date of July 1965, were these the same as the job functions that were performed [225] by the wire weavers prior to June of 1952? A. Similar but not completely the same. Some of the necessary skills had been eliminated.

Q. Some of the skills have been eliminated? A. Yes.

Q. Do you know when the unit of journeymen apprentices was established at the Sinclair Company, referring now to the time when the wire weavers union was the representative? A. This building that we occupy today was formerly Bucannen and Holt Company and this company went bankrupt and my father was prevailed on by one of the local banks to try and salvage this operation which he did and this was after he started his own company so he transferred his business into this building and this was in 1933 and to my knowledge the wire weaving journeymen and apprentices existed at that time.

Q. Now, back in 1952 the Sinclair Company had no connection with the Lindsey Company, is that correct? A. No, we were competitors.

Q. And when did that business connection, what was the date of that? A. In July of 1964.

Q. And was there any particular reason that led to this business agreement? A. Yes, we had reached a point in our operation where we [226] felt that we must sell or join with another company to survive successfully in the future.

Q. Now, you said you were not with the company in 1952 when the strike occurred? A. Yes.

Q. You were in the service? A. I was in the service.

Q. When did you come back? A. I came back in January of 1954.

Q. And have you been with the Sinclair Company continuously since then? A. Yes.

* * * * *

[227] Q. (By Mr. Simerka.) Mr. Sinclair, is the Sinclair Company operation conducted in one building? A. No.

Q. There is more than one? A. There are two buildings.

Q. And what are the addresses of the two buildings? A. Sixty Appleton Street and 115 Park Street.

TRIAL EXAMINER: How about the wire weavers where are they located?

THE WITNESS: They are located at Appleton Street.

Q. (By Mr. Simerka.) What operations are at the Park Street plant? A. We have a non-ferris foundry at the Park Street location.

Q. And the only operation? A. We build our shipping boxes from this building also.

Q. And the balance of your operations are conducted in Appleton Street? A. Yes.

* * *

[229] Q. (By Mr. Simerka.) Mr. Sinclair, on or about August 17th had you learned or did you learn of a recognition request [230] that was made on behalf of the Teamsters Union? A. Yes, I did.

Q. You already testified that you rejected that demand because of a number of employees involved in the request, eighty-seven? A. Yes.

Q. Are there any other reasons why you rejected that bargaining request that you have not already testified to? A. No, I don't believe so.

Q. On September 20th or on or about September 20th the union again made a request to the company to recognize and bargain with it? A. Yes.

Q. I show you General Counsel's exhibit number eleven which was your reply to the union? A. Yes.

Q. The last sentence of the last part of the second paragraph indicates that the request for recognition was denied and reads, "(c) because the company expects that there will

be questions concerning the appropriate bargaining unit which should be determined by the Board." A. Yes.

Q. Were you questioning the bargaining unit requested journeymen and apprentices? A. Yes.

[231] Q. What respects were you questioning them? A. Well, I did not know what was meant by an apprentice and we had none. I assumed they were talking about other employees of whom I have no knowledge and I had a previous request for the entire plant and I felt all through this whole situation that we should talk about the entire plant.

Q. Well, was—were you of the opinion that a unit of journeymen and apprentices if you had apprentices would have been appropriate at that time? A. No.

Q. And why not? A. I just didn't feel that this comprised what would be considered an appropriate unit in our plant.

Q. Well, what were your reasons for thinking the journeymen were not appropriate as of September 20, 1965? A. Well, I had questions about their skills as a craft, and I just didn't feel that this was a proper unit.

Q. Now, on October 11th or on or about October 11th you received another letter from the Teamsters Local 404? A. Yes.

Q. I show you General Counsel's exhibit number twelve and you rejected that request for recognition, isn't that correct? A. Yes, I rejected it.

Q. And will you tell us the reasons why you rejected that [232] request? A. Here again there were exclusions, they were excluding the group of our people there was no foundry group, there was in any way included in this and I again felt that the entire plant should be discussed.

Q. Did you ever communicate your feelings regarding the unit or the beliefs regarding the unit questions to any of your employees? A. Yes.

Q. In what way? A. I prepared notices as these things were going on and I placed them on the bulletin board of our plant and tried to keep our people informed as to what was happening and they were all very seriously interested and curious to know what was going on.

Q. All right.

MR. SIMERKA: May I have this marked for identification?

(The document above-referred to, was marked Respondent's Ex. 15, for identification.)

Q. (By Mr. Simerka.) Mr. Sinclair, I show you what has been marked as respondent's exhibit number fifteen for identification. Can you tell us what that is? A. Yes, this is one of the notices that I just referred to that was placed on our bulletin board October 21st.

Q. How long did that notice remain posted if you remember? [233] A. They were normally left on the boards three or four days.

Q. And this bulletin board is observed by what groups of employees? A. We have one in our foundry group that has a bulletin board in this building. We—and we have a bulletin board in the Appleton Street plant and they are both located at the time clock and they also have a bulletin board in our office. So that all of our people see the bulletin boards.

Q. Was this particular notice, respondent's exhibit number fifteen that is marked for identification, posted both at the Appleton plant and the Park Avenue plant? A. Yes.

MR. SIMERKA: I now offer Respondent's exhibit number fifteen.

MR. PANOS: We have no objection.

TRIAL EXAMINER: All right. It may be received.

(The document above-referred to, heretofore marked Respondent's Ex. 15 was received in evidence.)

Q. (By Mr. Simerka.) Now, Mr. Sinclair, subsequent to October 21st the date shown on this particular notice, was there a meeting or a hearing in connection with the election petition filed by the union? A. Yes.

Q. Which was it a hearing or a meeting? [234] It was a meeting of the labor board representative and the union and myself.

Q. The Labor Board representative and the union? A. Yes.

Q. Who was there on behalf of the union? A. Mr. Napoli.

Q. And on behalf of the Board? A. Mr. Paone.

Q. And you were there? A. Yes.

Q. And your Counsel? A. Mr. Einhart.

Q. What was the result of this meeting? A. Well, we signed a stipulation for an election. The union apparently agreed with us that our foundry people should be included because they were included in the stipulation.

Q. I see. The stipulation that you signed was a document which has been received in evidence as respondent's exhibit number two? A. Yes.

Q. All right. Did you post any notice to the employees regarding the execution of this stipulation? A. Yes.

MR. SIMERKA: I would like to have this marked for identification.

[235] (The document above-referred to, was marked Respondent's Ex. 16 for identification.)

Q. (By Mr. Simerka.) I show you a document which has been marked for identification as respondent's exhibit number sixteen and I ask you if you can identify that? A. Yes, this is a notice that I prepared and posted on November 2nd reporting this meeting in which we signed an agreement for an election.

Q. Was this posted at both the Appleton and Park Avenue plants? A. Park Street, yes, sir.

MR. SIMERKA; We offer Respondent's exhibit number sixteen.

MR. PANOS: We have no objection to the authenticity and we will present our argument to the weight to be given to these exhibits in our brief.

TRIAL EXAMINER: All right. It will be received.

(The document above-referred to, was heretofore marked Respondent's ex. 16, was received in evidence.)

Q. (By Mr. Simerka.) Mr. Sinclair, did you subsequently learn that the election which had been agreed upon on November second was not to be held? A. Yes.

Q. And will you tell us how you learned about it and what [236] you—where you learned about it? A. I received a copy of a wire that stated that the union was withdrawing their petition and was submitting a new one in a smaller unit.

Q. And then did you later actually receive such a petition for a smaller unit? A. Yes.

Q. Did you communicate with your employees regarding this? A. Yes.

MR. SIMERKA: May I have this marked.

(The document above-referred to was marked Respondent's Ex. 17 for identification.)

Q. (By Mr. Simerka.) I show you a document which is marked as Respondent's exhibit number seventeen for identification and will you tell us what that is? A. Yes, this is a bulletin board notice that I prepared and posted in both of our buildings on November 8, 1965.

Q. And about how long was that posted if you know? A. This would be again three or four days.

MR. SIMERKA: We offer respondent's exhibit number seventeen.

TRIAL EXAMINER: Any objection?

MR. PANOS: We don't object to its authenticity but we will argue the weight and relevancy in our brief.

[237] TRIAL EXAMINER: It may be received.

(The document above-referred to, heretofore marked Respondent's Ex. 17, was received in evidence.)

MR. SIMERKA: May I have this also marked.

(The document above-referred to was marked Respondent's exhibit 18 for identification.)

Q. (By Mr. Simerka.) Mr. Sinclair, I show you a document that has been marked as respondent's exhibit number eighteen for identification and will you tell us what that is? A. Yes, this is another notice for our bulletin board and it was again posted in both buildings and I prepared and posted it on November the 9th.

Q. This one remained posted the same length of time? A. Yes, this would have been the same length of time.

MR. SIMERKA: We offer respondent's exhibit number eighteen.

TRIAL EXAMINER: All right. You take the same position?

MR. PANOS: We take the same position with all of these notices, respondent's exhibit 15, 16, 17 and this one here, 18.

TRIAL EXAMINER: All right. It may be received.

(The document above-referred to, heretofore marked Respondent's Ex. 18, was received in evidence.)

MR. SIMERKA: May I have this marked for identification?

(The document above-referred to was marked Respondent's Ex. 19 for identification.)

[238] Q. (By Mr. Simerka.) Mr. Sinclair, I show you a document that has been marked for identification as Respondent's exhibit number nineteen, will you tell us what that is? A. This again is a bulletin board notice prepared by myself and posted on November the 29th and again it was posted in both plants and remained on the board a few days.

MR. SIMERKA: We offer respondent's exhibit number nineteen.

TRIAL EXAMINER: All right subject to—

MR. PANOS: The same position.

TRIAL EXAMINER: Position taken by the General Counsel I will receive the exhibit.

(The document above-referred to was heretofore marked Respondent's ex. 19 and was received in evidence.)

Q. (By Mr. Simerka.) Mr. Sinclair, I show you respondent's exhibit number nineteen. At the time you prepared and posted this notice a new stipulation for certification upon consent election had already been executed, is that correct? A. Yes.

Q. In the second paragraph of this notice posted on the bulletin board, "Although we still feel strongly that

all of our production and maintenance employees should have the right to vote in any labor election we were advised by the [239] Board that an election can be properly held among our wire weavers." Will you tell us by whom you were advised? A. I was advised by my counsel, Mr. Einhart, that the journeymen wire weavers would be held by the Board to be an appropriate group. I didn't agree with this, but he said it would be from his information and so there seemed to be no sense in arguing about it.

Q. In this notice you say, "We were advised by the Board." You reported a conversation that you had with your counsel? A. Yes, he had been in contact with Region One office of the Board.

Q. Before the second stipulation was executed was there a meeting or conference with regard to this stipulation? A. No, this was done by telephone.

Q. You actually did not execute this stipulation yourself? A. No, I didn't.

Q. It was signed by Fred Greene? A. Yes.

Q. And is there any reason why he signed it rather than yourself? A. Well, I know that I was expected and I was going to be away at the time so I authorized Fred Green to sign it so there wouldn't be any delay in that.

MR. SIMERKA: May I have this marked please.

(The document above-referred to was marked Respondent's Ex. 20 for identification.)

[240] Q. (By Mr. Simerka.) Mr. Sinclair, I hand you a number of cards, fourteen cards and the top card covered by the rubber band which is marked as Respondent's Exhibit number twenty. Will you tell us what those are? A. Yes, these are the reference notes that I used when I talked to the journeymen weavers on December 8th in our plant.

Q. Is there anything that you said to the employees on December 8, 1965 that is not contained on these cards? A. Yes, I opened my remarks just briefly to say that I had not used any reference before but that I had things to say that I wanted to be absolutely sure and straight on and complete

and I didn't want to be misquoted so I was using these cards.

MR. SIMERKA: Mr. Trial Examiner, the respondent offers the cards which are marked as respondent's exhibit twenty and the Xerox copies are a duplicate.

MR. PANOS: May I ask a few questions on voir dire?

TRIAL EXAMINER: All right.

MR. PANOS: Mr. Sinclair, with reference to these cards I believe you said these were your reference notes that you used during your talk with the employees on December 8th?

THE WITNESS: Yes.

MR. PANOS: And that these cards did not contain every- [241] thing that you said to the employees?

THE WITNESS: They contained everything but the preliminary remarks.

MR. PANOS: You didn't read these cards to them?

THE WITNESS: And they also on the initial card there were some words used to connect the sentences and this is very basically what I said.

MR. PANOS: Basically you feel this was sort of an outline?

THE WITNESS: No, it was a rather complete statement of what I said.

MR. PANOS: But you didn't read these cards to them, Mr. Sinclair, did you?

THE WITNESS: Basically I read those cards to them, yes.

MR. PANOS: Well—

TRIAL EXAMINER: What do you mean basically?

THE WITNESS: At the very beginning—

TRIAL EXAMINER: Except for the opening remarks?

THE WITNESS: I read these cards.

TRIAL EXAMINER: You read one card after another as you stood before these people?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: All right.

MR. PANOS: Let me take card number one and read from it. Outset—How vote—your decision—yours alone—no one can threaten [242] or coerce.

THE WITNESS: Right.

MR. PANOS: Is that just what you said?

THE WITNESS: I said at the very beginning I checked this and connected the words that you just read into a sentence.

MR. PANOS: So that in making your speech to them you used words other than words the exact words as I set forth in these cards?

THE WITNESS: On the initial card, yes.

MR. PANOS: Mr. Trial Examiner, I will object to the receipt of these cards into evidence. The best evidence here is the testimony that we have heard that this witness testify to yesterday and this morning, and he has stated that he did not read a speech and there was no prepared speech and we submit that based on the rules of evidence, that these cards are not and should not be properly received into evidence. It cannot be the best evidence of what he said to the employees.

TRIAL EXAMINER: Well, are you offering these as the notes which the witness had before him and on which he referred when he made his talk to the employees on December 8th?

MR. SIMERKA: Yes, those are the notes that the witness testified that he used in the course of his talk.

[243] TRIAL EXAMINER: Well, for that purpose I can't see where they are objectionable.

MR. PANOS: Well, I submit then that they are being received for the limited purpose of showing what the notes were and not necessarily to prove the contents of these notes.

TRIAL EXAMINER: Well, counsel has stated that in response to my question that they are being offered as the notes with which the witness had before him when he made his talk to the employees on December 8th and to which he referred when he made his talk and for that purpose I will receive them as respondent's exhibit number twenty.

(The documents above-referred to, heretofore marked Respondent's Ex. 20, was received in evidence.)

Q. (By Mr. Simerka.) Mr. Sinclair, just to make sure that your testimony on the record is clear on card number one which reads outset, dash how vote dash your decision alone dash no one can threaten or coerce. You said you used the connecting words? A. Yes.

Q. To make a sentence out of it? A. Right.

* * *

[244] TRIAL EXAMINER: I will sustain the objection. The cards are in evidence and they are subject to inspection.

Q. (By Mr. Simerka.) In the couse of your talk did you tell us how you used the cards as you talked, did you keep turning the cards as you covered the subject matter? A. Yes, I put the cards behind and went through these.

Q. I see. Did you cover all of the matter that is stated on these cards? A. Yes.

Q. And are there any others that are not stated on these cards the subject matters that are not stated on these cards that you discussed at your meeting on December 8th? A. No, at the end of this I asked if anyone had any questions that they would like to ask me and I didn't get a question.

* * *

[247] Q. (By Mr. Simerka.) Mr. Sinclair, paragraph 14(a) of the complaint alleges that, during the second and third weeks of July, 1965 at your Holyoke plant that you threatened your employees to close the plant if they became or remained or gave any assistance or support to the union, did you ever at any time threaten employees that you would close down the Holyoke plant or plants if they became or remained members of the union or if they gave assistance or support to it? A. I did not.

* * *

[248] CROSS-EXAMINATION

* * *

[250] [By Mr. Panos.] Q. And with respect to your testimony concerning automation I believe that you had parts that were added to existing looms? A. Yes.

Q. For example, it has been brought to my attention that electric clutches were added to the looms? A. Yes.

Q. And finger devices known as fingers? A. Yes.

* * *

[254] Q. When the request was made to you that you recognize Teamsters Local 404 for the journeymen-wire-weavers and apprentices did you consult with Mr. Einhart at that time with respect to the appropriateness of the unit? A. Yes.

Q. And did he advise you as to whether the unit was appropriate or not? A. No, at that time I felt we were dealing with the whole plant.

Q. But when the union first requested that you recognize them with respect to the journeymen-wire weavers I believe you testified previously that you formed an opinion that that was not an appropriate unit in your mind? A. Yes.

Q. And this was in disagreement with the position taken by your attorney, was it not? A. No. I didn't know what that unit was composed of as I have explained before.

Q. Now— A. And I don't believe that he did either.

Q. Did you ask your attorney if that was an appropriate unit or not? A. No, I don't believe that I did.

Q. I hand you General Counsel's exhibit number nine, which [255] is the September 20th letter of the union requesting recognition for the journeymen-wireweavers and apprentices and directing your attention to the fourth sentence, "Should you have any doubt as to our representing a majority of your employees in the above-described bargaining unit, we will be more than willing to submit the signed authorization cards of your employees to a neutral party, mutually agreed upon and to allow the third party to compare these cards with your present payroll." With reference to the above-described bargaining unit at that time that you received this letter did you have any doubt as to the appropriateness of that unit that they requested? A. Yes.

Q. And did you bring this to the attention of the union after they sent this letter to you? A. Yes, I answered this letter.

Q. Did you tell them why you felt you doubted that the unit was appropriate? A. No, I just told them that I didn't think or consider it an appropriate unit.

Q. And the only reason or response that your letter of September 28th? A. Yes.

Q. You made it a practice at that time, Mr. Sinclair, I believe based on your testimony that whenever any event [256] happened you either sent a letter to your employees informing them of what happened or you posted a bulletin board notice? A. Yes, I did.

Q. You kept them up to date as to all aspects of your relations with Teamsters Local 404 and during that period from July to December of 1965? A. I tried to keep them posted on what was happening, yes.

Q. And it is your position that you had doubts as to the appropriateness of the wire weavers unit and you did nothing to contact the union to dispel any doubts? A. I have doubts all through this, and I think the appropriate unit and I did right from the beginning in our plant was the entire production force of our plant.

Q. Is it your position, Mr. Sinclair, that the election that was conducted on December 9th was in an inappropriate unit? A. No, I was informed that the Board would consider it an appropriate unit and there was nothing I could do about this.

Q. As a matter of fact, the only union that ever represented any employees at the Sinclair Company was the union that represented the wire weavers, isn't that right? A. That's correct.

Q. You never had a union representative or rather a [257] union represent all of the production and maintenance employees including the wire weavers? A. No, I suffered with the situation.

MR. PANOS: Nothing further.

REDIRECT EXAMINATION

Q. (By Mr. Simerka.) You said in July you talked to the members of the weaving department? A. The weaving department and, as I said earlier, there were seamers, finishers and helpers.

Q. What? A. Seamers, finishers and helpers were present.

* * *

[261] MR. SIMERKA: Respondent proposes the stipulation that on November 8, 1965 respondent's attorney V. J. Einhart phoned the then Regional Director, Mr. Bernard L. Alpert, and objected to the allowance without prejudice of the withdrawal of the petition in Case No. 1-RC-8664 and in that telephone call he was informed by Mr. Alpert that the request for the withdrawal of the petition had been received prior to the approval of the proposed stipulation.

MR. PANOS: As I understand your conversation with me it was never approved prior to his approval and no approval was taken.

MR. SIMERKA: That is agreed to. I will agree to add that the Regional Director did or rather never did approve that stipulation.

MR. PANOS: We will agree to the existence of that but would not—with the condition that we don't feel that this is material in any way.

TRIAL EXAMINER: All right. But to save time rather than having Mr. Einhart come here and testify you will agree.

MR. PANOS: We will agree to that.

TRIAL EXAMINER: All right.

MR. SIMERKA: The respondent rests.

TRIAL EXAMINER: You have any rebuttal?

MR. PANOS: No.

* * *

GENERAL COUNSEL'S EXHIBIT 3.

Letter, July 3, 1965, From Robert Williams, President, Wire Weavers Trade Division, International Brotherhood of Teamsters.

July 3, 1965

Dear Sir:

As a fellow employee I am happy to be able to greet you. We have been informed that your fellow employees are interested in improving their status in the wire weaving industry. It should be of interest to all of you to know that the parent company which owns your employer is the Lindsay Wire Works of Lindsay, Ohio with whom we have a collective bargaining agreement. It should also be of interest to you to know that the Teamster Union has contracts in most of the major wire weaving firms in the country among which are the following:

Cabble Wire Company	Eastwood Neally
Cheney Bigelow	McClusky Wire Works

We are presently in the process of negotiating at the Appleton Wire Works in Appleton, Wisconsin. In this last round of collective bargaining which was the first experience in the Teamster Union, we succeeded in getting a collective bargaining package which was better than 62½¢ over the three year period. In this package of improvements were a pension plan which provided payments of $150.00 a month over and above social security benefits; health and welfare plan which included hospitalization, medical services and life insurance of at least $3,000.00 per employee, improvements in holidays, vacations and other benefits. This is among the best settlements of the year barring none.

Speaking as President of the Wire Weavers Teamster's Union, I am proud to say that the results of our representation have been very gratifying. It is our primary hope that we can carry the benefits of our organization to all unorganized members of our trade for that is surely

the only way to preserve the integrity of our skills and this industry.

We shall be writing to you again, but we hope that this letter will give you the opportunity to show your interest in improving yourselves in earnings, pension plans, health and welfare, vacations and working conditions which are certainly not the least of the important things for us in our industry. If you do have an interest in our organization, please sign the enclosed authorization card which will permit us to represent you in collective bargaining when a sufficient number of you have signed.

If there are any questions I shall be more than happy to answer you individually or as a group, as you wish.

With very best and cordial greetings, I am.

Fraternally yours,

ROBERT WILLIAMS
Robert Williams, President
Wire Weavers Trade Division
International Brotherhood of Teamsters

GENERAL COUNSEL'S EXHIBIT 4.

Authorization Card, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Ind.).

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (IND.)

TEAMSTERS LOCAL UNION No. 404

Authorization for Representation Date _____
of Application

Desiring to enjoy the rights and benefits of collective bargaining, I, the undersigned, an employee of the _____

_____
Firm Name

Employers address _____ City _____
Name of applicant _____ Occupation _____
Print Full Name Classification
Home address _____ City _____ Home Tel. _____

do hereby authorize the above organization, or any other local union it may hereafter designate or charter, to represent me for the purpose of collective bargaining and to negotiate a union security shop and membership fees deduction contract with my employer.

I hereby rescind and revoke any previous authorization given by me to any other organization. This authorization shall remain in effect one year from date, and thereafter subject to thirty days' written notice to withdraw such authorization.

I, the undersigned, hereby apply for membership in the above Union of _____. If admitted to membership, I agree to abide by the Constitution of the International as well as the local Constitution and By-Laws which are not in conflict with the International laws.

Date of Birth _____ Health _____ Social Security No. _____

_____
Signature of Applicant [Write in Full Name]

Note: This application is strictly CONFIDENTIAL. Your employer does not see this card.

GENERAL COUNSEL'S EXHIBIT 6.

Letter, Organizing Committee to Fellow Employees.

FELLOW EMPLOYEES:

This letter is being sent to all members of the Sinclair Wire Co. Foundry, to try and bring each employee up to date on the coming election for the Teamsters Union Local 404 of Springfield. A petition for an election for the Union has been sent to the company for an election of all production and maintenance employees of the Sinclair Company, 60 Appleton Street, Holyoke.

Since the petition has been filed we have been contacted and led to believe that at the Foundry there are people interested in the Union. If so, we would like to continue and get full co-operation from the employees at the Foundry on Park Street. To date, we have a very good percentage of the employees at the Appleton Street plant behind us.

To give you a brief summary of the benefits we hope to negotiate for. Our parent company, as of February 5, 1964, has signed an agreement with the Teamsters Union of Ohio. Some of these benefits include: time and a half after eight hours, jury duty benefits, more paid holidays, graduated vacation schedule up to four weeks, minimum hiring wage $2.10 per hour, funeral benefits, seniority benefits. In addition to some of these benefits we hope to obtain a pension plan which would give a man $150.00 a month upon retirement. In order to become eligible for the pension plan an employee would have to serve a maximum of three (3) years. In all plants previously organized this time limit of eligibility has never exceeded three (3) years. There are also death benefits for the beneficiary and complete disability benefits.

Our union dues will total eight dollars per month for all employees.

Enclosed is a card that would like to have you fill out and mail as soon as possible. This card will not be seen by any of your employers. We expect the voting to take place within the next two weeks. This will be a secret ballot. We are asking for your support to help us bring a union to the Sinclair Company. If there are any further questions concerning the union, please contact us and we

will be more than happy to meet you anytime at your convenience.

Respectfully yours,

ORGANIZING COMMITTEE

GARY A. BRUNAULT,

24 Smith Street,
So. Hadley Falls,
Massachusetts.

RICHARD BOUGIE,

81 Ducharme Avenue,
Willimansett,
Massachusetts.

GENERAL COUNSEL'S EXHIBIT 7.

Letter, August 20, 1965, V. Jay Einhart to Calvin McCoy.

STANLEY, SMOYER & SCHWARTZ
Cleveland 14, Ohio

August 20, 1965

Mr. Calvin McCoy
Roemisch & Wright
National City Bank Bldg.
Cleveland, Ohio 44114

Re: The Sinclair Company,
Holyoke, Massachusetts

Dear Mr. McCoy:

This letter will confirm the information furnished you by telephone concerning the above named Company.

In reply to your request on behalf of the International Brotherhood of Teamsters for recognition as the exclusive collective bargaining representative of the employees of The Sinclair Company, 60 Appleton Street, Holyoke, Massachusetts, you are hereby advised as follows:

(1) All labor relations at The Sinclair Company are handled by the management at that plant.

(2) Our office has been retained by David H. Sinclair, President of The Sinclair Company to represent the Company in matters involving labor relations.

(3) Your request for recognition is denied, (a) because the Company has a good faith doubt that the International Brotherhood of Teamsters represents an uncoerced majority of its employees, (b) because as stated by NLRB Chairman McCullooch, authorization cards are unreliable as a means for determining a Union's majority status, and (c) because the Company expects that there will be questions concerning the appropriate bargaining unit which should be determined by the Board.

For all of these reasons, we would suggest that the Teamsters Union follow the election procedures established by the Board.

If you have any questions concerning this matter, please call us.

Very truly yours,

STANLEY, SMOYER & SCHWARTZ
V. JAY EINHART.

VJE: mjb
cc: Mr. David H. Sinclair
bcc: Mr. D. L. Baker

GENERAL COUNSEL'S EXHIBIT 8.

Letter, Sept. 22, 1966, Calvin L. McCoy To Whom It May Concern.

ROEMISCH AND WRIGHT
Cleveland, Ohio 44114

September 22, 1966

TO WHOM IT MAY CONCERN:

This letter confirms the fact that I called Mr. V. J. Einhart, Cleveland attorney for "Sinclair" in Massachusetts, at about 11:30 A.M. on August 17, 1965; and as a local attorney for the Teamsters, I told him we had a majority of signed cards, and requested recognition as bargaining agent for all production and maintenance employees. I also advised Einhart that the unit was comprised of about eighty-seven (87) people.

Mr. Einhart waived the need for a written demand; and he denied my request for recognition by way of his letter of August 20, 1965.

I assumed Einhart represented "Sinclair" because of his being counsel for Lindsay Wire, which had a substantial interest in Sinclair.

I only represented Local No. 859, of course, at the time above indicated.

Very truly yours,

CLM/cef

CALVIN L. McCOY.

GENERAL COUNSEL'S EXHIBIT 9.

Letter, Sept. 20, 1965, Carmin P. Napoli to David H. Sinclair.

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY AND HIGHWAY CONSTRUCTION EMPLOYEES.

Springfield 4, Mass.

September 20th, 1965

Mr. David H. Sinclair, President
Sinclair Company
60 Appleton Street
Holyoke, Massachusetts

Dear Mr. Sinclair

This will advise you that as of today the majority of your Journeyman-Wireweavers and Apprentices at your Holyoke, Massachusetts location have designated this Local Union, an affiliate of the International Brotherhood of Teamsters, as their collective bargaining representative.

We therefore request recognition as the exclusive bargaining representative of the aforementioned Employees.

We further request that you meet with us, as soon as possible, for the purpose of negotiating a collective bargaining agreement covering wages, hours and other conditions of employment.

Should you have any doubt as to our representing a majority of your Employees in the above described bargaining unit, we will be more than willing to submit the signed authorization cards of your Employees to a neutral party, mutually agreed upon and to allow the third party to compare these cards with your present payroll.

We realize, of course, there may be some aspects of this matter you may feel should first be resolved before the recognition requested above can be granted. If so, we want you to know, we are more than willing to meet with

you or your representatives for the purpose of discussing such issues, if any, for mutually satisfactory disposition.

In the event you are willing to accept our offer, to submit these authorization cards for a check, you may reach us at the above address. We will then meet with you or your representatives for the purpose of selecting the third party to carry out the comparison of cards and current payroll.

Please be advised that your Employees have been instructed as to their legal rights in this matter and we suggest that all present terms and conditions of employment continue as in the past.

We would appreciate hearing from you on this matter at your earliest convenience.

Sincerely,

TEAMSTERS LOCAL UNION No. 404,
CARMIN P. NAPOLI,
President-Business Representative

GORDON E. MORSE,
Business Representative.

CPN/gs
Certified Mail No. 435477
Return Receipt Requested.

GENERAL COUNSEL'S EXHIBIT 10.
Letter, Sept. 24, 1965, Carmin P. Napoli to David H. Sinclair.

[Letterhead of]

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY AND HIGHWAY CONSTRUCTION EMPLOYEES.

September 24th, 1965

Mr. David H. Sinclair, President
Sinclair Company
60 Appleton Street
Holyoke, Massachusetts

Dear Mr. Sinclair

In conjunction with our letter of September 20th, 1965 with re: our demand for recognition for a certain group of your Employees, kindly be advised that Mr. Richard E. Bougie, 81 Ducharme Avenue, Willimansett and Mr. Gary A. Brunault, 24 Smith Street, South Hadley Falls, Massachusetts, both employed as weavers at your plant located at 60 Appleton Street, Holyoke, Massachusetts, are members of an organizing committee in behalf of the Teamsters Local Union No. 404.

They have been advised of their legal rights as provided under the Statute and will conduct themselves accordingly.

We would appreciate your instructing all Company officials of this correspondence so they may be fully aware of our current Union activity.

Should you have any questions, kindly feel free to contact either of the undersigned.

Very truly yours,

TEAMSTERS LOCAL UNION No. 404,
CARMIN P. NAPOLI,
President-Business Representative

GORDON E. MORSE,
Business Representative.

CPN/gs
Certified Mail No. 435481
Return Receipt Requested
cc: Mr. Richard E. Bougie
Mr. Gary A. Brunault
files

GENERAL COUNSEL'S EXHIBIT 11.

Letter, Sept. 28, 1965, David H. Sinclair to Teamsters Local Union No. 404.

[Letterhead of]
THE SINCLAIR COMPANY
September 28, 1965

Teamsters Local Union No. 404
119 Plainfield Street
Springfield, Massachusetts

Attention: Carnien P. Napoli, President
Gordon E. Morse, Business Representative

Gentlemen:

This will acknowledge receipt of your letters dated September 20 and 24, 1965, which were addressed to me. I was out of the city from September 20 to September 27th, and as a result received your letters only yesterday.

Your request for recognition is denied (a.) because the Company has a good faith doubt that Local 404 of the International Brotherhood of Teamsters represents an uncoerced majority of its weaving department employees, (b.) because as stated by NLRB Chairman McCullooch, authorization cards are unreliable as a means for determining a Union's majority status, and (c.) because the Company expects that there will be questions concerning the appropriate bargaining unit which should be determined by the Board.

For all these reasons we suggest that Local 404 follow the election procedures established by the Board.

Yours very truly,

THE SINCLAIR COMPANY
DAVID H. SINCLAIR
President

DHS/mij

GENERAL COUNSEL'S EXHIBIT 12.

Letter, Oct. 11, 1965, Carmin P. Napoli to David H. Sinclair.

[Letterhead of]

GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY AND HIGHWAY CONSTRUCTION EMPLOYEES

October 11th, 1965

Mr. David H. Sinclair
President
The Sinclair Company
60 Appleton Street
Holyoke, Massachusetts

Subject Matter: Teamsters Local Union No. 404 request for recognition as bargaining representative

Dear Mr. Sinclair

This correspondence is to supplement our letter of September 20th, 1965 in re to the above subject matter.

You will note that at that time our request for recognition was limited to a special group of your Employees at your plant located at 60 Appleton Street, Holyoke, Massachusetts.

We are further advising you that as of this date our Local Union represents the majority of your Employees at your Appleton Street plant, in the following departmental classifications: Weave Shop, maintenance, machin shop, shipping room, finishing room, dandyroll, cylinder, water mark and part time production Employees. Excluding Employees in the service department, foremen, all other Employees, office clerical, guards, supervisors and professional Employees as defined in the Act.

We therefore request recognition as the exclusive bargaining representative of the Employees identified in paragraph three (3) with the exception of those identified in the exclusions. We further request that you mee. with us as soon as possible for the purpose of negotiating a collective bargaining agreement covering wages, hours and other conditions of employment.

Should you have any doubt as to our representing a majority of your Employees in the above described bargaining unit, we will be more than willing to submit the signed authorization cards of your Employees to a neutral party, mutually agreed upon and to allow the third party to compare these cards with your present payroll records.

We realize, of course, that there may be some aspects of this matter you may feel should first be resolved before the recognition requested above can be granted. If so, we want you to know, we are more than willing to meet with you or your representatives for the purpose of discussing such issues, if any, for our mutually satisfactory disposition.

In the event you are willing to accept our offer to submit these authorization cards for a check you may reach us at the above address.

We will then meet with you or your representatives for the purpose of selecting the third party to carry out the comparison of cards and current payroll records.

Please be advised that your Employees have been instructed as to their legal rights in this matter and we suggest that all present terms and conditions of employment continue as in the past.

We would appreciate hearing from you on this matter at your earliest convenience.

Very truly yours

TEAMSTERS LOCAL UNION No. 404
CARMIN P. NAPOLI
President-Business Representative

CPN/gs
Certified Mail No. 037342
Return Receipt Requested

cc: Mr. Richard E. Bougie, Organizing Committeeman
81 Ducharme Avenue
Willimansett, Mass.
Mr. Gary A. Brunault, Organizing Committeeman
24 Smith Street
South Hadley Falls, Mass.
files

GENERAL COUNSEL'S EXHIBIT 13.

Letter, Oct. 21, 1965, David H. Sinclair to Teamsters Local Union No. 404.

cc: V. J. Einhart
Don Baker

October 21, 1965

Teamsters Local Union No. 404
119 Plainfield Street
Springfield, Massachusetts

Attention: Carmin P. Napoli, President
Gordon E. Morse, Business Representative

Gentlemen:

This will acknowledge receipt of your letter dated October 11, 1965, which was addressed to me. I was again out of the city and as a result received your letter on October 18th.

Your request for recognition is denied (a.) because the Company has a good faith doubt that Local 404 of the International Brotherhood of Teamsters represents an uncoerced majority of its production and maintenance employees, (b.) because as stated by NLRB Chairman McCullough, authorization cards are unreliable as a means for determining a Union's majority status, and (c.) because the Company expects that there will be questions concerning the appropriate bargaining unit which should be determined by the Board.

For all these reasons we are pleased to note that Local 404 has followed the election procedures established by the Board as evidenced by its petition which has been docketed Case No. 1-RC-8664.

Yours very truly,

THE SINCLAIR COMPANY
DAVID H. SINCLAIR
President

DHS/mij

GENERAL COUNSEL'S EXHIBIT 14.

Letter, November 2, 1965, David H. Sinclair to All Employees.

THE SINCLAIR COMPANY

Wire Division,
Fourdrinier Wires____Cylinder Wires
Dandy Rolls Stands and Suction Boxes
Cylinder Moulds____Size Strainers
Foundry Division
Bronze and Aluminum Castings

60 Appleton Street
Holyoke, Massachusetts 01040
Tel. 413 532-9488
TWX 413 534-4524

November 2, 1965

To All Employees:

The Labor Board election, which is scheduled for November 19, 1965, raises a number of questions which should be answered. Some of the questions deal with your legal rights while others deal with the plain facts as they exist here at the plants. Let's take the questions one by one and try to get straight answers.

Some of you may have signed Union cards for one reason or another, but would now like to vote against the Union. This raises the following question:

Q. If you signed a Union card, do you now have the right to vote against the Union?

A. Yes. Although you may have signed a Union card, you now have every right to vote *against* the Union at the election. This right is protected by federal law.

I am sure that many of you feel that how you vote is your own business and should not be for public consumption. This raises the following question:

Q. Will anyone know how you vote?

A. No. The election will be by secret ballot and all ballots will be marked in the privacy of a voting booth. Ballots should not be signed, so neither the Company, nor the Union, or any other employee will know how you cast your ballot. If you do sign the ballot, or put any identifying mark on it, it will *not* be counted.

There may be some of you who feel that you would rather not take sides and, as a result, not vote in the election. This raises the following question:

Q. If any employee fails to vote, will it have an effect on the outcome of the election?

A. Yes. The results of the election will be determined by a majority of those who actually vote—so be sure to vote.

Some of you may prefer to take no active part in the election on the ground that if the Union wins it will make no difference to you because you do not intend to join. This raises the following question:

Q. If Local 404 wins the election, will each employee be required to join the Union and pay dues, whether or not he voted for the Union?

A. Yes. If Local 404 wins the election it will demand that we sign a contract under which all of our production and maintenance employees will have to join and pay dues. If anyone refuses to join or pay dues, we would have to discharge him at the request of the Union.

All of us are primarily interested in job security. All of us are vitally interested in keeping our jobs in order to support our families. This raises the following question:

Q. Can the Teamsters Union offer you more job security than you now have?

A. No. The only real job security that any of us have here at Sinclair is dependent upon our ability to operate this plant at a profit. All of you know that we operated at a loss or a break even point for a number of years, and that as a result our plant and equipment is in need of repair. To be perfectly honest with you had it not been for the fact that an outside company purchased our operation, it is entirely possible that we would no longer be in business. Had it not been for this purchaser, we might not have our jobs today.

When a Company fails to operate at a profit no Union contract in the world offers any job security, because no Company can remain in business unless it can make money.

We here at Sinclair were given a "second chance," but we must make the most of that chance. If we want our jobs it is up to us to operate this plant at a profit. The Company who is helping us expects us to stand on our own feet. It has no desire nor intention of continuing to invest money here to improve our buildings, equipment and working conditions unless we can demonstrate that we can make a profit. The Company who now controls our future has a right to expect profits from this operation. We can not expect it to continue to subsidize a losing operation and it will not do so.

When we look at all of the facts as they now exist, the answer to the questions of job security here at Sinclair is clear. Through increased efforts of all concerned we can stay in business and have real job security. However, there is nothing that the Teamsters or any other Union can offer you which will in any way increase your job security under the circumstances existing at this plant.

It is easy for the Teamsters Union to make "big promises" and to tell you that they can obtain higher wages and greater fringe benefits for you. Anyone can

make promises—but it is quite another thing to fulfill those promises. This raises the following question:

Q. Can the Teamsters fulfill their "big promises" of higher wages and greatly increased fringe benefits?

A. No. If the Teamsters win the election the Company has an obligation to bargain with the Union in good faith in an effort to reach agreement on wages, hours and working conditions. We will meet this obligation, but we will not agree to any increase in costs which can put us out of business.

As stated before, because of financial conditions the Sinclair plant has been on "thin ice." We are still on "thin ice," and it just doesn't make sense for us to meet unreasonable Union demands which will result in further losses and eventually the necessity of closing the plant.

We suggest that you consider the above questions and answers carefully because the outcome of the NLRB election scheduled for November 19th may have a great effect on the future of all of us.

Yours truly,

THE SINCLAIR COMPANY
David H. Sinclair
President

DHS/mij

GENERAL COUNSEL'S EXHIBIT 15.

Letter, November 5, 1965, David H. Sinclair to All Employees.

[Letterhead of]

THE SINCLAIR COMPANY

November 5, 1965

To All Employees:

Sinclair Must Make Its Own Way

I realize you want more money. This is not unusual. Everyone wants more money—including me.

What we want, and what we can get is frequently quite a ways apart. "You can't get blood out of a turnip," and "Nobody wins beating a dead horse" are two old ways of expressing it.

Teamster business agents can promise you the moon, but they can deliver only what Sinclair can afford to pay.

Poor Earnings History

The Sinclair Company has had a poor earnings history. No one likes to talk about their financial problems, but I believe I must be very frank with you at this time.

My father started this Company the year I was born—1925. Then came the depression. Buchanan & Bolt went bankrupt. In 1933 the bank induced my father to take it over with a promise of financial help which never materialized.

Dad never took a big salary out of the plant. All profits were plowed back into the business. There were some years in which there were no profits—instead we had losses.

The Wire Weavers' strike in the early 1950's tied up the plant for three months. We were virtually out of business when the plant reopened on a non-union basis.

In an effort to put the Company in a better competitive position we started an expansion program in 1961. This resulted on a drain of our already limited money and last year our accumulated debts forced us to sell control of the Company. The new owners have made it clear that Sinclair must make a profit.

The new ownership has spent money in modernizing the plant. New production material and handling equipment has been installed. We have been able to improve the quality of our product somewhat, but let's face some cold facts—our present looms are too narrow to make the wide cloth which is most in demand, and much of our equipment is in need of replacement or repair. Before we can induce top management to invest large sums in new looms and equipment, we are going to have to prove that their installation will be profitable.

Many of you have questioned the wisdom of the improvements to the office. That is a decision which you might not have made, but it was thought necessary as a sales point for customers who come into the office. Actually its cost was small compared to the new equipment which has already been placed in the plant, but new lathes and milling machines do not have much "eye appeal."

Profits and Not Pressure

If this plant is to go forward and furnish real job security for you, we are going to have to prove that we can make a profit. The new ownership is interested in profits and not pressure. They have no ties with Holyoke or Massachusetts. If a dollar invested here can't earn as much as a dollar invested in Mississippi or Ohio, or somewhere else, you can be sure that their dollars are going to go where they can earn the most pennies.

I know that the Teamsters Union promises you a lot, but what can they deliver except pressure—the threat of a strike?

Frankly, I do not believe the threat of a strike will cause the new owners any loss of sleep. However, a long strike would be bad for me because I would like to continue to live in Holyoke. I have pride in the Sinclair family name and would like to see the plant modernized, expanded and prosper.

The decision must be made by you, individually. No one can make the decision for you. No one has a right to threaten you, or coerce you to make you vote their way. The election is absolutely secret. No one can ever know how you have voted.

The big question for you is: What can the Teamsters Union actually do for you in return for the big initiation fee and high monthly dues it will demand you pay as its price for letting you keep your job here at Sinclair?

Think it over carefully! Then be sure that you vote! You must vote to make your wish count.

Sincerely,

THE SINCLAIR COMPANY
David H. Sinclair
President

DHS/mij

GENERAL COUNSEL'S EXHIBIT 16a.

Letter, November 22, 1965, David H. Sinclair to All Employees.

[Letterhead of]
THE SINCLAIR COMPANY
November 22, 1965

To All Employees:

Enclosed please find a copy of the book written by Senator Bob Kennedy entitled, "The Enemy Within."

This book is the experience of Senator Kennedy when he was Attorney General of the United States and inves-

tigating racketeering aspects of the labor movement in the United States. I think you will find that it makes for thoughtful and interesting reading. I hope you will take the time to read it, as I am sure you will agree this information is presented by a man who really knows.

Sincerely,

THE SINCLAIR COMPANY
David H. Sinclair
President

DHS/mij

GENERAL COUNSEL'S EXHIBIT 17.

Letter, November 30, 1965, David H. Sinclair to All Wire Weavers.

[Letterhead of]

THE SINCLAIR COMPANY

November 30, 1965

To All Wire Weavers:

Can We Afford a Strike?

Some of you remember the long strike of the Wire Weavers Union nearly 15 years ago. This plant was closed for 13 weeks. We were virtually out of business when my father wrote to the employees advising them we must reopen or close down. The plant reopened on a non-union basis.

Then came the long battle to try to make our way back. We never quite made it. This is why my family had to sell control of the Company.

Conditions Have Changed

At the time of the Wire Weavers strike, this was a family owned operation. We were all Holyoke people. That is why we tried so hard to make a comeback here in Holyoke.

That strike was a disaster to us. Today it is a different story. We are a part of a multi-plant operation. A strike can still close the Holyoke plant, but other plants can pick up the work.

During the Wire Weavers strike, the workers lost three months' wages—money they never recovered. The Company was also driven to the brink of bankruptcy.

In a strike today, the employees would again lose their wages, but here the similarity ends.

Profits Not Pressure

As I wrote you before, the new ownership of The Sinclair Company is interested in profits and not pressure. What could the Teamster Union do to improve our profit position? Could they sell a single foot of wire cloth, or a single dandy roll?

The answer is "NO"!

Could the Teamsters Union furnish us the technical help necessary to improve productivity and product quality?

The answer is "NO"! These Union officers know nothing about your job and our mutual problems.

What CAN the Teamsters Union Do?

What can the Teamsters Union do to earn the big initiation fee, monthly dues and frequent assessments it would collect from you if it wins the Labor Board secret election?

It can make "big" demands which the Company cannot meet.

When the Company answer is "no" to the Teamsters Union "big" demands, it can call you out on strike.

A strike is a Union's only weapon to enforce its "big" demands.

Are You Prepared For a Strike?

Can you afford a long strike which could last for many weeks? This is a question which you should discuss

with your family before making your decision on how you wish to vote.

Can you afford a strike when you know the Holyoke plant has been given a second chance to stay in business and furnish jobs for all of us?

This Company is not anti-union. We would not close the plant in retaliation for employees voting for a Union. But this Company must show a profit, regardless of whether or not you select the Teamsters Union as your spokesman.

Real job security at the Holyoke plant is dependent upon profits and not Teamster Union pressure, or promises.

Make Your Own Decision

I have tried to give you the facts as I see them.

How you decide to vote is a question which only you can answer!

Again I urge you to make your decision on facts and not the wild promises of men who have a big "dues deduction" axe to grind.

Whatever your decision, be sure you go to the polls and vote!

Vote without fear! The election is absolutely secret. No one can ever know how you voted.

You must vote to make your wish count!

Sincerely,

THE SINCLAIR COMPANY
Dave
DAVID H. SINCLAIR
President

DHS/mij

GENERAL COUNSEL'S EXHIBIT 18.

Letter, December 1, 1965, David H. Sinclair to All Wire Weavers.

[Letterhead of]

THE SINCLAIR COMPANY

December 1, 1965

To all Wire Weavers:

Is This the Leadership You Want?

Every organization mirrors and reflects the character of its top officers.

If the leaders are good men, then normally it is a good organization. If its leaders are bad, then normally it is *not* a good organization.

Before making your decision on whether or not you wish to turn your welfare, and your right to come to work at Sinclair, over to the Teamsters Union, you should give serious consideration to the type of Union it is.

Its Top Officers Have Been Convicted of Serious Crimes

David Beck, its immediate past president, was convicted and served a long prison sentence for a series of felonies.

James R. Hoffa, its present president, is out of jail on appeal bonds following his conviction in United States District Courts in Tennessee and Chicago for his offenses.

The AFL-CIO has expelled the Teamsters Union because of alleged racketeering and hoodlum domination and control.

Dozens of Teamster Union Officers across the entire country—from coast to coast and from the Canadian to the Mexican borders have been convicted of a long list of shocking misdeeds.

"The Enemy Within"

Senator Robert Kennedy, when he was Chief Counsel for the U. S. Senate Labor Racketeering Committee, wrote a book about the Teamsters Union entitled "The Enemy Within."

Senator McClelland, who is Chairman of the Labor Racketering Committee, has written newspaper and magazine articles about the hoodlum control of the Teamsters Union.

Perhaps you have read some of these shocking articles. If not, we suggest you might do so at the public library.

Are We Scared?

Naturally the question occurs to you: Is management scared of the Teamster's "Goon Squads"?

Certainly we feel a certain amount of anxiety. One cannot read the sworn testimony of an employer before the Senate Labor Racketeering Committee about Teamster Union Bosses' threats to run down his children on their way home from school with their big automobiles without some concern.

We also know that a Norwalk, Ohio, truck line secured a verdict for several Hundred Thousand Dollars in the U. S. District Court in Massachusetts against the Teamsters Union for its unlawful acts.

You Also Have Much to Fear

We know that there is a certain risk to us from the Hoodlum element which controls this Union.

However, as you read Senator Kennedy's book, "The Enemy Within," and a few of Senator McClelland's documented articles on Teamster Lawlessness, you will find that it is more frequently the dues paying members of this Union who are the victims of its Racketeers' violence.

All of You Will Be Hooked With It

If the Teamsters Union wins the Labor Board secret election, *every one of you* will be hooked with it for the length of any contract which may be signed. You can be sure that the Union Bosses will demand that all of you be forced to join the Union and pay monthly dues, fees, and assessments as its price of letting you work here.

If the Teamsters Union wins the election, it will be very difficult for you to get another election to vote it out.

Teamsters Union Needs Your Money

A recent newspaper article reported that International President James R. Hoffa had spent over Half a Million Dollars of the duespayers' money in trying to keep out of jail.

Lesser Union officials have also financed their defenses in criminal court with money coerced from Teamster members.

That is why the Teamsters Union needs your money now to try to keep its top leaders out of jail.

Think For Yourself!

Are these the type of men you want to have to bow down to and call "brother"?

Are these the type of men you want to give a substantial chunk of your pay as their price of letting you work here?

Only You Can Decide

Only you can decide these important questions. You will make your decision in the secrecy of the Labor Board's voting booth. The fact that you may have signed a Union card in no way obligates you to vote for the Union. You can, and should, vote as you think best for *you* as you stand in the secrecy of the voting booth.

A *"NO"* vote is a vote *against* surrendering your rights to the Bosses of the "Hoodlum saturated" Teamsters Union.

A "Yes" vote is a vote to become a part of them. Make your decisions on facts, not "hot air" promises. You must vote to make your wish count.

Sincerely,

THE SINCLAIR COMPANY
Dave
DAVID H. SINCLAIR
President

DHS/mij

[GENERAL COUNSEL'S EXHIBIT 19]

The Sinclair Company

Let's Look At The Record

[GENERAL COUNSEL'S EXHIBIT 19]

The Sinclair Company

Let's Look At The Record

December 7, 1965

TO ALL WIRE WEAVERS:

The Holyoke-Springfield industrial graveyard is filled with Companies which died under Union pressure.

Textile mills have either gone out of business completely, or moved South.

Paper mills in the area have been liquidated, to be replaced by Southern mills close to abundant pulpwood.

As paper mills opened in the South, makers of fourdrinier and cut cloth opened plants in the South to be near their customers.

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A Profitable Week-End Trip

Before making the very important decision on how to vote in the Labor Board secret election on Thursday, December 9, 1965, we think every Wire Weaver in this plant would find it profitable to visit a few of the sites of once prosperous companies in the Holyoke area.

We list only a few of the many you can recall:

Company	Jobs Lost
Chemical Fine Paper Co.	660
C. F. Church & Co.	487
Crocker-McElwain	100
General Electric	252
Holyoke Plastics Co.	100
Livingston Worsted Mills	365
Wm. Skinner Silk Mills	300
White & Wyckoff	250
Winfield Hats, Inc.	425

There were, of course, many small companies, such as:

Duo Chemical	7
New England Electronics	35
Industrial Research Corp.	35

There are many more! They total around 3500 jobs which no longer exist in the Holyoke area.

Many Were Sick When The "Union Doctor" Came In

Some of the industrial corpses were already sick when the Unions came in with "big promises" to the employees of what the Unions could do for them. These companies needed higher production and better quality to meet the stiffer competition. The "Union Doctors" gave them bloodletting strikes, restricted production and higher labor costs.

The result, as you can see as you look around you, was the death of these companies.

Everyone Was Hurt

Everyone in the area has been hurt by the loss of these plants. The stockholders lost all, or a major part of their investment. Some do not have the money to start new businesses, even if they had the courage to do so.

The employees lost their jobs. Some of them found other jobs, but in so doing they only took jobs which some other unemployed person would have taken.

The whole community has been hurt! First, by high employment, high relief rolls, and low consumer buying.

Second, by higher taxes for both workers and owners of the plants which have managed to stay in business.

Third, by discouraging investors from other sections of the country from coming into the area and building new plants. Dollars are looking for a place to light where there is an equal chance to earn a profit. Every plant in this area which goes out of business is a frightening scarecrow to outside investors looking for a place to locate a new business, or to expand an old one.

Unions Have Not Solved Our Problems

Whatever your feelings about Unions may be, these facts exist! Factories are gone! Jobs are gone! What have Unions done to promote sound industrial growth in this area? The answer is nothing! Can you think of any cases where Unions have induced companies to remain in the Holyoke-Springfield area by showing them how they could make a reasonable profit here?

What facts do you have which would lead you to believe that a hoodlum dominated Union, like the Teamsters, can give you real job opportunity at the Sinclair Company? Real job opportunity is based upon the profit and loss picture of the employer, and not the "hot air" promises of a professional Union dues collector.

Our History Is Not Bright

Buchanan & Bolt went bankrupt. Local banks, stuck with sizeable loans, induced my father to take it over. He believed in Holyoke. For years he paid himself a meager salary and plowed back any profits that were made into the business to build it up. The 13-week Weavers' strike was a disaster. The Weaving business never fully recovered. Eventually control of the company had to be sold.

Against a background such as ours, your dreams of "Union miracles" can be dangerous to your real job security. We don't know what the future holds for any of us, but you can be sure the new owners of Sinclair Company were looking for profits, and not operation "Holyoke rathole" into which to pour dollars without hope of profit.

Think For Yourself

To most of you this is the most important election in which you have ever voted. Make your decision on facts!

Before making your decision, drive past a few of the vacant plants where businesses died. It will not be a pleasant drive, but it could be a very informative one for you.

Think it over carefully! Your decision calls for clear thinking.

Yours truly,

The Sinclair Company

Dave

David H. Sinclair
President

Remember:

The election is absolutely secret. No one can ever know how you have voted.

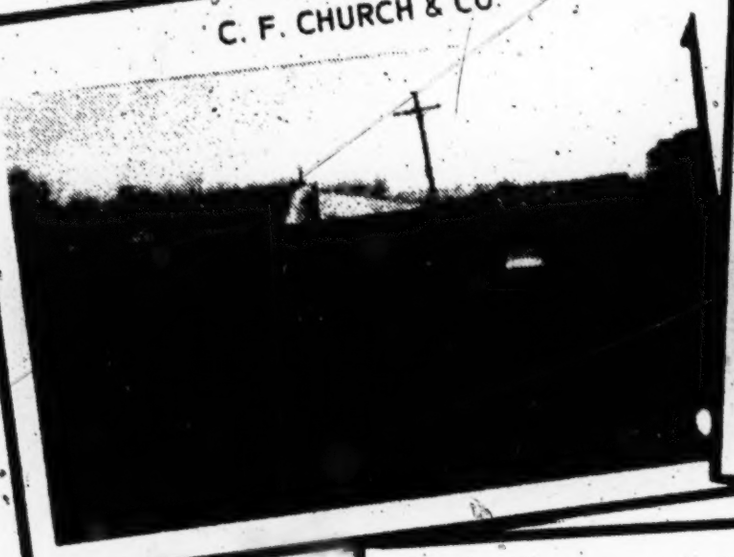
You must vote to make your wish count. Failure to vote is the same as voting against the way you wish the election to go.

VOTE RIGHT → NO ☒

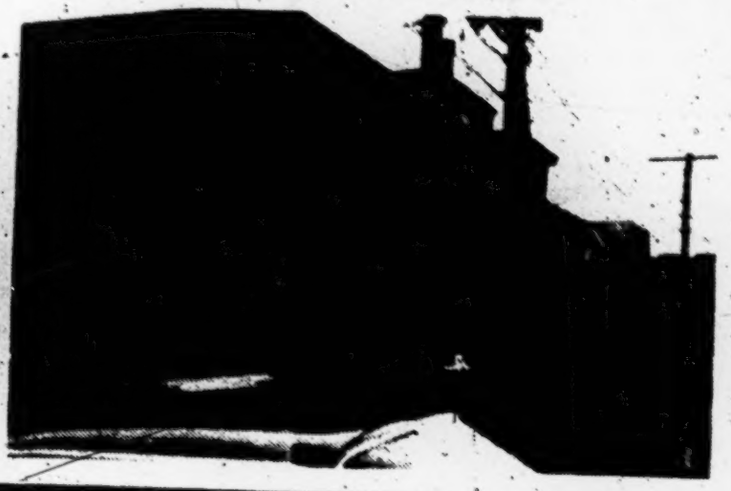
AVOID STRIKES

REMEMBER WHEN THESE PLANTS FURNISHED JOBS TO AREA PEOPLE?

C. F. CHURCH & CO.



CROCKER-McELWAIN

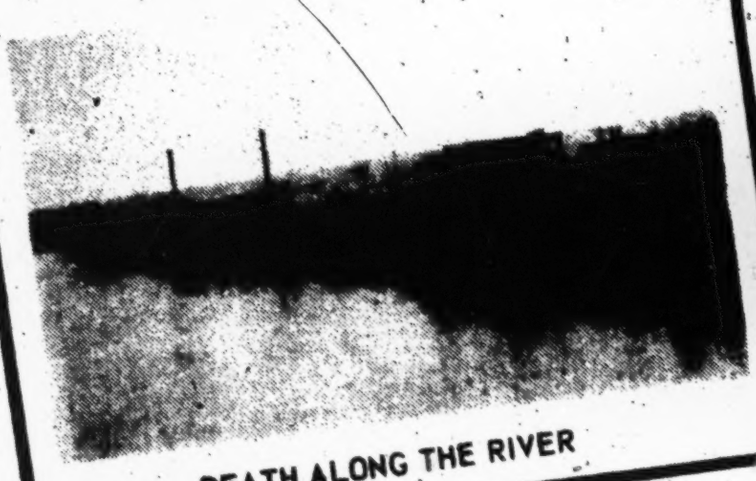


THINK

NOT EVEN G. E. COULD MAKE A PROFIT

UNIONS FURNISHED NO JOB SECURITY HERE!

CHEMICAL FINE PAPER



DEATH ALONG THE RIVER

WHITE & WYCKOFF

SO QUIET TODAY

GENERAL COUNSEL'S EXHIBIT 20.

Sheet Handed Out by Sinclair Company December 8, 1965

VOTE RIGHT AVOID STRIKES

PUT YOUR "X" ON THE RIGHT

No—Is Your Candidate
No—Never Called A Strike
No—Never Cost You A Single Day's Pay
No—Will Never Take A Cent Out Of Your Pay Check
No—Will Not Force You To Contribute Part Of Your Pay To Hire Lawyers To Defend "Union Bosses" In Criminal Court
No—Will Never Cost You A Cent In Dues, Fees, Fines Or Unknown Assessments

DO NOT SIGN OR DEFACE YOUR BALLOT

Yes	NO
	X

Protect Yourself Protect Your Family

VOTE NO SAVE DOUGH

THE SINCLAIR COMPANY

WONDER WHERE THE DUES LOOT GOES?

Do You Know?

That the Teamsters Union has paid more than $570,000.00 in lawyer's fees to try to keep International President James R. Hoffa out of jail?

(Mr. Hoffa has been sentenced to prison by United States District Courts in Tennessee and Chicago.)

That Dave Beck, former International President, who spent several years in jail for misusing Teamster Welfare Funds and other Union money (dues, fees, assessments paid by Union members) is being paid a huge pension and furnished a lavish mansion by the Teamster Union?

That James R. Hoffa receives a salary of $75,000 a year, plus expenses?

That the Teamster Union was expelled from the AFL-CIO because of "Hoodlum" and "Racketeer" domination of the Union?

[GENERAL COUNSEL'S EXHIBIT 21]

Who would buy the Groceries...

While you walk the Teamsters Picket Line?

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An Important Question

The Sinclair Company

DO YOU WANT ANOTHER 13-WEEK STRIKE?

TO ALL WIRE WEAVERS:

The Teamsters' Union Organizers can promise you anything and everything, but they can only deliver to you that which an employer feels it can pay.

We have always had a policy of treating all employees alike, regardless of the building or department in which they might work. The mere fact that the Teamsters Union may become the bargaining agent for a single department cannot change that policy. Whatever is done for one group must be done for all employees.

No Changes At This Time

During a Union organizing campaign an employer is prohibited by law from making any changes in wages or other benefits which could induce any employee to change his mind on how he will vote. Because of this rule, we are unable to discuss wages with other groups of our employees whom the Union does not wish to represent at this time.

Another Long Strike Possible

The Union has only one weapon with which it can try to make good its big campaign promises to the Wire Weavers. That weapon is a strike. We had a 13-week strike in the Wire Weaving Department in the early 1950's. The Wire Weaving Department was closed. Both the employees and the Company were seriously hurt by that strike.

We have no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike. We have no hopes that the Teamsters Union Bosses will not call a strike. The Union organizers will not lose any wages during a strike. Only striking employees and the Company would be hurt!

The Teamsters Union is a strike-happy outfit. During an unsuccessful effort to organize some telephone company employees, International President James R. Hoffa stated:

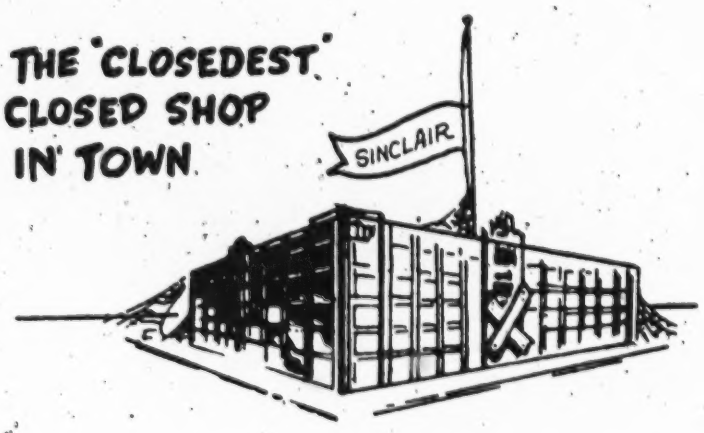
> "If it were necessary to strike the Company, it could very well be a six-or-nine-months' strike and the Unions would expect all installers to be ready to wage that kind of battle with the employers, or not come into the Teamsters." Los Angeles Herald-Examiner, November 4, 1962.

Unions sometimes call strikes as a "face-saving" gesture. The organizers know when they are making the "big promises" that those promises cannot be kept, but they do not want to admit to you immediately after an election that they have hoodwinked you. However, after you have been out on strike for 3 or 4 months, the Teamsters hope you are so anxious to go back to work that you will forget about the big promises.

Your Rights And Ours

You have a right, if you are a Weaver, to vote for the Teamsters Union. You have an equal right to vote against the Union. The fact that you may have signed a Union authorization card in no way obligates you to vote for the Union.

You have a right to walk out on strike if the Union wins the Labor Board election and calls a strike. You have an equal right to refuse to strike and to come through the Union's picket line. This might be very rough for awhile. The Teamsters Union is notorious for its picket line violence.



Ask Yourself These Questions

Do you think the Teamsters Union Organizers can make good on their big promises? The answer is obviously, no.

How long a strike can you afford? Only you know how much money and how much credit you have.

We are sure that if you answer these questions to yourself fairly, you will vote NO in the Labor Board election on December 9th!

Yours truly,

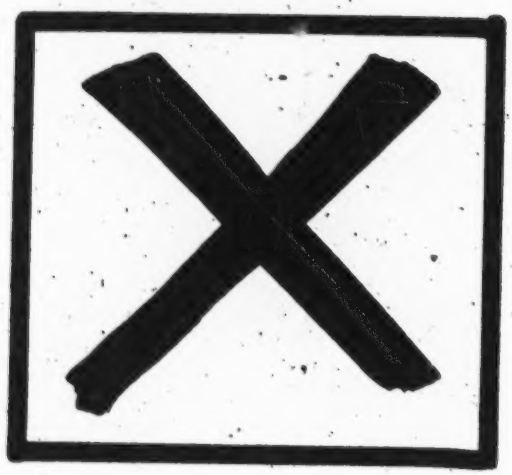
The Sinclair Company

David H. Sinclair
President

VOTE RIGHT

Avoid Strikes

NO



[RESPONDENT'S EXHIBIT 2]

STIPULATION FOR CERTIFICATION UPON CONSENT ELECTION

Pursuant to a Petition duly filed under Section 9 of the National Labor Relations Act, as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), the undersigned parties hereby AGREE AS FOLLOWS

1. SECRET BALLOT.–An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board.

2. ELIGIBLE VOTERS.–The eligible voters shall be those employees included within the Unit described below, who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements, but *excluding* any employees who have since quit or been discharged for cause and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated prior to the date of the election, and employees engaged in an economic strike which commenced more than twelve (12) months prior to the date of the election and who have been permanently replaced. At a date fixed by the Regional Director, the parties, as requested, will furnish

to the Regional Director, an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. NOTICES OF ELECTION.–The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The parties upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. OBSERVERS.–Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. TALLY OF BALLOTS.–As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties.

* * *

8. COMMERCE.–The Employer is engaged in commerce within the meaning of Section 2(6) of the National Labor Relations Act, and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c). *(Insert commerce facts.)*

> The Sinclair Company is a Mass. Corporation engaged in the manufacture and sale of paper mill wire cloth and rolls at its plants located at 60 Appleton St. and 115 Park St. Holyoke, Mass. It annually ships goods valued in excess of $50,000 to points outside the Commonwealth of Mass.

9. WORDING ON THE BALLOT.–Where only one labor organization is signatory to this agreement, the name of the

organization shall appear on the ballot and the choice shall be "Yes" or "No." In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot, or if the occasion demands, from top to bottom. *(If more than one union is to appear on the ballot, any union may have its name removed from the ballot by the approval of the Regional Director of a timely request, in writing, to that effect.)*

First.

Second.

Third.

10. PAYROLL PERIOD FOR ELIGIBILITY—P/e October 29, 1965.

11. DATE, HOURS, AND PLACE OF ELECTION.—November 19, 1965

1:30 P.M. to 2:00 P.M. – Park St. plant – 2nd floor PATTERN SHOP

3:00 P.M. to 4:30 P.M. – Appleton St. plant – SHIPPING AREA

12. THE APPROPRIATE COLLECTIVE BARGAINING UNIT.—

All production and maintenance employees at Company plants located at 60 Appleton St. and 115 Park St., Holyoke Mass., including regular part time employees, but excluding office clerical employees, service employees, professional employees, guards and supervisors as defined in the Act.

If Notice of Representation Hearing has been issued in this case, the approval of this stipulation by the Regional Direc-

tor shall constitute withdrawal of the Notice of Representation Hearing heretofore issued.

The Sinclair Company
60 Appleton St. Holyoke, Mass.
By /s/ David H. Sinclair, Pres. 11/2/65

Recommended:

/s/ Francis V. Paone 11/2/65

Date Approved_____

_____

Regional Director,
National Labor Relations Board.

General Teamsters, Chauffeurs, Warehousemen And Helpers Building Materials, Heavy & Highway Construction Empolyees, Local Union No. 404 a/w I.B.T.C.W. & H. of America
119 Plainfield St. Springfield, Mass.
By Carmin P. Napoli, Pres. B.A. 11/2/65

Case No. 1-RC-8664

[RESPONDENT'S EXHIBIT 3]

WESTERN UNION TELEGRAM

BA345 SSG291 (03)

3 SGA445 PD 5 EXTRA=SPRINGFIELD MASS 5 301P EST=
BERNARD ALPERT, REGIONAL DIRECTOR NLRB
FIRST REGION=

24 SCHOOL ST BSN= 1965 Nov 5 PM 4:11

REQUEST PERMISSION TO WITHDRAW WITHOUT PREJUDICE IN CASE NUMBER 1-RC-8664-

THE SINCLAIR CO. WILL FILE NEW PETITION IN A SMALLER UNIT. PETITION TO FOLLOW=

CARMIN P NAPOLI PRES BUSINESS REP TEAMSTERS LOCAL 404==

1-RC-8664- 404=

[RESPONDENT'S EXHIBIT 4]

WESTERN UNION TELEGRAM

WU43 PD SPRINGFIELD MASS 5 258P EST
DAVID H SINCLAIR PRES
THE SINCLAIR CO HOLYOKE MASS

PLEASE BE ADVISED THAT AS OF THIS DATE WE HAVE REQUESTED THE NLRB FIRST LEGION BOSTON MASS. THAT WE BE ALLOWED TO WITHDRAW OUR PETITION IN CASE NUMBER 1-RC-8664 WE WILL FILE A NEW PETITION IN A SMALLER UNIT

CARMIN P NAPOLI PRES BUSINESS REP TEAMSTERS LOCAL 4040

1-RC-8664

CLR

IN SIGNATURE THAT SHOULD READ LOCAL 404 NOT 4040

CLR

WU 43 RC MPSC TKS

[RESPONDENT'S EXHIBIT 5]

NATIONAL LABOR RELATIONS BOARD
FIRST REGION
24 School Street
Boston, Massachusetts 02180

Telephone 223-3300

November 8, 1965

General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials Heavy & Highway Construction Employees, Local Union No. 404, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
119 Plainfield Street
Springfield, Massachusetts

Attn: Carmin P. Napoli, President

Re: THE SINCLAIR COMPANY
Case No. 1-RC-8664

Gentlemen:

This is to notify you that your telegraphic request for permission to withdraw without prejudice the above-mentioned case is hereby granted. The agreement had not been approved prior to receipt of your request and under present Board policy each of the parties may withdraw its consent without prejudice in these circumstances.

Very sincerely,

Bernard L. Alpert
Regional Director

cc: The Sinclair Company
60 Appleton Street
Holyoke, Massachusetts
Attn: David H. Sinclair, Pres.

J. Einhart, Esquire
Stanley, Smoyer & Schwartz
1270 Union Commerce Building
Cleveland, Ohio

[RESPONDENT'S EXHIBIT 6]

NATIONAL LABOR RELATIONS BOARD
REGION 1
24 School Street
Boston, Massachusetts 02108

Telephone 223-3300

November 8, 1965

J. Einhart, Esquire
Stanley, Smoyer & Schwartz
1270 Union Commerce Building
Cleveland, Ohio

Re: THE SINCLAIR COMPANY
Case No. 1-RC-8664

Dear Mr. Einhart:

Enclosed is a photostat of the Stipulation in the above-mentioned case which was signed by both the Union and the Employer and the Board Agent, Francis V. Paone, on November 2, as requested by you in your telephone conversation with me this date.

Very sincerely,

Bernard L. Alpert
Regional Director

Enclosure

[RESPONDENT'S EXHIBIT 7]

NATIONAL LABOR RELATIONS BOARD
FIRST REGION
24 School Street
Boston, Massachusetts 02108

Telephone 223-3300

November 9, 1965

The Sinclair Company
60 Appleton Street
Holyoke, Massachusetts
Attn: David H. Sinclair, President

Re: THE SINCLAIR COMPANY
Case No. 1-RC-8664

Gentlemen:

This is to advise you that the Petition in the above matter has, with my approval, been withdrawn without prejudice.

Very sincerely,

Bernard L. Alpert
Regional Director

cc: Stanley, Smoyer & Schwartz
1270 Union Commerce Building
Cleveland, Ohio
Attn: J. Einhart, Esquire

Teamsters Local 404
119 Plainfield Street
Springfiled, Mass.
Attn: Carmin P. Napoli, President

[RESPONDENT'S EXHIBIT 11]

NATIONAL LABOR RELATIONS BOARD
FIRST REGION
24 School Street
Boston, Massachusetts 02108

Telephone 223-3326

November 22, 1965

The Sinclair Company
Attn: David Sinclair, President
60 Appleton Street
Holyoke, Massachusetts

Mr. Carmin P. Napoli, President
General Teamsters, Chauffeurs, Warehousemen
and Helpers, Building Materials, Heavy &
Highway Construction Employees Local
Union No. 404
119 Plainfield Street
Springfield, Massachusetts

Re: The Sinclair Company
Case No. 1-RC-8713

Gentlemen:

Enclosed is a Stipulation for Certification Upon Consent Election in the above-captioned matters as described in our recent telephone conversation. It is requested that the agreement be signed and returned as soon as possible.

The election has been scheduled for Thursday, December 9, 1965, between the hours 3:00 p.m. to 4:30 p.m. on the company premises. The eligible employees are those employed for the payroll period ending November 13, 1965. It is understood that the eligibility list submitted to this office recently will be used at the election. Notices for posting will be mailed to you prior to the election. You may appoint a non-supervisory employee to act as an observer.

If you have any questions, please call me, or, in my absence, Mr. Joseph Barry, Supervisory Examiner, 223-3368.

Very truly yours,

Francis V. Paone
Labor Management Relations
Examiner

cc: V. J. Einhart, Esquire
Stanley Smoyer & Schwartz
1270 Union Commerce Building
Cleveland, Ohio

Enclosure

[RESPONDENT'S EXHIBIT 12]

November 24, 1965

National Labor Relations Board
First Region
24 School Street
Boston, Massachusetts 02108

Attention: Francis V. Paone, Labor Management Relations Examiner

Subject: The Sinclair Company
Case No. 1-RC-8713

Gentlemen:

In the absence of our Mr. David Sinclair the writer was authorized to sign the Stipulation for Certification Upon Consent Election, which we enclosed herewith.

Very truly yours,

Fred W. Greene, Jr.
Production Manager

FWG:mij

Enclosure

[RESPONDENT'S EXHIBIT 14 (REJECTED)]

LIST OF EMPLOYEES AS OF AUGUST 17, 1965

WEAVERS

Oscar Neisner
Howard Neill
William Dean
Rene H. Tardif
Marcel Sikorski
Thomas E. Cleland
Richard Bougie
Ernest Geissler
Philip Sharpe
Carl Hass
John Kliendienst
Gary Brunault
Raymond St. Germain

WEAVE SHOP

Viateur Goulet
Raymond Shyloski

SEAMING

William D. Sullivan
Janet S. Downie
Mabel Dupell

FINISHING

Herve A. Gadouas
Ronald Bogart
Eugene Parnicky
Roger Provost
Albin Rogowski
Thomas Quinlan

DANDY ROLL

Helen Leduc
Gene Williams
Ernest Leblond
Charles Seiffert
Howard Keyes
Emile Boileau
Charles Ludden, Jr.
James Murphy
Patrick O'Hare
Charles Duval
Leonard Shea
Michael McGale
Frank Zabik

FOUNDRY

Richard Viau
William Hyte
Eddie Lee Smith
Roger Wolcott
Charles Brazier
Jean Dionne
Robert Washington
Edward Skinner
Arthur Lamagdeleine
John Childers
James Tucker

MACHINE SHOP

Stanley Grip
William Abbott
Edward Lamirande

CYLINDER MOULD
William Barre
Clement Duquette
Walter Mul
Albert LaBrie

SERVICE MEN
Eugene Flaherty
James Mitchell
Wallace D. Leslie

OHIO DIV.
Dana Gleason
Howard Robinson
Rene Cote
Leroy Anderson
Roland Bernashe
William Sligo, Jr.
George A. Bellerose
Daniel Borecki
Robert Kliendienst
Walter Donicz

SHIPPING
Henry Cook
Frank Smead
Joseph Nadeau

RESPONDENT'S EXHIBIT 15.

Notice, Oct. 21, 1965.

October 21, 1965

NOTICE

On October 13, 1965, Local 404 of the Teamsters Union filed a Petition with the National Labor Relations Board requesting an election among the following employees:

> Weave shop, maintenance, machine shop, shipping room, finishing room, dandyroll, cylinder, watermark and part-time production employees

Local 404 would apparently exclude our foundry employees. We firmly believe that if any election is held it should include *all* of our production and maintenance employees and we have made our position clear to the NLRB.

Local 404 originally requested recognition for employees in our "Weaving Department only." We denied this request because we felt then, as now, that all of our employees should have something to say about whether or not our plant becomes unionized.

We will keep you fully advised of all future developments concerning this matter and will be talking to you from time to time about it.

RESPONDENT'S EXHIBIT 16.

Notice, November 2, 1965.

November 2, 1965

NOTICE

We met with a representative of the National Labor Relations Board today and worked out the details for an NLRB election.

Who May Vote:

All production and maintenance employees including regular part-time employees who were employed at our Appleton Street Plant and our Park Street Plant on October 29, 1965, have the right to vote. Office clerical employees, outside service employees, professional employees and supervisors will not be permitted to vote.

When will the election be held:

The election will be held on Friday, November 19, 1965, and the polls will be open during the following hours:

Park Street Plant	1:30 P.M. to 2:00 P.M.
Appleton Street Plant	3:00 P.M. to 4:30 P.M.

The election will be by secret ballot and will be conducted by a representative of the National Labor Relations Board. The outcome of this election may have a great effect on the future of all of us here at Sinclair. We will be discussing this matter in more detail between now and the date of the election.

DAVID SINCLAIR

RESPONDENT'S EXHIBIT 17.

Notice, November 8, 1965.

November 8, 1965

NOTICE

As you know, Local 404 of the Teamsters Union entered into a written agreement with us last Tuesday which provided that an NLRB election would be held among *all* of our production and maintenance employees on Friday, November 19, 1965.

Notwithstanding this written agreement signed by Carmin Napoli, President of Local 404, we were advised by Napoli late Friday afternoon by telegram that Local 404 is withdrawing the Petition it filed with the NLRB and will now file a new Petition for a "smaller unit" of employees.

This latest action of Local 404 makes two things clear:

1. The Teamsters Union knows that it can not win an election on November 19th, if all of you had a right to vote. The Union realizes that a great majority of you know that you are better off without the representation offered by Local 404.
2. A written agreement with the Teamsters Union doesn't appear to mean very much, because the Teamsters will back-out on the deal if it doesn't suit them.

If Local 404 is permitted to withdraw its Petition, there will be no NLRB election on Friday, November 19, 1965. This is about the fourth time that the Teamsters Union has changed position concerning which of you it would like to represent. We don't know what the Unions next move will be, but when it occurs, we will keep you fully advised.

DAVE SINCLAIR

RESPONDENT'S EXHIBIT 18.

Notice, November 9, 1965.

November 9, 1965

NOTICE

On November 8th, Local 404 of the Teamsters Union filed a Petition to the National Labor Relations Board requesting an election among the following employees:

Apprentice and Journeymen Wire Weavers

All other production and maintenance employees have been excluded from this Petition. The Union has now come "full circle" in their efforts for recognition. We will keep you fully advised on all other developments concerning this matter.

DAVE

RESPONDENT'S EXHIBIT 19.

Notice, November 29, 1965.

November 29, 1965

NOTICE

As we told you in our last notice, Teamsters Local 404 realized it had no chance of winning an election if all of you had a right to vote. Therefore, it obtained permission from the NLRB to withdraw its original petition and has now filed a second petition seeking an election among our wire weavers only.

Although we still feel strongly that all of our production and maintenance employees should have the right to vote in any Labor Board election, we were advised by the Board that an election could properly be held among our wire weavers. Therefore, we finally agreed that an election could be held on Thursday, December 9, 1965, among journeymen wire weavers only. All of the rest of you have no right to vote even though the results of the election may have a serious effect upon your future at Sinclair.

Because all of you are so directly involved, even though the Teamsters Union won't let you vote, we will send you copies of any letters we may write to the wire weavers, so you may be kept fully advised.

/s/ DAVID SINCLAIR

RESPONDENT'S EXHIBIT 20.

Card 1

Outset—How vote—your decision—yours alone no one can threaten or coerce

Election absolutely secret, no one will know how you voted

As big a decision affecting your general future as you can make—So vote

Card 2

Could stand and talk hours without covering corruption in Teamsters. Senator Kennedy (when Att. General) wrote a book about it. You have copies. Hope you read. Senator McClellan Chair Labor Racketeering Comm. wrote many long articles. I could talk at length about Dave Beck misusing union funds & going to jail. or Jimmy Hoffa & jail terms facing. I could but I won't. You people read the newspapers too. Perhaps you don't care. That is matter for your conscience. Never had to deal with this kind.

Card 3

Lot more important things than who represents you Lets look at some facts: NLRB says I can't promise you anything to influence your vote. Don't worry—I promise nothing

Card 4

New ownership has made it clear to me that they are not going to sink a bundle of money in here for fun. Sinclair must stand on its own. If we operate profitably we all keep our jobs & grow in them. If we don't none of us will have a job including *me* Teamsters Union has nothing to do with it What can they do under these circumstances Can they sell a sq. ft. of wire cloth No. They will tell you that's up to management & they're right

Card 5

Can Teamsters provide efficiency experts to show us how to cut production costs No. Same management problem, and it is history of unions to fight efficiency
WHAT CAN THEY DO
Demand Higher Wages & expensive welfare & pension plans—which could lead to even larger losses than we have had. Can call you out on strike. You people know what it is like. You have had strike experience.

Card 6

I don't think our new ownership will lose a minutes sleep over whether the Union threatens the Co. with a strike. They have made it clear to me that they look for profit and not a hole to pour money down. If we have to negotiate with the Teamsters & cannot reach agreement on a contract under which we can make money they could care less about the threat of strike.

Card 7

On the other hand if we can make money they don't need the Teamsters or any other union to make them share it. They are honorable people. If they weren't we wouldn't have associated with them.

I don't think it makes a whole lot of difference to the Teamsters whether Sinclair stays in business or not. They probably feel if Sinclair closes other

Card 8

Cos. with whom they have a contract will pick up the business or most of it & they will be picking up the monthly dues from someone else. They don't care which sheep they shear so long as they get the wool.

LETS LOOK FACTS STRAIGHT IN FACE!

It makes a hell of a lot of difference to you & to me who is working. I want my job. I suppose you want yours. If you

Card 9

did not want your job here you would have quit long ago and gone to another plant. So lets not kid ourselves that we don't care. WE DO CARE

Now I would be the last one to black list you for getting another job if this plant closed by strike but the Teamsters can't guarantee you another job either.

Again LETS LOOK AT FACTS HEAD ON. No one likes to admit he's getting older.

Card 10

We're all Jack Benny's We're never going to be over 39, but we don't look that way to an employment manager

Most companies probably have a large number of applicants who are young, have better educations and certainly a lot better insurance rating than you and I. They can be hired for a lot less money. True you have experience, but it is limited to a particular small craft.

Card 11

I have assumed in case we are forced to shut down because of a strike that some other plant will pick up our business. This is not necessarily so. Pressure is still on from foreign wire weavers. Maybe three months from now I'll be forced to sell foreign wires if the Teamsters Union stops our production. You all know we have had to handle foreign wires in the past

Card 12

I don't care what the Teamsters Union has promised you. I can't promise you anything except that I'll do my level best to keep Sinclair Co. in business and growing. Thats important to Dave Sinclair because it's his job too.
I have given you the facts today and by mailings as I know them

Card 13

to be. It's not a rosy picture for you or for me. Now the decision is up to you. Perhaps you feel I'm exaggerating or bluffing. I'm deadly serious and I'm deeply concerned. I think you people would feel I have always been honest in my dealings with you as my Dad was before me. I'm not concerned with beating a union—I'm concerned with our future.

Card 14

The election is secret—no one knows your vote.
The fact that you may have signed a union card does not obligate you to vote for the Union.
You can and should vote as you think best for yourself in the secrecy of the Labor Boards voting booth. Think it over carefully. To you and your dependents this is one of the most important elections in which you will ever vote

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

[Caption Omitted in Printing]

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE CASE.

This proceeding, involving consolidated cases, was heard before Trial Examiner Louis Libbin at Springfield, Massachusetts, on October 4 and 5, 1966, pursuant to due notice. The complaint in Case No. 1-CA-5266, issued on July 22, 1966, pursuant to charges filed by the Union, named in the caption, on December 14, 1965, alleges, in substance, that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act, (1) by refusing at all time after September 20, 1965, upon request, to bargain collectively with the Union which was the exclusive bargaining representative of the employees in a designated appropriate unit, and (2) by engaging in various specified acts of interference, restraint, and coercion. Respondent's duly filed answers denies the unfair labor practice allegations and asserts certain affirmative defenses. Case No. 1-RC-8713 arises out of a representation election conducted by the Board on December 9, 1965, timely objections to the election filed by the Union on December 14, 1965, and timely exceptions filed by the Union on February 2, 1966, to the Regional Director's Report on Objections. The Board, on March 8, 1966, ordered that a hearing be held to resolve the issues raised by the Union's objections and exceptions.

For the reasons hereinafter indicated, I find that Respondent violated Section 8(a)(1) and (5) of the Act, that there is merit to some of the Union's objections, and that

the election should be set aside. Upon the entire record[1] in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT.

I. THE BUSINESS OF THE RESPONDENT.

Respondent, The Sinclair Company, is a Massachusetts corporation with its principal place of business in Holyoke, Massachusetts, where it is engaged in the manufacture, sale and distribution of paper mill rolls, wires, and related products. Respondent receives materials, annually valued in excess of $50,000, at its Holyoke plant directly from points outside the Commonwealth of Massachusetts; it also ships products, having an annual value in excess of $50,000, from its Holyoke plant to points outside the Commonwealth of Massachusetts.

Upon the above admitted facts, I find, as Respondent admits in its answer, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[1] I hereby note and correct the following obvious errors in the typewritten transcript of testimony:

Page	*Line*	*Change*	*To*
78	21	66	65
95	11	to	the
102	15	or	of
102	16	wekk	well
105	11	we	were
108	5	along	a long
111	15	buy	but
112	7	copies	companies
113	14	into	in to
116	7	this	thin
162	6	out	our
168	18	whole	hole
170	6	lon	long

II. THE LABOR ORGANIZATION INVOLVED.

The complaint alleges, the answer admits, the record shows, and I find, that General Teamsters, Chauffeurs, Warehousemen & Helpers, Building Materials, Heavy & Highway Construction Employees, Local No. 404, an affiliate of International Brotherhood of Teamsters, the Charging Party herein called the Union or Local 404, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES AND OBJECTION TO ELECTION.

A. Introduction; the Issues.

The Union began organizing Respondent's employees in July 1965.[2] By letter dated September 20, the Union informed Respondent that it represented a majority of Respondent's journeyman wire weavers and apprentices, and requested recognition and a meeting to negotiate a collective-bargaining agreement. At that time, the Union had signed authorization cards from 11 of Respondent's 14 journeymen wire weavers. The Respondent employed no apprentices. By reply letter dated September 28, Respondent refused the Union's request for recognition on the asserted grounds that it doubted the Union's claimed majority status, the appropriateness of the unit, and the reliability of authorization cards to prove majority status. Upon the filing of a representation petition by the Union on November 8, the Board, pursuant to a consent election agreement, conducted an election among Respond-

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[2] Unless otherwise indicated, all dates hereinafter mentioned are in the year 1965.

ent's journeymen wire weavers on December 9; of the 13 ballots cast among the 14 eligible voters, the Union was defeated by a vote of 7 to 6. Meanwhile, during the period from July up to and including the day before the election, Respondent's President Sinclair addressed the employees through a series of speeches, letters, pamphlets, and individual talks, to induce them to reject the Union as their collective-bargaining representative.

The principal issues in this case are (1) whether the speeches, letters, pamphlets, and individual talks of President Sinclair, either separately, or in their totality, constituted interference, restraint and coercion violative of Section 8(a)(1) of the Act;[3] (2) whether, by so much of the foregoing conduct which occurred after the filing of the representation petition, the Respondent interfered with the employees' exercise of a free choice in the election of December 9 so as to warrant setting aside the election; and (3) whether Respondent's refusal to bargain with the Union was motivated by a good-faith doubt with respect to the requested unit and the Union's majority status therein.

B. Background.

The Sinclair Company was founded by President David H. Sinclair's father in 1925. From 1933 until 1952, the American Wire Weavers Protective Association, herein sometimes called the AWWPA, represented Respondent's journeymen wire weavers and apprentices and had contracts covering this unit on a national basis. President

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[3] Also in issue is whether Respondent violated Section 8(a)(1) of the Act by the conduct of Superintendent William Seavey, an admitted supervisor, in allegedly attempting to cause the South Hadley American Legion Post to deny the use of its meeting hall to Respondent's employees for a union organizational meeting.

David Sinclair began working for Respondent on a full time basis in 1947, and, until 1952, was Respondent's representative in the contract negotiations with AWWPA for the journeymen and apprentice wire weavers, which negotiations were held on an industry-wide basis in Cleveland and New York. In 1952, Respondent's plant was closed for about 12 or 13 weeks as a result of a strike called by AWWPA. The strike terminated in September 1952, when the plant was reopened without a union contract on the basis of Respondent's last offer to the AWWPA. Respondent had no further dealings with AWWPA which thereafter "faded out" and no longer represented any of Respondent's employees. From the termination of the strike in 1952 until the Union began its organizational efforts in July 1965, Respondent's employees were not represented by any union.

In 1963, Respondent opened a weaving plant in Florence, Mississippi, which was known as the Sinclair Wire Works. Gary Brunault, a member of the Union's employee organizing committee in July 1965 but no longer employed by Respondent at the time of the instant hearing, testified that sometime in the summer of 1963 he went to President David Sinclair's office and asked for a raise, that Sinclair stated that the Company could not afford one, that Brunault stated that the good thing about a union is that you could negotiate for a raise with power, and that Sinclair replied that there would not be a union at Respondent's plant so long as he was president and that if Brunault did not like the conditions he knew where the door was. President Sinclair remembered an occasion

made the other statements attributed to him by Brunault. Although Brunault testified that the conversation lasted about 20 minutes, he could not remember anything else that was said. President Sinclair impressed me as a forthright and candid witness. I was not favorably impressed by Brunault. Under all the circumstances, I do not credit Brunault's disputed testimony and credit Sinclair's denials.

In 1964, the Lindsay Wire Weaving Company of Cleveland, Ohio, herein sometimes called Lindsay, acquired 100 percent of the stock of Respondent, which then became a Division of Lindsay. Respondent's Florence, Mississippi, plant at that time also became part of the Lindsay operation which, in addition, consisted of plants in Cleveland and Mentor, Ohio. However, David Sinclair continued as, and still is, president of Respondent.

C. Interference, Restraint, and Coercion.

President Sinclair first learned of the Union's organizational campaign in the early part of July when he was informed by some employees, and was given a copy, of the leaflet and attached authorization card mailed to the homes of employees. From that time until the day of the election, President Sinclair, through a series of speeches, letters, pamphlets, and talks with individual employees, engaged in a campaign to induce the employees to reject the Union as their collective-bargaining representative.

1. The facts.[4]

(a) *The July speech.*

Early in July President Sinclair talked to all the employees in separate groups concerning the Union's organizational drive. He had no written speech and used no notes. His speech to the wire weaving group, which lasted about 10 to 12 minutes, is the only one concerning which Sinclair testified as follows:

When he talked to the weaving department, which included the wire weavers, he told them that he was "going to be blunt" with them because he knew that the union organizing campaign started in their department. He told them that "I was disappointed" that they were considering getting a union into the plant "because they had union experience, that the last union [with which] we had had dealings in our wire weaving group had a strike of a good many weeks duration and that most of the people there could well remember that had almost put our company out of business at that point and that I was disappointed to see that some of what I considered to be lessons of the past weren't living with them any more." He spoke of the Company's financial condition, indicating that ever since the last strike the shop has been running on "thin ice"; pointed out that "strikes were initiated by unions" and not "by any act of the Company"; emphasized that if the Company could not agree to the Union's demands, "the union's only weapon is a strike"; and pointed out that, while he did not intend to close, a strike "could lead to the closing of the plant." Sinclair also told the group that the wire weavers craft was a small one, that it would be difficult for

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[4] Unless otherwise indicated, the factual findings in this section are based on evidence which is either admitted or undisputed.

them to find other jobs because it was not like finding a job as a machinist, that many of them did not have the education, which would make it difficult for them to find another job, and that many of them were getting too old to go out and find new jobs.

He further told the men that he did not have a great deal of respect for the Teamsters, that he had read a great deal about their leadership, and that this was not the kind of an organization that he would like to deal with. He also stated that "there were inequities in our method of compensating or paying the weaving shop," that he had been concerned with this for a long time, that "if I was involved with negotiations I would certainly correct this," and that "by correcting these it would mean that I would negotiate down in the instance where these things would correct themselves in that direction as well as up in other directions."

He told the group that "we had basically been given a second chance in the chance to grow through our merger with Lindsay," that "we had to earn our own way," and that he "hoped that we would be able to reach a point where we would put in new and more modern equipment than we had to make everyone's job better, but that certainly the Lindsay Company was not going to pour money into this if we were not making a profit." He also told them that "we had a very sad experience with a union before, which they knew of, and that he did not want to get into the position" where the Union would strike the Company when it could not meet the Union's demands, with the resultant possibility of the plant closing, adding that the last thing he wanted was a closed plant.

Sinclair further told the group that he did not feel that Lindsay needed the production equipment in Respond-

ent's weaving department to meet the total needs for wire cloth of the entire organization, that he did not think "the Lindsay organization was going to be concerned" if "through contract negotiations with a union our people went on strike," that a strike could close Respondent's plant and nothing would prevent Lindsay from having Respondent's weaving work done at Lindsay's plant in Ohio or Mississippi. He also stated that Respondent was subject to foreign competition and that it was conceivable that if the plant was closed, under any circumstances, that some of the work would go to foreign companies and that Respondent had handled foreign wires in the past. He pointed out that all they had to do was to look around Holyoke if they thought a strike could not close Respondent's plant.[5]

(b) *The November 2 letter*

On November 2, President Sinclair mailed to all employees a letter bearing that date and addressed "To All

[5] The above findings are based on the credited testimony of President Sinclair. Richard Bougie, the only other witness who testified to the content of Sinclair's speech, testified as a witness for the General Counsel that Sinclair also stated during the course of his talk that "if we attempted to bring in a union at this time that Lindsay was sure to close," and that "if he was instructed to negotiate a contract he would negotiate down and not up." Sinclair denied having made these statements. With respect to the first statement, Bougie testified that he was "reasonably sure" that Sinclair said it; he then added that it was "probably not in those words." He either did not know or could not "recall" what Sinclair said on most of the other subjects. Although the General Counsel called as witnesses 10 of the weavers who were employed at the time of Sinclair's speech, he adduced no testimony from them or from any other witness in corrobo ation of Bougie in this respect. Under all the circumstances, I am convinced that Bougie's testimony merely reflects his impression of what Sinclair said; I do not credit Bougie's testimony that Sinclair in fact made the above statements attributed to him, and credit Sinclair's denials in this respect.

Employees." The letter informed the employees that the pending Labor Board election "raises a number of questions which should be answered." Then, in answer to hypothetical questions raised by Sinclair, the letter states, among other things, that "there is nothing that the Teamsters or any other Union can offer you which will in any way increase your job security under the circumstances existing at this plant" (page 2), "We are still on 'thin ice,'" and that "it just doesn't make sense for us to meet unreasonable Union demands which will result in further losses and eventually the necessity of closing the plant" (page 3).

(c) *The November 5 letter*

This letter from President Sinclair is dated November 5 and is also addressed "To All Employees." President Sinclair testified that this letter was mailed to all employees on that date or a few days thereafter. In this letter Sinclair reviewed the Company's "poor earnings history," and emphasized that the "new ownership is interested in profits and not pressure. They have no ties with Holyoke or Massachusetts. If a dollar invested here can't earn as much as a dollar invested in Mississippi or Ohio, or somewhere else, you can be sure that their dollars are going to go where they can earn the most pennies" (page 2). Contrasting what the Union would do, he stated that "the Teamsters Union promises you a lot, but what can they deliver except pressure—the threat of a strike?" He then stated that "I do not believe the threat of a strike will cause the new owners any loss of sleep. However, a long strike would be bad for me because I would like to remain in Holyoke. I have pride in the Sinclair family and

would like to see the plant modernized, expanded and prosper" (page 2).

(d) *The November 22 letter and book entitled, "The Enemy Within"*

By a covering letter dated November 22 and addressed "To All Employees," Sinclair enclosed "a copy of the book written by Senator Bob Kennedy entitled, 'The Enemy Within' "; informed the employees that "this book is the experience of Senator Kennedy when he was Attorney General of the United States and investigating racketeering aspects of the labor movement in the United States"; and urged them to "take the time to read it."

(e) *The undated November pamphlet*

It was stipulated that this pamphlet was sent by President Sinclair, as it is addressed, "To ALL WIRE WEAVERS" about 2 to 3 weeks before the December 9 election.

Page one shows a Teamster picket in front of the Respondent's plant with the question "Who would buy the Groceries * * * while you walk the Teamsters picket line?" A heading in bold red letters on page two asks, "Do you want another 13-week strike?" Another paragraph on page two has the underscored heading *"No changes at this time,"* and states:

> During a union organizing campaign an employer is prohibited by law from making any changes in wages or other benefits which could induce any employee to change his mind on how he will vote. Because of this rule, we are unable to discuss wages with other groups of our employees whom the Union does not wish to represent at this time.

Other paragraphs on page two point out that "the Union has only one weapon with which it can try to make good its big campaign promises to the Wire Weavers. That weapon is a strike. We had a 13-week strike in the Wire Weaving Department in the early 1950's. The Wire Weaving Department was closed * * * We have no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike. We have no hopes that the Teamsters Union Bosses will not call a strike * * * The Teamsters Union is a strike happy outfit * * * Unions sometimes call strikes as a 'face-saving' gesture."

On page three there appear the statements that "you have an equal right to refuse to strike and to come through the Union's picket line. This might be very rough for a while. The Teamsters Union is notorious for its picket line violence." Following these remarks is a cartoon showing Respondent's plant closed down with a "Sinclair" flag flying a half mast and the statement in red letters next to the cartoon, "The 'Closedest' Closed Shop In Town."

Towards the end of page three, the Respondent states that the Teamsters Union Organizers "obviously" cannot make good on their promises, and asks, "how long a strike can you afford?" This appears near a cartoon of a "closed shop worker" with his empty pocket labeled "IBT Was Here."

The entire last page contains the admonition, in bold red and black letters, to "VOTE RIGHT AVOID STRIKES," followed by an X in a square with the word "No" over the square.

(f) *The November 30 letter*

In this letter, addressed to "ALL WIRE WEAVERS," President Sinclair again reminds the employees of the long

strike 15 years ago when Respondent was "virtually out of business" and the plant was "reopened on a non-union basis." He then warns that "a strike can still close the Holyoke plant, but other plants can pick up the work," and that the new ownership "is interested in profits and not pressure." He then points out that the "Teamster Union" cannot do anything "to improve our profit position," but can only make "big" demands "which the Company cannot meet" and then "call you out on strike" because "a strike is a Union's only weapon" to enforce its "big" demands. He then asks, "can you afford a long strike" "when you know the Holyoke plant has been given a second chance to stay in business and furnish jobs for all of us?"

(g) *The December 1 letter*

In the December 1 letter, addressed "To All Wire Weavers," Sinclair devotes three pages to informing the employees that the Teamsters Union is involved with "serious crimes," "racketeering," "hoodlum domination," "shocking misdeeds," "goon squads," "threats to run down children," and "unlawful acts." He then warns that "if the Teamsters Union wins this election, it will be very difficult for you to get another election to vote it out." He then concludes with the admonition that "A '*No*' vote is a vote *against* surrendering your rights to the Bosses of the 'Hoodlum saturated' Teamsters Union" while "A 'yes' vote is a vote to become a part of them."

(h) *The December 7 letter*

This is a four page letter or handbill, dated December 1, from President Sinclair "To All Wire Weavers," and entitled "Let's Look At The Record." The first page

contains a large cartoon, showing that certain named companies lie buried in a graveyard with the Teamster Union about to bury the Sinclair Company. The letter opens with the statement that "the Holyoke-Springfield industrial graveyard is filled with Companies which died under union pressure," and warns that before deciding how to vote in the December 9 election "every WIRE WEAVER in this plant would find it profitable to visit a few of the sites of once prosperous companies in the Holyoke area." Page two lists the names of companies which closed down, with number of jobs lost, and points out that "these companies needed higher production and better quality to meet stiffer competition. The 'union doctor' gave them bloodletting strikes, restricted production and higher labor costs. The result, as you can see as you look around you, was the death of these companies." Sinclair then states in part, that "whatever your feelings about unions may be, these facts exist! Factories are gone! Jobs are gone!" (Page 2). He asks, "what facts do you have which would lead you to believe that a hoodlum dominated union, like the Teamsters, can give you real job opportunity at the Sinclair Company?". (Page 2). He then warns that "against a background such as ours, your dreams of 'union miracles' can be dangerous to your real job security," and urges that "before making your decision, drive past a few of the vacant plants where business died," assuring that "it will not be a pleasant drive but it could be a very informative one for you" (page 3). At the bottom of page 3, in bold black letters, appears the slogan, "VOTE RIGHT, AVOID STRIKES," with an X in a square and the word "no" over the square.

Page four contains the names and pictures of five plants which closed down, with statements such as: "Re-

member When These Plants FURNISHED Jobs To Area People?" * * * "Unions Furnished No Job Security Here!" * * * "Death Along The River" * * * "So Quiet Today."

Sinclair admitted at the instant hearing that he had no objective basis for stating that a union had anything to do with the closing of these plants.

(i) *The December 8 leaflet*

The parties stipulated that this leaflet was handed out to the unit employees (wire weavers) on December 8 by President Sinclair at a company meeting. One side of this leaflet refers to the convictions of Teamsters International officials and to the "Hoodlum" and "Racketeer" domination of the Union. The other side repeats the slogan to "VOTE RIGHT, AVOID STRIKES" and enumerates what a "No" vote will do, such as "never called a strike" and "never cost you a single day's pay" or "a cent of your paycheck." It concludes with the indication that a "No" vote will "protect yourself" and "protect your family."

(j) *The December 8 speech*

President Sinclair delivered a speech to the unit employees (wire weavers) at 1:30 p.m. on December 8, in the presence of the weave shop foreman. This time he talked from notes which he had before him. Many of the things he said were admittedly a repetition of what he had previously stated in his July speech. He opened his speech by referring to the corruption in the Teamsters and the conviction of some of its officials. Among the statements admittedly made by Sinclair were, in substance, the following:

The Lindsay Company has made it clear that they want to make a profit in Holyoke at Sinclair and will not sink a bundle of money in Sinclair "for the fun of it"; if the Sinclair Company does not make a profit on its own, there was nothing to prevent Lindsay from having the work done at its facilities in Mississippi or Ohio; we have been operating on "thin ice"; the Teamsters Union can only demand higher wages and expensive welfare and pension plans which could lead to even larger losses, and can call you out on strike; we could not accede to unreasonable demands; the Union's only weapon is a strike; a strike could lead to the closing of the plant; the weaving production at Sinclair was not a necessity to the success of the total operation of the Lindsay organization because Lindsay had other facilities where the material could be woven; he did not think the Lindsay organization was going to be concerned about the threat of a strike; we were still subject to foreign competition and it was perfectly conceivable, if under any circumstances the plant should close, that some of this work could go to the foreign wire companies; we had to handle foreign wires in the past; the Teamsters cannot guarantee you another job if the plant should close because of a strike; it made no difference to the Teamsters whether or not Sinclair stayed in business; the Teamsters might feel that other companies with whom they had contracts would pick up our lost business; "they don't care which sheep they shear so long as they get the wool"; "it makes a lot of difference to me who is working"; I "want my job and I suppose that you want your job"; the wire weavers had a skilled trade which had limited use; "we are all Jack Benny's," with no one admitting that he is getting older; some of the wire

weavers were over 60 years old, which is a difficult time in life to start over again; "most companies probably have a large number of applicants who are younger and better experienced," with "a lot better insurance rating," who "could be hired for less money"; "I am giving you the facts today and by my mailings previously"; "I am not concerned with beating a union," but "I am concerned with our future."

At the end of his talk, he asked if any of the employees would like to ask questions. No questions were asked.[6]

(k) *Individual employee talks*

President Sinclair admitted that during the period from July to the date of the election on December 9, he talked to about 10 of the 14 wire weavers in the unit, individually, in the weave shop where they worked. He admitted that on these occasions he told the individual employee that he would like to talk to him about the Union, asked if the employee had any questions concerning President Sinclair's position and the Company's feeling about the matter, and stated that he would answer any such questions if he could. Some of the employees asked questions which he attempted to answer. These questions "included some of the matters that were in my talk to the group in July."

The record contains the specific content of only one of these conversations. In the latter part of September or the first part of October, after Sinclair had been informed by the Union in a letter dated September 24 that Richard Bougie, a wire weaver, was appointed a member of the Union organizing committee, President Sinclair came to

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[6] The findings concerning the December 8 speech are based entirely on Sinclair's testimony and Respondent's Exhibit No. 20

Bougie's work place and asked what Bougie expected to get out of the Union, adding that "I realize that you are sold on this idea and I am here to try to unsell you." Bougie replied that he would like to see job security, seniority rights, and possibly a pension plan. Sinclair mentioned the things he liked such as a health and accident plan, stated how much these things would cost, and explained that he could not afford them.[7]

2. Concluding Findings.

I am convinced and find that the series of letters, pamphlets, leaflets, and speeches from and by President Sinclair, hereinabove described, taken together and considered as a whole, reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead Respondent to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers. I reach the same conclusion and make the same finding based only on the totality of so much of the foregoing as occurred after November 8, the date on which the Union filed its representation petition, particularly when considered in the light of the letters and speech which preceded that date as background.[8] By the foregoing conduct, Respondent in each case interfered with, restrained, and coerced the employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.[9]

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[7] The findings as to this conversation are based on the credited testimony of Bougie. Sinclair did not deny Bougie's testimony in this regard.

[8] Cf. *Dee's of New Jersey, Inc.*, 161 NLRB No. 18.

[9] See, e.g. *Miller-Charles & Co.*, 146 NLRB 405, affd. 341 F. 2d 870 (C.A. 2); *Harvey Aluminum*, 156 NLRB No. 115; *Supre-*

Sinclair admitted that his company had made a small profit in 1965, that the Charging Union in this case, Local No. 404, had never made any demands at all upon Respondent, and that he had no basis for concluding that this Local or its leaders were in any way connected with racketeering or hoodlums or picket line violence. But the message which the foregoing preelection campaign, even after November 8, reasonably tended to convey to the employees was that if they selected this Union as their bargaining representative, a strike would be inevitable because the Union would make excessive demands which Respondent would refuse to meet, that a strike could lead to the closing of the plant or the transfer of the weaving production to Lindsay's other facilities, and that the wire weavers would then lose their jobs and find it difficult to get other jobs because of their age and limited craft skills.

The General Counsel further contends in his brief that certain specific statements in the July speech and subsequent letters and the individual talks with the 10 unit employees, each independently constituted a violation of Section 8(a)(1) of the Act. In view of my previous findings concerning Respondent's violation of Section 8(a)(1), I deem it unnecessary to consider and to pass upon these contentions.

D. The Allegation Concerning the Rental of the American Legion Hall

Paragraph 14(c) of the complaint alleges: "Respondent, by its supervisor and agent, William Seavey, during

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nant Mfg. Co., 144 NLRB 507, 510-511, enfd. 341 F. 2d 756, 761 (C.A. 6); *Ideal Baking Company*, 143 NLRB 546; and *Kolmar Laboratories, Inc.*, 159 NLRB No. 74, and cases cited in footnote 3.

the month of November 1965 or the first part of December 1965, in the Holyoke or South Hadley, Massachusetts area, attempted to cause the officers and/or managing agents of the American Legion Post organization not to allow its employees to use the American Legion Post facilities located at South Hadley, Massachusetts for the purpose of holding a union organizational meeting, and said Legion Post has officers and members who are employees of the Respondent, in order to interfere with, restrain and coerce the employees in the exercise of their rights guaranteed in Section 7 of the Act."

William Seavey is employed by Respondent as superintendent of the Machine Division and is admitted to be a supervisor and agent of Respondent. During the past 10 years, Seavey has been a member of the American Legion Post 260, headquartered in a building owned by the Legion Post and located about one-half to three quarters of a mile from Respondent's plant. At one time or another, Seavey has held every position with the Legion Post; in November 1965, he was the Chaplain, a member of the Board of Directors, and the President of the Board of Trustees.

Seavey has been a member of the Board of Directors since the time when he was the moving force in the purchases of the Legion Post building in 1959 or 1960. During his stewardship and because of his efforts, the membership of the Post had risen to 176 but had fallen to 140 or 150 in November 1965. Seven of the members were employed by Respondent, including Post Commander Nadeau and President Sinclair.

The top floor of the Legion building is rented from time to time to other organizations, and was regularly rented for the monthly meetings of labor organizations which represented employees at two area companies. Al-

though this hall was never rented by Respondent, a going away party for two of Respondent's employees was held there in 1963, attended by Seavey and President Sinclair, and a retirement party for one of Respondent's employees was held there in 1965, attended by President Seavey. Respondent has an Employee Association which takes care of this type of function.

During the time material herein, the manager of the building was Harold Geisler, who was also on the Board of Directors but was not an employee of Respondent. The steward was Richard Meta, who was also employed there as the bartender. The Board of Directors consisted of 14 members. There are two Trustees who have the authority with respect to the upkeep and maintenance of the building. When a question arises regarding the use of the building, the Board of Trustees will meet and pass upon it. Either a member will leave a note for the Manager regarding a proposed rental or the Manager can arrange the rental. The Board of Trustees acts officially in rental matters only when a problem arises, and this does not occur in more than one case out of a hundred.

In November 1965, Post Commander Nadeau, who was employed by Respondent as a truckdriver, asked Seavey if he knew that Respondent's employees were attempting to rent the Legion Hall for a union organizing meeting. It was Nadeau's practice to request Seavey's opinion on all matters pertaining to American Legion business. Seavey replied that he had heard about it but had not heard anything official. Nadeau asked Seavey what he thought about it. Seavey replied that he "didn't like it," stating that President Sinclair and five other employees of Sinclair were members of the Post and that he "didn't think it was right."

A few weeks later, Seavey was approached by two members of the Legion Post's Board of Directors, Geissler and Petri, concerning the hall rental for the proposed union meeting. Geissler was also the manager of the Legion Post. Seavey stated that he would rather not discuss the matter at the bar, and they moved to an adjoining room. The bartender or steward informed them that "one of the boys" gave him a $10 down payment for the use of the hall. All three expressed surprise, and this was the first time Seavey obtained any real information about the matter. Geissler and Petri asked Seavey how he felt about it. Seavey replied that he didn't like it, that there would be conflict with members that were in the shop, that the Legion had worked hard for members, that he had tried to build the Post up and that he had brought seven members in from Sinclair, that he didn't want to use the Legion Hall as grounds for an argument, and that he would prefer that the meeting be held somewhere else, on neutral grounds.

No meeting of the Board of Directors or of the Trustees was held; nor did Seavey request such a meeting, although he was a member of both Boards. Seavey gave no instructions to the Steward or to the Manager concerning this matter; nor did he mention it to President Sinclair or any other agent or supervisor of Respondent. However, as a result of this matter involving the rental of the hall to Respondent's employees for union organizational meetings, Seavey resigned as president of the Board of Trustees before his term had expired.

Upon consideration of all the foregoing, I find that Respondent did not violate Section 8(a)(1) of the Act by the above-described conduct of Superintendent Seavey.

E. Objections to Election.

An election was conducted by the Board in a unit of Respondent's journeymen wire weavers on December 9, 1965. As previously noted, the Union lost the election by a vote of 7 to 6. Thereafter, timely objections and exceptions were filed by the Union, and the hearings ordered by the Board was for the purpose of resolving the issues raised thereby. The hearing was consolidated with the hearing in the unfair labor practice case.

It is well settled that the Board will consider only conduct which occurred after the date of the filing of the petition as a basis for objections to an election.[10] In this case, the petition was filed on November 8, 1965. As I have previously found, the series of letters, pamphlets, and leaflets, and the December 8 speech, from and by President Sinclair after November 8, taken together and considered as a whole, particularly in the light of his letters and speech which preceded that date as background, violated Section 8(a)(1) of the Act because they reasonably tended to convey to the wire weavers the belief or impression that selection of the Union in the forthcoming election could lead Respondent to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers. I further find that the aforementioned conduct also interfered with the exercise of a free and untrammeled choice in the election involved here. See *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786-1787. Accordingly, I find that the Respondent's conduct deprived the employees of their right to express a free choice in the election. I therefore find merit in, and sustain the, objections num-

[10] *Goodyear Tire & Rubber Co.*, 138 NLRB 453.

bered 1, 2, and duplicate 2, and recommend that the election of December 9, 1965, be set aside.

Moreover, assuming, *arguendo,* that Respondent's above-described conduct is not found to be violative of Section 8(a)(1) of the Act, I nevertheless recommend setting the election aside. It is clear that Respondent's entire pre-election campaign after November 8 generated an atmosphere of fear of economic loss which completely polluted the free atmosphere which is indispensable to a valid election and tended to foreclose the possibility that the election issues will be decided on the basis of the employees' judgment as to whether the Union will be able to represent them effectively in light of existing economic conditions.[11]

F. The Refusal to Bargain.

1. The appropriate unit and the Union's majority status therein.

The complaint alleges, the answer admits, and I find, that all journeymen wire weavers of Respondent employed at its Holyoke, Massachusetts, plant, exclusive of all other employees, all production and maintenance employees, service employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The parties stipulated to the names of the employees in the appropriate unit at all material times herein, which consisted of a total of 14 employees; they further stipulated that the same 14 named employees were the only ones

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[11] See e.g., *Ideal Baking Company,* 143 NLRB 546, 553; *General Industries Electronics Co.,* NLRB 428; and *Brunswick Corp.,* 147 NLRB 1139.

employed in the unit by Respondent during the period from July 6 through December 9, 1965. The General Counsel introduced into evidence Union authorization cards signed in July 1965, by 11 of the 14 employees in the appropriate unit. At the hearing, but no longer mentioned in his brief, counsel for Respondent objected to the cards signed by Gary Brunault, Victor Goulet, and William Dean. He affirmatively stated that he had no objections to the cards signed by the other eight employees, thus conceding that in July, 1965, the Union had valid authorization cards signed by a majority of the employees in the appropriate unit.

The objection to the card signed by *Brunault* was on the alleged ground that the date was not properly authenticated. His cards bears the date of 7-20-65. Brunault credibly testified that he received the Union card at his home by mail about July 6 or 7, 1965, that he filled it out and signed it at home but did not date it, that he then put it in his shirt pocket and later mailed it when he got to a mailbox. He further credibly testified that to the best of his recollection it was July 8 when he filled it out and signed it. The card bears a United States postal stamp of July 9. Brunault explained that someone must have put the date on the card after it was received by the Union. I find that Brunault signed the card between July 6 and 9, 1965, and that this is a valid authorization card for the purpose of determining the Union's representative status.

The objection to the card signed by *Goulet* was on the alleged ground that Goulet could not testify positively concerning the facts in connection with the card. Goulet credibly testified that he signed the card on July 7, and that he filled it out himself, including the date. I find no merit in Respondent's objection, and find this to be a valid

authorization card for the purpose of determining the Union's representative status.

The objection to the card signed by *Dean* was on the ground that he allegedly did not voluntarily mail the card or deliver it to the Union. Dean credibly testified that he received the card in the mail, that he signed it at home, that he had read it before signing it, that he then placed it on his bureau because he wanted to think it over for "a little while," and that the next day his wife told him that she had his son mail it. He further credibly testified that, although he had not authorized his wife to mail it, he did nothing thereafter to try to get his card back or to revoke his authorization. I find this card to be a valid authorization card for the purpose of determining the Union's representative status.

It thus appears that a clear majority of the employees in an appropriate unit had validly designated the Union as their bargaining representative when the Union made its demand on September 20, 1965, for recognition and bargaining. While a Board election is normally the best method of determining whether or not employees desire to be represented by a bargaining agent, where, as here, an employer engages in unfair labor practices which make impossible the holding of a free election, there is no alternative but to look to the signed authorization cards as the only available proof of the choice employees would have absent the employer's unfair labor practices.[12] To the extent that the election revealed a loss of Union support, such loss must be found attributable to the Respondent's unfair labor practices. I find that at all times on and after Sep-

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[12] *Bryant Chucking Grinder Company,* 160 NLRB No. 125 (pp. 5-6).

tember 20, 1965, the Union has represented a majority of the employees within the appropriate unit and has been, and still is, the exclusive representative of all the employees within said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

2. The request and refusal.

By letter dated September 20, 1965, from Union President Carmin Napoli and addressed to Respondent's President Sinclair, the Union advised that "the majority of your journeymen-wireweavers and apprentices at your Holyoke, Massachusetts, location have designated this Local Union, an affiliate of the International Brotherhood of Teamsters, as their collective bargaining representative"; requested "recognition as the exclusive bargaining representative of the aforementioned Employees" and a "meeting, as soon as possible, for the purpose of negotiating a collective bargaining agreement covering wages, hours and other conditions of employment"; and offered "to submit signed authorization cards of your Employees to a neutral party, mutually agreed upon, and to allow the third party to compare these cards with your present payroll" if "you have any doubt as to our representing a majority of your employees in the above described bargaining unit." The letter concluded with the statement that "we would appreciate hearing from you on this matter at your earliest convenience." President Sinclair admitted receiving this letter and replying by a letter dated September 28, 1965. The reply letter acknowledged receipt of the above-described letter of the Union; stated that "your request for recognition is denied (a) because the Company has a good-faith doubt that Local 404 of the In-

ternational Brotherhood of Teamsters represents an uncoerced majority of its weaving department employees, (b) because as stated by NLRB Chairman McCullough, authorization cards are unreliable as a means for determining a Union's majority status, and (c) because the Company expects that there will be questions concerning the appropriate bargaining unit which should be determined by the Board"; and suggested "that Local 404 follow the election procedures established by the Board." The Union admitted receiving this letter.

3. Respondent's contentions and concluding findings.

Sinclair testified that "I was not at all sure that they represented a majority of the employees because I didn't actually know exactly what they were talking about as far as bargaining unit is concerned." He further testified that he was questioning the appropriateness of the requested bargaining unit of journeymen wire weavers and apprentices because "we had no apprentices at that time" and "I did not know what was meant by an apprentice." I find this argument to be specious. Sinclair very well knew what an apprentice wire weaver was. He admitted that Respondent had in the past employed wire weaver apprentices, that it had not been unusual for a wire weaving department to employ both journeymen and wire weaver apprentices, that the only union which ever represented any of Respondent's employees represented the journeymen wire weavers and apprentices, and that many of the journeymen wire weavers employed by Respondent during the period from July through December had started as apprentices and had served their apprentice years with Respondent. He further admitted that the helpers em-

ployed in the weaving department "to assist the weavers in the various operations of setting up and removing cloth" are not apprentices. Sinclair admittedly made no effort to ascertain to whom the Union was referring by the category of apprentices. He knew that he had no apprentices in his employ at that time and that there were only 14 journeymen wire weavers employed. In the latter part of November, Respondent entered into a stipulation that its journeymen wire weavers constituted an appropriate unit. I find that Respondent did not have any good-faith doubt as to the composition of the bargaining unit which the Union claimed to represent[13] or that such unit was appropriate for collective bargaining purposes even if Respondent at that time employed no apprentices. Moreover, a good-faith, but erroneous, belief that a unit is inappropriate is no defense to a refusal to bargain.[14]

As previously noted, the Union's bargaining request of September 20 and the representation petition which it filed on November 8, covered a unit of journeyman wire weavers and apprentices. However, as Respondent employed no apprentices, the stipulation which the parties executed in the latter part of November and the instant complaint covers a unit only of journeyman wire weavers as an appropriate unit. Counsel for Respondent contends in his brief that there was no bargaining request in a unit confined solely to journeyman wire weavers and that there is a fatal variance between the unit requested and the unit for which it is alleged Respondent unlawfully refused to

[13] See, e.g., *Ivy Hill Lithograph Co.*, 121 NLRB 831, 835.

[14] *Tom Thumb Stores, Inc.*, 123 NLRB No. 833; *United Butchers Abattoir, Inc.*, 123 NLRB 946, 957; *Southern Paint Co., Inc.*, 156 NLRB No. 2 and cases there cited; and *Owego Street Supermarkets, Inc.*, 159 NLRB No. 139.

bargain. I find no merit in this contention. I find that there is no substantial variance in the units and that the Union's bargaining request was a valid request for bargaining in the unit to which the parties subsequently stipulated and herein found appropriate.[15]

Nor do I find any merit in Respondent's contention that it had a good-faith doubt of the Union's majority representation claim. Sinclair testified that this doubt was based on his "personal feeling." As previously found, after the Union's bargaining request, Respondent engaged in a coercive course of conduct designed to induce the employees to abandon their support for the Union and which dissipated the Union's majority status and prevented a free choice in the subsequent election. Such conduct gives rise to the inference, which I herein make, that Respondent's refusal to bargain on and after September 20, 1965, was not motivated by any good-faith doubt as to the Union's majority status in an appropriate bargaining unit but was instead motivated by a desire to gain time within which to dissipate that majority status. *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732, 737, 741 (C.A.D.C.), cert. denied 341 U.S. 914. By such refusal, Respondent violated Section 8(a)(5) and (1) of the Act.[16]

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[15] See e.g. *Edwards Fields, Inc.*, 141 NLRB 1182, 1195; *Mid-West Towel & Linen Service, Inc.*, 143 NLRB 744, 752; *Sabin Vending Co., Inc.*, 147 NLRB 1010, 1011; *Hamilton Plastic Molding Co.*, 135 NLRB 371, 373; *Galloway Mfg. Corp.*, 136 NLRB 405; *Gotham Shoe Mfg. Co.*, 149 NLRB 862, 873; and *Fleming & Sons of Colorado, Inc.*, 147 NLRB 1271, 1273.

[16] I find no merit in the procedural contention of counsel for Respondent that the 8(a)(5) allegation in the complaint is defective because it fails to contain an affirmative allegation that Respondent did not have a good-faith doubt of the Union's majority status when it refused its request for recognition and bargaining. While the burden is on the General Counsel to establish affirmatively that a good-faith doubt of majority was not the

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE.

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW.

1. All journeymen wire weavers of Respondent employed at its Holyoke, Massachusetts, plant, exclusive of all other employees, all production and maintenance employees, service employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times on and after September 20, 1965, the Union has been, and still is, the exclusive representative of all the employees within said appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment, within the meaning of Section 9(a) of the Act.

3. By refusing to recognize and bargain with General Teamsters, Chauffeurs, Warehousemen and Helpers,

reason for Respondent's refusal to bargain, there is no requirement that the complaint must contain such an allegation. *John P. Serpa, Inc.*, 155 NLRB No. 12 (p. 2); *H. & W. Construction Company, Inc.*, 161 NLRB No. 77 (pp. 6-7). As found in the text, the General Counsel has satisfied his burden in this case.

Building Materials, Heavy & Highway Construction Employees, Local No. 404, an affiliate of International Brotherhood of Teamsters, as the exclusive representative of the employees in the above-described appropriate unit, the Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

4. By the foregoing conduct and by threatening employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment for the wire weavers, if they were to select the above-named labor organization as their collective bargaining representative, in the manner described in section C, *supra,* the Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, and thereby has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY.

Having found that Respondent engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action which will effectuate the policies of the Act.

Having found that Respondent refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, I will recommend that, upon request, Respondent recognize and bargain collectively with the

Union as the exclusive representative of all its employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. Moreover, I would recommend the same bargaining order even if the record had warranted the conclusion, contended for by Respondent, that it relied on a *bona fide* doubt of the Union's majority in refusing to bargain with the Union. As previously found, the Union represented a clear majority of the journeymen wire weavers when Respondent began its unlawful campaign directed at destroying that majority. To the extent that the election revealed a loss of union support thereafter, such loss must be found attributable to the Respondent's unfair labor practices. Therefore, effectuation of the policies of the Act would still require such a bargaining order in order properly to remedy Respondent's other unfair labor practices herein found.[17]

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER.

Respondent, The Sinclair Company, Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with General Teamsters, Chauffeurs, Warehousemen and

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[17] *Bryant Chucking Grinder Company*, 160 NLRB No. 125 (pp. 5-6).

Helpers, Building Materials, Heavy & Highway Construction Employees, Local No. 404, an affiliate of International Brotherhood of Teamsters, as the exclusive representative of its employees in the following appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

> All journeymen wire weavers of The Sinclair Company employed at its Holyoke, Massachusetts, plant, exclusive of all other employees, all production and maintenance employees, service employees, guards and all supervisors as defined in Section 2(11) of the Act.

(b) Threatening the employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, if they were to select the above-named, or any other, labor organization as their collective-bargaining representative.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively with the above-named labor organization as the exclusive representative of the employees in the above-described unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its plant in Holyoke, Massachusetts, copies of the notice attached hereto and marked Appen-

dix A.[18] Copies of said notice to be furnished by the Regional Director for the First Region, shall upon being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other materials.

(c) Notify the said Regional Director in writing, within 20 days from the date of this Decision and Recommended Order, what steps the Respondent has taken to comply herewith.[19]

I also recommend that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

I further recommend that the election in Case No. 1-RC-8713, held on December 9, 1965, be set aside.

Dated at Washington, D. C., January 12, 1967.

(s) LOUIS LIBBIN
LOUIS LIBBIN
Trial Examiner

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[18] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

[19] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the First Region, in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX A

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT threaten our employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, if they were to select GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES, LOCAL NO. 404, AN AFFILIATE OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL, upon request, recognize and bargain collectively with the above-named Union as the exclusive representative of all employees in the following appropriate unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and embody in a signed agreement any understanding reached. The bargaining unit is:

All journeymen wire weavers employed at our Holyoke, Massachusetts, plant, exclusive of all other employees, all production and maintenance

employees, service employees, guards and all supervisors as defined in Section 2(11) of the Act.

THE SINCLAIR COMPANY
(*Employer*)

Dated ---------- By ----------
(*Representative*) (*Title*)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 20th Floor, John F. Kennedy Federal Building, Cambridge and New Sudbury Sts., Boston, Mass. (Tel. No. 223-3353).

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
[Caption Omitted in Printing]

DECISION AND ORDER.

On January 12, 1967, Trial Examiner Louis Libbin issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of these allegations. Thereafter, the Respondent filed exceptions, with a supporting brief, and the General Counsel filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National La-

bor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Decision, the exceptions, the briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the modification set out below.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and orders that the Respondent, The Sinclair Company, Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Delete the word "other" from paragraph 1(c) of the Trial Examiner's Recommended Order, and substitute therefor the words "like or related. * * *"

2. Delete the word "other" from the paragraph beginning "WE WILL NOT in any other manner" in Appendix A attached to the Trial Examiner's Decision, and substitute therefor the words "like or related. * * *"

IT IS FURTHER ORDERED that the petition for certification of representative filed in Case No. 1-RC-8713 be, and it hereby is, dismissed, and that all prior proceedings held thereunder be, and they hereby are, vacated.

Dated, Washington, D. C., May 2, 1967.

FRANK W. MCCULLOCH, *Chairman*
GERALD A. BROWN, *Member*
[SEAL] HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
[Caption Omitted in Printing]

ORDER SUPPLEMENTING DECISION AND ORDER.

On May 2, 1967, the Board issued a Decision and Order[1] in the above-entitled proceeding.

IT IS HEREBY ORDERED that the said Decision and Order be, and it hereby is, supplemented as follows:

(1) By adding footnote reference 1 following the word "findings" on the fifth line of the third paragraph of page 1.

(2) By adding the following footnote at the bottom of page 1:

> [1] Contrary to the assertion made by the Respondent, we do not read the Trial Examiner's decision as relying on the distribution of the book "The Enemy Within" as a part of the totality of the Respondent's conduct in violation of Section 8(a)(1) of the Act. In any event, we would not find the distribution unlawful in itself or in context, either as a violation of Section 8(a)(1) or as grounds for setting aside the election.

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby supplemented.

Dated, Washington, D. C., June 16, 1967.

By direction of the Board:

OGDEN W. FIELDS,
Executive Secretary.

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[1] 164 NLRB No. 49.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

[Caption Omitted in Printing]

(July 3, 1968.)

McENTEE, *Circuit Judge*. This is a petition for enforcement of a Labor Board order issued against the respondent, The Sinclair Company. The order is based on findings that the company interfered with the organizational rights of its employees by threatening that unionization would cause them to lose their jobs and also that the company refused to bargain with the union as the representative of its employees in violation of § 8(a) (1) and (5) of the National Labor Relations Act.[1] The basic question is whether on the record as a whole these findings are supported by substantial evidence. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

The respondent company, whose main plant is in Holyoke, Massachusetts, was founded in 1925. It was acquired by Lindsay Wire Weaving Company of Cleveland, Ohio, in 1964 and is now a division of Lindsay. David Sinclair, son of the founder and the central figure in this litigation, continued as president under the new regime.

Briefly, the company's labor relations background is as follows. From 1933 to 1952 its journeymen and apprentice wire weavers were represented by a union known as the American Wire Weavers Protective Association. (A.W.W.P.A.) This relationship terminated in 1952 after A.W.W.P.A. called a strike that lasted some thirteen weeks. From 1952 to 1965 the employees were not represented by any union.

[1] Accordingly, the Board ordered the company to cease and desist from its unfair labor practices, to bargain upon request, with the union as the authorized representative of its wire weavers, and to post appropriate notices.

Early in July 1965[2] the Teamsters Union began organizing the employees.[3] By letter dated September 20, Teamsters Local 404 notified the company that it represented a majority of its journeymen wire weavers and apprentices; requested that the company bargain with it and made the usual offer to submit the signed authorization cards for authentication.[4] The company refused to recognize the union. Local 404 filed a representation petition. The parties stipulated to a Board conducted election among the wire weavers and said election was held on December 9. With a total of thirteen ballots cast the union lost by a vote of seven to six. Thereupon it petitioned the Board to set aside the election and filed the unfair labor practice charges here involved. Adopting the findings of the trial examiner, the Board set aside the election and entered an unfair labor practice order. The issue revolves around the pre-election conduct of the company's president.

In July when Sinclair learned of the union's efforts he immediately addressed the employees in separate groups, with the view to dissuading them from joining the union.[5]

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[2] All dates hereinafter mentioned, unless otherwise indicated, to the year 1965.

[3] Sometime between 1952 and 1965 A.W.W.P.A. merged or affiliated with the Teamsters Union.

[4] At that time the union had authorization cards from eleven of the company's fourteen journeymen wire weavers. There were no apprentices.

[5] He reminded them, particularly the wire weavers, that the last union had a long strike that almost put the company out of business, and that the company has been on "thin ice" ever since. Sinclair also told them that "A strike could lead to the closing of the plant." Continuing in this vein he indicated that wire weaving offered only limited job opportunities and in view of their age and lack of education, new jobs would be hard to get. He then proceeded to down-grade the Teamsters Union and con-

On November 2, and again on November 5, he sent them letters vigorously opposing the union.[6]

We now come to the period directly involved in the Board's findings.[7] Two or three weeks before the scheduled election, Sinclair embarked upon an intensive campaign to induce the wire weavers to reject the union. His first message consisted of a letter or pamphlet illustrated with drawings and entitled "Who Would Buy The Groceries * * * While You Walk The Teamsters Picket Line?" Its dominant theme was "Do You Want Another 13-Week Strike?"[8] Among other things, the pamphlet emphasized that the union has but one weapon—a strike; that the Teamsters Union is a "strike happy outfit"; that

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cluded by saying that in merging with Lindsay the company had been given a second chance but that Lindsay didn't need the company's wire cloth production and in the event of a strike could satisfy its needs elsewhere.

[6] In the first of these letters Sinclair indicated that employees who signed cards could still vote against the union. He also told them that nothing the Teamsters or any other union could offer would increase their job security and ended with the warning that the company was still on "thin ice" and that it didn't make sense for the company to meet unreasonable union demands which could result in further losses "and eventually the closing of the plant."

The November 5 letter reviewed the poor earnings history of the company; stated that the new ownership was interested in "profits and not pressure"; that the Teamsters Union can only deliver pressure—the threat of a strike; that the new management had no ties in Holyoke or Massachusetts and he "did not believe the threat of a strike will cause the new owners any loss of sleep" but "a long strike would be bad for me because I would like to continue to live in Holyoke."

[7] While the Board took into account the company's prior conduct as background, its findings were based on the company's activities during the period from November 8, when the instant representation petition was filed, and December 9, the date the election was held.

[8] A majority of the wire weavers had participated in the 1952 strike.

it can again close the wire weaving department and the entire plant by a strike and that only the striking employees and the company, not the union organizers, would be hurt. On November 30 he followed up with a similar letter to the wire weavers reminding them again of the disastrous effects of the long 1952 strike on both the company and the employees. He also stated that "a strike can still close the Holyoke plant." The very next day (December 1) Sinclair sent the wire weavers a third communication containing more of the same, listing the misdeeds of several top Teamsters officials, denouncing the union and its tactics and urging the wire weavers to vote "No" in the election.

Next came a four page leaflet dated December 7, entitled "Let's Look At The Record" and illustrated with a cartoon. This leaflet purported to be an obituary of the companies in the Holyoke-Springfield area that allegedly had fallen victim to union demands and had gone out of business, eliminating some 3500 jobs in the area. The leaflet concluded by suggesting that the wire weavers drive past these plants before making their decision to vote for the union. The day before the election another handbill entitled "Vote Right—Avoid Strikes" was passed out by the company. In graphic form it set out several supposedly beneficial effects of voting "No" in the election and ended with a scathing attack on high Teamsters officials and the union itself. That same afternoon the president personally addressed the wire weavers in a final appeal to reject the union. Again he mentioned union corruption and reminded his hearers of the company's precarious financial condition. In his closing plea, Sinclair again told the wire weavers of the unlikelihood of their

obtaining other employment because of their age and limited education. It also appears that Sinclair talked personally to about ten of the fourteen wire weavers between July and December 9 in an effort to persuade them not to vote for the union.

An employer violates § 8(a) (1) of the Act if in communicating with his employees during a union organizational campaign preceding an election he makes promises of benefits, threats of loss, or reprisal for their vote. *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (7th Cir. 1967). The respondent defends on the ground that in making the pre-election statements above mentioned it was merely informing its employees of the facts; that it made no untrue statements; that these statements considered separately are lawful and this being so, the combination of them could not result in illegal conduct. The problem is not as simple as that. Conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact, unless, which is most improbable, the eventuality of closing is capable of proof. The employer's prediction must be in terms of demonstrable "economic consequences." *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 761 (6th Cir. 1965). Moreover, in considering coercive effect the test is the totality of the circumstances. *N.L.R.B. v. Kolmar Laboratories, Inc.*, 387 F.2d 833, 837 (7th Cir. 1967). *Daniel Construction Co. v. N.L.R.B.*, 341 F.2d 805 (4th Cir.), *cert. denied*, 382 U.S. 831 (1965); *N.L.R.B. v. Wagner Iron Works*, 220 F.2d 126, 139 (7th Cir. 1955), *cert. denied*, 350 U.S. 981 (1956).

As stated in *N.L.R.B. v. Kropp Forge Co.*, 178 F.2d 822, 828-29 (7th Cir. 1949), *cert. denied*, 340 U.S. 810 (1950):

"A statement * * * might seem * * * perfectly innocent * * *, including neither a threat nor a promise. But, when the same statement is made by an employer to his employees, and we consider the relation of the parties, the surrounding circumstances, related statements and events and the background of the employer's actions, we may find that the statement is a part of a general pattern which discloses action by the employer so coercive as to entirely destroy his employees' freedom of choice and action. * * * If, when so considered, such statements form a part of a general pattern or course of conduct which constitutes coercion and deprives the employees of their free choice guaranteed by Section 7, such statements must still be considered as a basis for a finding of unfair labor practice."

It is evident that Sinclair's communications were designed to impress upon the wire weavers (1) that the 1952 strike had left the company in a state of continuing financial difficulty; (2) that the union's only weapon is a strike and the Teamsters Union is a "strike happy outfit"; (3) that another strike could, and in his opinion would, close the plant and (4) that it would be difficult for the wire weavers because of their age and limited education to secure other employment. Whether an employer has used language that is coercive in its effect is a question essentially for the specialized experience of the Board. *Daniel Construction Co. v. N.L.R.B., supra.* The Board found

"that the series of letters, pamphlets, leaflets, and speeches from and by President Sinclair, hereinabove described, taken together and considered as a whole, reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead Respondent to close

its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers."

The Board also found that the aforesaid conduct interfered with the employees' exercise of a free and untrammeled choice in the election.[9]

On the record before us we think there is substantial evidence to support these findings. Also, it is clear that under the circumstances the company must take the responsibility for the pre-election conduct of its president. *Daniel Construction Co. v. N.L.R.B., supra.* In *N.L.R.B. v. Freeport Marble & Tile Co.*, 367 F. 2d 371 (1st Cir. 1966), we held that respondent having made threats of economic consequences to its business in case of unionization has the burden of proving justification. The company has not met its burden here.

Also, we think the Board's finding that in refusing to bargain with the union the respondent violated § 8(a)(5) and (1) of the Act is supported by substantial evidence. The company contends that it refused to recognize and bargain with the union for the following reasons: (1) that it had a good faith doubt that Teamsters Local 404 represented an uncoerced majority of the weaving department employees; (2) that authorization cards are an unreliable means for determining the union's majority status, and (3) that it expected there would be questions concerning the appropriate bargaining unit which should be determined by the Board. In its consent to the election respondent agreed that the wire weavers group constituted an appropriate unit. Furthermore, the company does not dispute that on September 20 when Local 404 requested

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[9] See n. 7.

recognition for this group it had valid authorization cards for at least ten of the fourteen wire weavers. A good faith doubt is not established merely by assertion but must have some reasonable or rational basis in fact. *N.L.R.B. v. Superior Sales, Inc.*, 366 F. 2d 229, 237 (8th Cir. 1966). Here the company made no attempt to discover what the actual card situation was when the union requested recognition for the wire workers unit. We therefore conclude that the company made no real showing of good faith doubt either as to the union's majority status or as to the appropriateness of the bargaining unit. Instead of recognizing the union on the basis of its admitted card majority the company insisted on an election—as the Board found, in order to gain time in which to dissipate the union's majority. In view of the company's unlawful interference with the employees' rights during the pre-election campaign, we think the Board acted within its discretion in setting aside the election and in ordering the company to bargain. *N.L.R. B. v. Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851 (1st Cir. 1967).

Actually what the company is contending here is that signed authorization cards are so unreliable that it has a right to reject a request for recognition based on them and insist upon an election. We have already rejected this proposition in this circuit. *N.L.R.B. v. Whitelight Products*, 298 F. 2d 12 (1st Cir.), *cert. denied*, 369 U. S. 887 (1962). See *N.L.R.B. v. Southbridge Sheet Metal Works, Inc., supra.* The representation status of a union may be shown by means other than an election. *Mine Workers v. Arkansas Flooring Co.*, 351 U. S. 62, 71-72 (1956).

In the instant case there is undisputed evidence of the union's majority status long prior to the election. It is

reasonable to conclude that this status was dissipated by the company's unlawful interference with the employees' Section 7 rights, thus tainting the December 9 election. In these circumstances we think the Board was warranted in entering a bargaining order rather than ordering a new election. *Wausau Steel Corp. v. N.L.R.B., supra.*

Finally, we see no merit in the company's contention that the Board's order is invalid in that it fails to specify the conduct it purports to proscribe.

The order will be enforced.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

[Caption Omitted in Printing]

(July 3, 1968.)

This cause came on to be heard upon Petition for Enforcement of an Order of the National Labor Relations Board, and was argued by Counsel.

Upon consideration whereof, it is now here ordered, adjudged, and decreed as follows: The Order of the National Labor Relations Board of May 2, 1967, is hereby affirmed and enforced.

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

December 17, 1968

[Caption Omitted in Printing]

ORDER

* * *

The petition for a writ of certiorari is granted. The case is placed on the summary calendar and set for oral argument immediately following Nos. 573 and 691.

* * *

[Subscription Omitted in Printing]

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC., ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in these three cases.

OPINIONS BELOW

The opinions of the court of appeals (App. A, D, G, pp. 1a–3a, 77a–79a, 163a–165a)[1] are not yet officially reported. The decisions and orders of the National Labor Relations Board are reported at 157 NLRB 1065 (*Gissel*), 166 NLRB Nos. 32 and 38 (*Heck's*), and 157 NLRB 636 (*General Steel Products*) (App. C, F, I, pp. 6a–76a, 82a–162a, 168a–217a).

JURISDICTION

The judgments of the court of appeals were entered on June 28, 1968 (App. B, E, H, pp. 4a–5a, 80a–81a, 166a–167a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit has erroneously construed the provision in Section 8(a)(5) of the National Labor Relations Act, which requires an employer to bargain collectively with the representative of a majority of his employees, by its rule that, irrespective of his other unfair labor practices, an employer is justified in refusing to recognize a union that bases its claim to representative status solely on the possession of authorization cards signed by a majority of the employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in App. J, pp. 216a–217a.

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[1] Because of the length of the appendices, they have been bound in a separate volume.

STATEMENT

The three decisions of the Court of Appeals for the Fourth Circuit which this petition seeks to review present the same legal issue in different factual contexts. Rule 23(5). We shall set forth the facts in one of the cases (*Gissel*) in considerable detail, and state those in the other two (*Heck's* and *General Steel*) more briefly.

A. THE BOARD'S FINDINGS OF FACT

1. Gissel

In the summer of 1964, Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO[1] began an organizing campaign at the Company's meat packing plant in Huntington, West Virginia. The Union was obliged to suspend its campaign for several months, however, because of its participation in Board unfair labor practice hearings concerning two other employers in the same town. As soon as Company Vice President Gissel became aware of the Union's activities at the other plants, he questioned his employees Frye and Mount about their contacts with the Union, threatening to discharge them if he had any reason to suspect they had become involved (App. C, pp. 26a–27a).

The Union resumed its campaign in January 1965; by January 22 it had obtained valid authorization

[1] The Union intervened in the court of appeals, and thus is a party here.

cards[3] from 31 of the 47 employees, in the unit, a clear majority. That day, Union Representative Spencer telephoned Gissel, told him that the Union represented a majority of the employees, and requested recognition. Gissel referred Spencer to the Company attorneys. The same day, Spencer wrote Gissel confirming his telephonic request for recognition and offering to turn the signed authorization cards over to the Company "so that there will be no possible doubt as to our majority status." His letter also specified that "truck drivers" were included in the claimed unit. (App. C, pp. 16a–17a.)

In a reply dated January 26, Gissel rejected the Union's request for recognition because (1) the Union had lost an election held four years previously and the Company did not believe that there had been any change in employee sentiment since that time; (2) the Company had been advised of certain improprieties in the Union's organizing techniques, including instances of direct misrepresentation in obtaining

[3] The wording of the card (App. C, pp. 24a–25a) was as follows:

APPLICATION

Food Store Employees Union, Local #347

P.O. Box 2751 Charleston, W. Va.

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions.

The card then provided spaces for the employee to sign his name and write his address, telephone number (sometimes omitted), the name and address of his employer, and the date.

authorization card signatures;[4] and (3) the Company did not know which employees were eligible voters, and did not think that truck drivers were part of the unit.[5] The letter concluded by stating that, if the Union really believed it represented a majority, it would have petitioned the Board for an election. (App. C, pp. 17a–18a.) The Company did not seek an election.

On February 10, Spencer renewed the Union's request for recognition and again offered to deliver the signed cards to the Company. He explained that the Union had not sought an election because "[t]he coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election by the employees is most difficult for us to combat." He concluded by announcing the Union's intention of filing unfair labor practice charges against the Company for its refusal to recognize the Union. These were filed the next day. (App. C, pp. 18a–19a.)

Gissel answered on February 12, asserting that the Union's approach only bolstered the Company's opinion that it did not represent a majority of the employees. The Union responded on February 16, again urging the Company to check the signed authorization cards, and stating that the cards would be available for inspection at any time. (App. C, pp. 19a–20a.)

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[4] No evidence to substantiate this claim was introduced at the hearing (App. C, p. 54a).

[5] The Board found that Vice President Gissel in effect acknowledged at the Board hearing that he understood that the Union was requesting the unit found appropriate in 1961 (App. C, p. 53a, n. 39). See n. 11, *infra*.

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The Company, meanwhile, had renewed its anti-union campaign. During the five-week period in which he was corresponding with the Union, Gissel interrogated employees about union activity in the plant; sought information about the union activity of specific employees; threatened to close the plant if the Union came in; promised employees benefits; and warned that there was to be "no more of this Union stuff," that the Union would not get in, and that the Union would have to "fight [Gissel] first." (App. C, pp. 27a–33a.) After learning in April of a union meeting scheduled for later that month, Gissel let it be known that the Company would send a representative there to report which employees attended. He sent someone to the meeting who reported such information to the Company. (App. C, pp. 33a–37a.) Two days after the meeting, Gissel forced Mount to admit that he attended the meeting, and then reduced both his and Frye's hours of work. Three days after this incident, Mount and Frye were discharged, to the accompaniment of derogatory remarks about the Union. (App. C, pp. 38a–48a.)

2. Heck's

By October 9, 1964, Chauffeurs, Teamsters & Helpers Local No. 175, after a brief organizational campaign, had obtained valid authorization cards from 13 employees out of a unit of 26 in the Company's Charleston area warehouses.[6] Believing that it had

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[6] The card, in relevant part, stated (G.C. Exh. 2(a)):

"Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Ware-

achieved majority status, the Union representative met that day with the Company and requested recognition. The Company president, when shown the cards, questioned one of the employees who had signed a card concerning his union membership, and thereafter responded "No comment" to the Union representative's repeated requests for recognition. The Union obtained another authorization card the next day, giving it actual majority status; it immediately filed a petition for a representation election with the Board,[7] and two days later made another demand for recognition, which the Company refused. (App. F, pp. 92a–94a, 120a–122a.)

Meanwhile, the Company embarked on an extensive anti-union campaign. It coercively interrogated the employees about their union activities, offered them help in withdrawing from the Union, threatened them with reprisals if the Union's campaign were successful, offered and gave them better jobs for opposing the Union, and discharged the leading employee organizer. (App. F, pp. 94a–100a.)

The same pattern was repeated a year later in connection with the Company's Ashland, Kentucky store, where Food Store Employees Union, Local 347, Amalgamated Meat Cutters & Butchers Workmen of North America, AFL–CIO, obtained authorization

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housemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours, or any other conditions of employment."

[7] The election was not held because of the unfair labor practice charges which were subsequently filed.

cards from 21 of the 38 employees by October 5, 1965.[8] The next day the assistant store manager told an employee that he knew that the Union had acquired majority status. When the Union requested recognition on October 8, however, Company counsel questioned whether department heads were included in the unit. The Union representative replied that the Union represented a majority with or without the department heads and that he would leave it to the Company to determine whether to include them. By letter of October 11, the Union restated this position, and offered to submit the authorization cards to the Company for verification. (App. F, pp. 134a–135a, 149a.)

On October 13, Company counsel refused the request for recognition because of an alleged ambiguity in the definition of the unit, and because a "poll" taken by the Company showed that a majority of the store employees did not want union representation. No reply was ever received from the Company to another request for recognition, made on October 25. (App. F, pp. 134a, 149a–150a.) Meanwhile, the Company told employees that an employee of another Company store had been "fired on the spot" for signing a card, warned employees that the Company knew which ones had signed cards, and polled employees about their desire for union representation without giving all of them assurances against reprisals (App. F, pp. 135a–144a).

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[8] The card, in relevant part, stated (B.A. 202):

"The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours and working conditions."

("B.A." refers to the appendix to the Board's brief in the court below.)

3. *General Steel*

The Upholsterers' International Union of North America, AFL–CIO, initiated an organizational campaign among the Company's employees in the early summer of 1964, and by August 13 had obtained authorization cards from 120 of the 207 employees in the unit.[9] The Union wrote to the Company on that date requesting recognition, and the next day filed a representation petition with the Board. Company counsel responded to the Union's request on August 26, alleging doubt of the Union's majority status, and refusing to bargain "unless and until it is certified by proper authority." (App. I, p. 184a.)

Meanwhile, the Company began an anti-union campaign. It interrogated employees about their union activities, threatened them with discharge for engaging in union activities or voting for the Union, warned that strikes and other economic consequences would result from unionization, and asserted that, although it would have to negotiate with the Union, it did not have to sign anything. (App. I, pp. 174a–184a.) The Union lost the Board election by a vote of 94–85 (App. I, p. 172a).[10]

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[9] The card in relevant part stated (App. I, p. 189a):

"I do hereby designate and authorize the Upholsterers International Union of North America, AFL–CIO, and its representatives to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment."

[10] The Union filed objections to the election, and the Board subsequently set it aside because of the Company's unfair labor practices (App. I, pp. 172a, 185a–186a).

B. THE BOARD'S CONCLUSIONS AND ORDERS

In each of the above cases, the Board found (1) that the Union had obtained valid authorization cards from a majority of the employees in the bargaining unit at the time of its demand for recognition,[11] and hence was entitled to represent the employees for collective bargaining purposes; and (2) that the Company's refusal to bargain was motivated not by a good faith doubt of the Union's majority status, but by a desire to gain time in which to dissipate that status (App. C, F, I, pp. 52a–58a, 118a–124a, 145a–158a, 203a–206a). It held that the refusals to bargain violated Section 8(a)(5) and (1) of the Act.

In each case the Board based its conclusion that the Company did not have a good faith doubt as to the Union's majority status on the fact that the Company had committed substantial unfair labor practices during its anti-union campaign. Thus, in *Gissel* it found that the Company coercively interrogated employees concerning their union activities, threatened them with discharge and other economic harm, and promised them benefits—all in violation of Section 8(a)(1) of the Act; and that the Company discriminatorily discharged Mount and Frye, in violation of Section 8(a)(3) and (1) (App. C, pp. 48a–52a, 58a–68a). In *Heck's*,

[11] In *Gissel*, the Board adhered to the unit determination which it had made when the Union filed a representation petition in 1961. In directing an election on that petition, the Board found appropriate a unit of "all production and maintenance employees * * * including truck drivers, truck driver salesmen and the janitors (with the usual exceptions)." The Union lost the 1961 election (App. C. pp. 14a–15a, 52a). In *Heck's*, the Board found that the Union at Charleston had acquired majority status at least by the time of its second demand for recognition (App. F, pp. 121a–122a).

the Board found that the Company coercively interrogated employees, threatened reprisals against them for supporting the Union, created the impression of surveillance of their union activities, and offered them benefits in exchange for opposition to the Union—all in violation of Section 8(a)(1); and that the Company discriminatorily discharged the leading union adherent, in violation of Section 8(a)(3) and (1) (App. F. pp. 94a–100a, 158a–159a). In *General Steel,* the Board found that the Company interrogated employees and threatened them with reprisals, including discharge, in violation of Section 8(a)(1) (App. I, p. 207a). In neither *Gissel* nor *Heck's* was there any evidence tending to support the employer's claim of doubt that the Union represented a majority of the employees.[12]

The Board ordered the companies to cease and desist from the unfair labor practices found; to offer reinstatement and back pay to the employees who had been discriminatorily discharged; to bargain with the Union upon request; and to post appropriate notices (App. C, F, I, pp. 69a–72a, 84a–86a, 159a–161a, 208a–209a).

C. THE DECISIONS OF THE COURT OF APPEALS

In each of the above cases, the court of appeals sustained the Board's findings that the Company had engaged in restraint and coercion in violation of Section 8(a) (1) of the Act, and, in *Gissel* and *Heck's,* the court also sustained the findings that the

[12] In *General Steel,* the trial examiner considered at length and rejected allegations of misrepresentation by the union and misunderstanding by the employees of the purposes for which the cards were being solicited. The Board adopted his conclusions. (App. I, pp. 189a–203a.)

Company had discharged employees in violation of Section 8(a) (3) and (1). In each case, however, the court rejected the Board's finding that the Company's refusal to bargain violated Section 8(a) (5) and (1) (App. A, D, G, pp. 1a–3a, 77a–79a, 163a–165a). The court's reasoning, which was the same in all three cases, is illustrated by the following statement from its opinion in *Gissel* (App. A, p. 3a):

> In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election.[3] The reasoning elaborated in those decisions applies with equal force here, and we decline enforcement of that portion of the Board's order requiring respondent to bargain with the union.
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> [3] *Crawford Mfg. Co.* v. *NLRB*, 4 Cir., 386 F. 2d 367, cert. denied, 36 LW 3403 * * *; *NLRB* v. *S.S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562; *NLRB* v. *Sehon Stevenson Co., Inc.*, 4 Cir., 386 F. 2d 551; *NLRB* v. *Heck's, Inc.*, 4 Cir., * * * (decided this day).

REASONS FOR GRANTING THE WRIT

1. Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." The latter section makes representatives "designated or selected * * * by a majority of the employees * * * the exclusive representatives of all the employees * * * for the purposes

of collective bargaining." Thus, under the statute an employer has a duty to bargain with a union that represents a majority of his employees. There is a settled gloss upon the Act that an employer confronted with a union demand to bargain need not do so if he has a good faith doubt as to the union's majority status.[13]

In the past, two ways of establishing majority status have consistently been recognized by the Board and the courts: through winning an election conducted by the Board under Section 9(c) of the Act, or through obtaining signed authorization cards from a majority of the employees where employer unfair labor practices have precluded a fair election. In recent years unions increasingly have relied upon the authorization-card method of establishing their majority status; and the courts of appeals other than the Fourth Circuit generally have enforced Board remedial orders requiring employers to bargain with unions where the Board determined that the union had obtained valid authorization cards signed by a majority of employees and that the employer had no good faith doubt as to that fact.[14]

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[13] See *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 741 (C.A.D.C.), certiorari denied, 341 U.S. 914 (n. 16, *infra*), and cases cited, n. 14, *infra*.

[14] *National Labor Relations Board* v. *Sinclair Co.* (C.A. 1), No. 7069, July 3, 1968, 68 LRRM 2720, 2723; *National Labor Relations Board* v. *Quality Markets*, 387 F. 2d 20, 23–25 (C.A. 3); *National Labor Relations Board* v. *Goodyear Tire & Rubber Co.*, 394 F. 2d 711, 712–713 (C.A. 5); *National Labor Relations Board* v. *Southland Paint Co.*, 394 F. 2d 717, 723–724 (C.A. 5); *National Labor Relations Board* v. *Atco-Surgical Supports*, 394 F. 2d 659, 660–661 (C.A. 6); *Atlas Engine Works* v. *National Labor Relations Board*, 396 F. 2d 775, 776 (C.A. 6); *National*

In a series of recent decisions (of which these three cases are examples) the Court of Appeals for the Fourth Circuit has rejected this settled line of au-

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Labor Relations Board v. *Taitel*, 261 F. 2d 1, 5 (C.A. 7), certiorari denied, 359 U.S. 944; *National Labor Relations Board* v. *Clark Products*, 385 F. 2d 396, 398 (C.A. 7); *National Labor Relations Board* v. *Ralph Printing and Lithographing Co.*, 379 F. 2d 687, 692–693 (C.A. 8); *Colson Corp.* v *National Labor Relations Board*, 347 F. 2d 128, 135–138 (C.A. 8), certiorari denied, 382 U.S. 904; *National Labor Relations Board* v. *Luisi Truck Lines*, 384 F. 2d 842, 846–847 (C.A. 9); *Furr's Inc.* v. *National Labor Relations Board*, 381 F. 2d 562, 568–570 (C.A. 10), certiorari denied, 389 U.S. 840; *United Automobile Workers* v. *National Labor Relations Board and Preston Products Co.*, 392 F. 2d 801, 807, 808 (C.A. D.C.), certiorari denied, 392 U.S. 906.

The view of the Second Circuit formerly fully comported with that of these other circuits. See *National Labor Relations Board* v. *Philamon Laboratories*, 298 F. 2d 176, 179–180 (C.A. 2, per Judge Marshall), certiorari denied, 370 U.S. 919; *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 181–182 (C.A. 2). However, recently the Second Circuit, while continuing to adhere to the view that an employer violates Section 8(a)(5) of the Act where, without a good faith doubt, he refuses to recognize a union which possesses valid authorization cards signed by a majority of the employees, has split over whether the circumstance that the employer engages in other unfair labor practices is relevant to a determination of his lack of good faith in refusing recognition. See *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 206–208 (C.A. 2, per Judge Friendly); *National Labor Relations Board* v. *Consolidated Rendering Co.*, 386 F. 2d 699, 704 (C.A. 2, per Judge Smith); *Bryant Chucking Grinder Co.* v. *National Labor Relations Board*, 389 F. 2d 565, 568 (C.A. 2, opinion of Judge Hays), compare 569, n. 1 (concurring opinion of Judge Friendly), certiorari denied, 392 U.S. 908. Notwithstanding these differences, the Second Circuit has not adopted the position of the Fourth Circuit. *National Labor Relations Board* v. *S. E. Nichols Co.*, 380 F. 2d 438, 441, n. 1 (C.A. 2); *National Labor Relations Board* v. *United Mineral and Chemical Corp.*, 391 F. 2d 829, 836, n. 10 (C.A. 2).

thority.[15] Instead, it has announced the general principle that "authorization cards are such unreliable indicators of the desires of the employees" (*Gissel*, App. A, *infra*, p. 3a) "that an employer is justified in entertaining a good faith doubt of the union's claims when confronted with a demand for recognition based solely upon union authorization cards" (*Heck's*, App. D., *infra*, p. 79a).[16] In practical effect, this special rule of the Fourth Circuit means that in

[15] In a fourth case, *Benson Veneer Co.* v. *National Labor Relations Board* (C.A. 4), No. 10446, July 8, 1968, 68 LRRM 2692, the primary ground of decision was that the union did not represent a majority of the employees when the company refused to bargain with it, and that the Board's contrary finding was without substantial evidentiary support. The Board has not petitioned for certiorari in that case, because that rationale involves only a factual question not warranting further review.

[16] A corollary of this principle is the rejection of the Board's rule that if, contemporaneously with or shortly after refusing the union's request for recognition, the employer engages in substantial unfair labor practices which make a fair election impossible, such conduct provides a basis for inferring that the employer did not have a good faith doubt as to the union's majority status. See *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 741 (C.A.D.C.), certiorari denied, 341 U.S. 914, where, in upholding that rule, the court explained:

> It has been held that an employer may refuse recognition to a union when motivated by a good faith doubt as to that union's majority status * * *. When, however, such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in section 8(a)(5) of the Act * * *. The Act provides for election proceedings in order to provide a mechanism whereby an employer acting in good faith may secure a determination of whether or not the union does in fact have a majority and is therefore the appropriate

that circuit, and in that circuit alone, a union may establish its majority status only by winning a Board election; and that the Board, irrespective of the employer's contemporaneous misconduct calculated to undermine the union, cannot require him to bargain with it even though it has obtained cards signed by a majority of the employees, in circumstances revealing no specific basis for employer doubt of their validity,[17] authorizing the union to represent them in collective bargaining.

Since the first of the Fourth Circuit's decisions announcing this new approach, four courts of appeals have specifically considered and rejected it. "Actually what the company is contending here is that signed authorization cards are so unreliable that it has a right to reject a request for recognition based on them and insist upon an election. We have already rejected this proposition in this circuit." *NLRB v. Sinclair Co.* (C.A. 1), No. 7069, July 3, 1968, 68 LRRM 2720, 2723. "The company has not contended that, as held by the Fourth Circuit * * * an employer is not required under any circumstances to recognize a union on the basis of a card majority. As to this we adhere to what was said in *NLRB v. S. E. Nichols Co.*, 380 F. 2d 438, 441 n. 1 (2d Cir. 1967)." *National Labor Relations Board v. United Mineral & Chem. Corp.*, 391 F. 2d 829,

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agent with which to bargain * * *. Certainly it is not one of the purposes of the election provisions to supply an employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by the union * * *.

[17] See p. 11, *supra*.

836 n. 10 (CA 2). "This Circuit, as do others, follows the rule that 'an employer cannot refuse recognition pending an election unless it doubts in good faith that the union has a majority.' * * * But see *NLRB v. S. S. Logan Packing Co.*, 4 Cir., 1967, 386 F. 2d 562." *National Labor Relations Board v. Goodyear Tire & Rubber Co.*, 394 F. 2d 711, 712–713 (CA 5). "We note with interest the views of the Court of Appeals for the Fourth Circuit expressed in *N.L.R.B. v. S. S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967). * * * We do not * * * agree with the view which we think is implied in the *Logan* case, that the 1947 Taft-Hartley amendment to section 9(c) of the Act served to impose restrictions upon the powers of the NLRB to fashion appropriate remedies for employer violations of the unfair labor practice sections of the NLRA." *National Labor Relations Board v. Atco-Surgical Supports*, 394 F. 2d 659, 660 (CA 6).

The continued existence of such different rules on this important issue in labor management relations impairs the uniformity of national labor policy that the Act was designed to achieve (cf. *Garner* v. *Teamsters Union*, 346 U.S. 485, 490–491).

Moreover, the rule of the Fourth Circuit would seriously impede the establishment of successful bargaining relationships in a substantial geographical area where union organizational activity is at a peak. The Board's experience has been that an employer who declines to bargain with a union which has authorization cards from a majority of the employees

frequently engages in significant unfair labor practices designed to undermine the union's majority and to prevent it from winning an election. Such unfair practices often have such a serious impact upon the employees that their effects cannot adequately be dissipated merely by setting aside the election, which the union has lost, and holding a new one. In such circumstances, an order directing the employer to bargain often is the only effective means of remedying the other unfair labor practices the employer committed during the organizational campaign (see *National Labor Relations Board* v. *Sehon Stevenson & Co.*, 386 F. 2d 551, 556–557 (C.A. 4, concurring opinion of Judge Sobeloff)).[18]

2. The Fourth Circuit's rationale of its rule rests upon two premises, neither of which is valid: (a) that union authorization cards are inherently unreliable as an indication that the employees want the union to represent them; and (b) that Congress, in amending the Act in 1947, intended to make a Board election the only method for resolving questions about a union's majority status. See *National Labor Relations Board* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 565–566, 568–570 (C.A. 4).

[18] Although the Fourth Circuit has left the door open to such orders in "extraordinary cases," where they may be used "without need of answering the question whether the union ever obtained majority status," *Heck's*, App. D, p. 79a; *National Labor Relations Board* v. *S.S. Logan Packing Co.*, 386 F. 2d 562, 570–571 (C.A. 4), it plainly considers that it, rather than the Board, is the appropriate agency to consider the extraordinariness of any given case. In this respect, too, it has usurped the Board's function, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488. See also *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 704–705.

(a) Although there have been abuses in the unions' use of authorization cards—primarily misrepresentations as to whether by signing the cards the employees were designating the union as their representative or merely authorizing it to seek an election to determine that issue[19]—it does not follow that such cards are inherently unreliable. On the contrary, for more than thirty years they have been used as a means of establishing a union's representative status under the Act. This Court has recognized the propriety of such use. In *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62—a case decided nine years after the 1947 amendments—the Court held that a State court improperly had enjoined peaceful picketing to obtain recognition for a union, because the subject matter of the suit was within the exclusive jurisdiction of the Board. The union had obtained signed authorization cards from a majority of the employees, but had not filed certain data with the Secretary of Labor or non-Communist affidavits with the Board, as the Act then required. The Court held that, although such nonfiling would have precluded the union from being certified by the Board as the representative of the employees, that fact did not make the Act inapplicable. The Court pointed out that even if the union had filed the data and affidavits, "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recog-

[19] See, *e.g.*, *Crawford Mfg. Co.* v. *National Labor Relations Board*, 386 F. 2d 367 (C.A. 4), certiorari denied, 390 U.S. 1028; *National Labor Relations Board* v. *S. S. Logan Packing Co.*, *supra*.

nition of the union would have violated § 8(a)(5) of the Act" (pp. 68–69); that nothing in the Act provided that, despite the failure to file such data and affidavits, "the union may not represent an appropriate unit of employees if a majority of those employees give it authority to do so" (p. 71); that Section 9(a), "which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen" (p. 71); and that "[a] Board election is not the only method by which an employer may satisfy itself as to the union's majority status" (p. 72, n. 8). This Court thus recognized that a union could ground its representative status upon authorization cards. For that was the sole basis upon which the union sought recognition, and the union's right to represent the employees was a keystone to the holding that the subject matter of the suit was preempted by the National Labor Relations Act. See also, *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702.

If in a particular case union authorization cards have been misused—although in the present cases the Board found that there had been no misuse and the court of appeals did not disturb that conclusion [20]—the proper remedy is to hold that the union did not

[20] As already stated, *supra*, p. 11, evidence of misrepresentation or misunderstanding was presented only in the *General Steel Products* case; the trial examiner and the Board found the challenged cards valid, but this ruling apparently played no part in the court of appeals' refusal of enforcement.

The standard by which the Board determines the validity of challenged cards, which was involved in three cases in which certiorari was denied last Term (*National Labor Relations Board* v. *Crawford Mfg. Co.*, 390 U.S. 1028; *Preston Prod. Co.*

represent a majority of employees when it sought recognition in that case, or that the employer—if he was aware of the infirmity—had a good faith doubt. But the fact that there are instances of misuse does not justify a court-promulgated rule that a union never may establish its majority status on the basis of such cards, or that an employer's claim of doubt as to the union's majority status must always be deemed to have been asserted in good faith when the union's claim rests upon cards.

(b) The court of appeals also erred in concluding that in the 1947 amendments to the Act Congress intended to make a Board election the sole method by which a union could establish its majority status. The House bill would have amended Section 8(a)(5) so as to make it an unfair labor practice only if an employer failed to bargain with a representative "currently recognized by the employer or certified as such under section 9."[21] But the Conference Committee rejected this proposal and left unchanged the Wagner Act provision[22] making it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) does not require a Board election. It simply provides that "[r]epresentatives designated or selected * * * by the ma-

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v. *National Labor Relations Board*, 392 U.S. 906; *Bryant Chucking Grinder Co.* v. *National Labor Relations Board*, 392 U.S. 908), is not at issue in the present cases.

[21] Section 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. of the LMRA (1947) 51; H. Rep. No. 245, 80th Cong., 1st Sess. 30, 1 Leg. Hist. (1947) 321.

[22] H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41, 1 Leg. Hist. (1947) 545.

jority of the employees in a unit * * * shall be the exclusive representatives of all the employees in such unit";[23] it does not, however, prescribe the procedure by which the employees shall designate or select their representative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
ABIGAIL COOLEY BASKIR,
Attorney,
National Labor Relations Board.

SEPTEMBER 1968.

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[23] To be sure, Section 9(c), which provides the procedure by which the Board certifies a union as a representative, was amended to eliminate the phrase "any other suitable method to ascertain such representatives." However, the effect of this change was merely to preclude the Board from issuing a *certification* on the basis of a card check as it had sometimes done under the Wagner Act (see S. Min. Rep. No. 105, 80th Cong., 1st Sess. 34, 1 Leg. Hist. (1947) 496). Since certification has significance to a union over and above establishing it as the representative of the employees with whom the employer has a duty to bargain—see *General Box Co.*, 82 NLRB 678, 680–682—Congress' action in changing the certification procedures was not inconsistent with its rejection of the proposed amendment to Section 8(a)(5).

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320-064—68——1

APPENDIX A

United States Court of Appeals for the Fourth Circuit

No. 11228

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

GISSEL PACKING COMPANY, INC., RESPONDENT

FOOD STORE EMPLOYEES UNION, LOCAL #347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, INTERVENOR

On Petition for Enforcement of an Order of the National Labor Relations Board

(Argued January 11, 1968. Decided June 28, 1968.)

Before HAYNSWORTH, Chief Judge, and BOREMAN and WINTER, Circuit Judges

Paul J. Spielberg, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Francis Flannery, Attorney, National Labor Relations Board, on brief) for Petitioner; C. Robert Schaub (Jenkins, Schaub & Fenstermaker on brief) for Respondent, and Albert Gore (Judith A. Lonnquist, and Jacobs and Gore on brief) for Intervenor.

PER CURIAM:

The National Labor Relations Board petitions for enforcement of its order [1] directing respondent, Gissel Packing Company, Inc. to take certain steps to remedy violations of the National Labor Relations Act [2] found by the Board to have occurred. We decline enforcement of that portion of the order directing respondent to bargain with the union upon request.

Respondent is a West Virginia corporation engaged in the slaughtering, processing, and wholesaling of beef and pork products. Amalgamated Meat Cutters and Butcher Workmen of North America, the union, attempted to organize certain of respondent's employees in 1960 and 1961. The Board directed that an election be held, but the union was defeated. About the middle of January, 1965, the union began a second campaign to organize respondent's employees, and it is out of this campaign that this controversy arises.

The Board concluded that during the 1965 campaign respondent violated Section 8(a)(1) of the Act by coercing its employees in the exercise of their rights under the Act and Section 8(a)(3) by discharging two employees because of their union membership and activity. Substantial evidence on the whole record, though not uncontradicted, exists to support these findings, and we enforce that portion of the Board's order requiring respondent to remedy these violations.

We are unable, however, to accept the Board's determination that respondent violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the union upon request, for the evidence is insufficient to support a finding that respondent did not have a good faith doubt as to the union's majority status when confronted with the demand for recognition. On

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[1] 157 NLRB No. 94.

[2] 20 U.S.C.A. § 151 *et. seq.*

January 22, 1965, union representative Spencer informed respondent that the union represented a majority of the employees in a certain unit and requested recognition, basing his claim upon possession by the anion of signed authorization cards from 31 of the 47 unit employees. Respondent replied through its agents that it doubted the union's claim, and invited Spencer to file for a Board election. The bases of its doubts were buttressed by the fact that a few years earlier the union lost a valid secret election after a similar claim of majority status.

In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election.[2] The reasoning elaborated in those decisions applies with equal force here, and we decline enforcement of that portion of the Board's order requiring respondent to bargain with the union.

Enforcement granted in part and denied in part.

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[2] Crawford Mfg. Co. v. NLRB, 4 Cir., 386 F. 2d 367, cert. denied 36 LW 3403, ____ U.S. ____; NLRB v. S. S. Logan Packing Co., 4 Cir., 386 F. 2d 562; NLRB v. Sehon Stevenson Co., Inc., 4 Cir., 386 F. 2d 551; NLRB v. Heck's, Inc., 4 Cir., ____ F. 2d ____ (decided this day).

APPENDIX B

United States Court of Appeals for the Fourth Circuit

No. 11228

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

GISSEL PACKING COMPANY, INC., RESPONDENT

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, INTERVENOR

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Gissel Packing Company, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns on the 25th day of March, 1966, in a proceeding before the said Board known upon its records as Case Nos. 9–CA–3472 and 9–CA–3583; upon the answer of the said Respondent, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the said order of the National Labor Relations Board be, and it is hereby, enforced as to that portion dealing with the violations of §§ 8(a) (1) and (3) of the National Labor Relations Act, and that enforcement with regard to that portion of the order requiring respondent to bargain with the union is denied; and that the said Respond-

ent, Gissel Packing Company, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said order as so enforced contained, in accordance with the opinion of the Court filed herein.

(S) CLEMENT F. HAYNSWORTH, Jr.,
Chief Judge, Fourth Circuit.

[Filed: June 28, 1968, Samuel W. Phillips, Clerk.]

A True Copy, Teste: Samuel W. Phillips, Clerk.
By Margaret L. Davis.

APPENDIX C

United States of America, Before the National Labor Relations Board

Cases Nos. 9–CA–3472, 9–CA–3583

GISSEL PACKING COMPANY, INC.

and

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO

DECISION AND ORDER

On December 14, 1965, Trial Examiner Rosanna A. Blake issued her Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's

Decision, the exceptions,[1] and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modification noted below.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Gissel Packing Company, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C., March 25, 1966.

[SEAL] JOHN H. FANNING,
Member.
GERALD A. BROWN,
Member.
SAM ZAGORIA,
Member.
National Labor Relations Board.

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[1] The Respondent excepted to the credibility findings made by the Trial Examiner. It is the Board's established practice, however, not to overrule a Trial Examiner's resolutions with respect to credibility unless, as is not the case here, the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd, 188 F. 2d 362 (C.A. 3).

[2] In adopting the Trial Examiner's conclusion that the Respondent violated Section 8(a)(5) of the Act, we need not rely upon her interpretation of the Supreme Court's opinion in *International Ladies' Garment Workers Union (Bernhard-Altmann Texas Corp.)* v. *N.L.R.B.*, 366 U.S. 731, as set forth in footnote 41 of the Trial Examiner's Decision.

The following inadvertences contained in the Trial Exam-

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Washington, D.C.

Case Nos. 9–CA–3472, 9–CA–3583

GISSEL PACKING COMPANY, INC.

and

FOOD STORE EMPLOYEES UNION, LOCAL #347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO

Jack V. Baker, Esq., for the General Counsel, *John E. Jenkins, Jr., Esq.,* Huntington, W. Va., for the Respondent, *Woodrow R. Gunnoe,* Business Representative, Charleston, W. Va., for the Charging Party.

Before: ROSANNA A. BLAKE, Trial Examiner

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon charges filed on February 11 and May 12, 1965, by the Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, the General Counsel, acting through the Regional Director for the Ninth Region, issued complaints on March 31 and June 21, 1965. On the latter date, the Regional Director also issued an order consolidating the two cases for hearing. The complaints alleged that Respondent

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iner's Decision are hereby corrected: "September 1965" is changed to "September 1964" (p. 11, line 39); "November 1963" is changed to "November 1964" (p. 17, line 55); "April 1963" is changed to "June 1963" (p. 26, line 22).

had engaged in conduct which violated Section 8(a) (1), (3) and (5) of the Act. In its answers, Respondent admitted certain allegations of the complaints, such as the commerce allegations, but denied having committed any unfair labor practice.

Thereafter, pursuant to due notice, a hearing was held before the undersigned Trial Examiner at Huntington, West Virginia, on August 4, 5, 6, and 17, 1965. All parties were represented and were given full opportunity to present evidence, to examine and cross examine witnesses, to argue orally and to file briefs. The parties waived oral argument and no briefs were filed.

Upon consideration of the entire record and upon my observation of the witnesses while testifying, I make the following:

Findings of Fact

I. THE BUSINESS OF RESPONDENT; THE LABOR ORGANIZATION INVOLVED

Gissel Packing Company, Inc., herein at times called the Company or the Respondent, is a West Virginia corporation with its principal office and place of business in Huntington, West Virginia. It is engaged in the slaughtering, processing, and non-retail sale of beef and pork products. In the 12 months prior to the issuance of each of the complaints, each a representative period, Respondent had a direct inflow of products and livestock, in interstate commerce, valued in excess of $50,000, which was purchased and shipped directly to its plant from points outside the State of West Virginia.

Upon the foregoing undisputed facts, Respondent admits and I find that it is an employer engaged in

commerce within the meaning of Section 2 (2), (6), and (7) of the Act.

It is also undisputed and I find that Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The issues

The complaints allege that Respondent engaged in conduct, such as interrogation, threats, and surveillance, which constituted interference, restraint, and coercion, that it discharged two employees because of their Union membership and activity, and that it violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union which represented a majority of its employees in an appropriate bargaining unit. In turn, Respondent contended that it had not engaged in any conduct which violated Section 8(a) (1) of the Act, stated that the employees were not discharged but quit, and asserted that it refused to bargain with the Union because it doubted both the Union's majority and the appropriateness of the bargaining unit.

As in many Board cases, the conclusions reached depend in considerable part upon whether the Examiner credits the witnesses called by the General Counsel or those called by Respondent. Having observed the demeanor of the witnesses and having considered the testimony in the light of all of the circumstances, I have concluded that some of the witnesses for each party testified truthfully in some respects and untruthfully in others. Although the general impres-

sion seems to be that a witness is either completely truthful or completely untruthful, "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *N.L.R.B.* v. *Universal Camera Corp.*, 179 F. 2d 749, 754 (C.A. 2). As a result, "It is no reason for refusing to accept everything a witness says, because you do not believe all * * *." that he says. (*Ibid.*)

In each case, the degree of the interest of the witness in the outcome of the proceeding has been considered in determining his credibility. Some of the witnesses for both sides had a financial interest in the outcome of the proceeding while the interest of others was more subjective, such as an interest in seeing the General Counsel and, indirectly, the Union win or lose. As the Supreme Court said in *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S 404, 408:

> For the demeanor of a witness
>
> > "* * * may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, *who has a motive to deny,* may be uttered with such hesitation, discomfort, arrogance, or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer* v. *McDougall,* 201 F. 2d 265, 269. [Emphasis supplied.]

Similarly, the court observed in *N.L.R.B.* v. *Warrenburg Board & Paper Corporation,* 340 F. 2d 920, 923 (C.A. 2), that "The testimony of those who attempted to buttress the Respondent's position was of questionable value since two of the witnesses were closely identified with the Company's management and the others, although originally Union members, were not shown to have retained their membership." And the court pointed out in *N.L.R.B.* v. *Radcliffe,* 211

F. 2d 309, 315 (C.A. 9), certiorari denied, 348 U.S. 833, that the Board "rightfully may decline to credit the testimony of interested witnesses, even though such testimony is uncontradicted."

As will appear, I have credited the testimony of most of the witnesses called by counsel for the General Counsel and have discredited much of the testimony of the witnesses called by Respondent. However, I have not credited the testimony of Herbert Mount, Jr., a witness for the General Counsel, except in those cases in which it is corroborated by similar testimony given by credited witnesses or other record evidence.[1] In other words, the conclusionary findings and the recommended order set forth *infra* would be the same even had Mount not been a witness. My inability to accept Mount's uncorroborated testimony is based in part upon his evasive manner while testifying and in part upon the conflicts between his testimony and his pre-hearing affidavit and lesser conflicts in his testimony at the hearing. On the other hand, when it has been found that a management representative made a statement to a creditable witness, I see no reason to doubt that the same representative made a similar statement to Mount or in his presence. Moreover, it is clear from the testimony of one of Respondent's witnesses that Mount was testifying truthfully in part, *i.e.*, when he asserted that he saw Terry Lewis, the son of one of the Company vice presidents, at a hotel before a Union meeting and heard Lewis make a telephone call to his aunt, Company Secretary-Treasurer Alfreda Closterman, at the plant. (See *infra*).

The presence of Lewis at the hotel has played an important part in my failure to credit most of the

[1] In addition, I have credited little of the testimony of General Counsel's witness Maynard other than that which could have been and was not refuted by available records. (See *infra*.)

testimony of Company Vice President Karl Gissel, who is referred to in the record and herein as Charles Gissel. Although Gissel's testimony is frequently indirect (see *infra*), he sought to create the impression that he did not make the statements attributed to him by witnesses for the General Counsel. In support of his statements, Gissel repeatedly asserted that the Company had learned, as a result of a prior election and unfair labor practice proceeding, what it could and could not do in connection with a Union campaign. However, the admitted presence of Lewis at the hotel is wholly inconsistent with Gissel's claim that the Company was determined not to commit any unfair labor practice during the 1965 Union campaign. No doubt, the Company was given good advice and made good resolutions about how it would conduct itself. Unfortunately, it is often difficult to heed good advice and keep good resolutions when faced with the very situation to which the advice and resolutions were intended to apply.[2] As noted by the court in *Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F. 2d 100, 103–104 (C.A. 5):

> When, as done here, an employer sets out to campaign against a union, one of the risks is that out of zeal, ignorance, or otherwise, foremen, supervisors, and similar representatives in championing the anti-union cause will overstep the mark.

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[2] When Charles Gissel was asked, "What is a 'Gissel fit'?" he answered, "You ask them boys (indicating); they will tell you. It is no more than a man getting mad and cussing and raising hell." Although Gissel said that he had been warned that the Union employees would try to make him mad, he did not quote even one provocative statement made by an employee. Vice President Herbert Gissel also admitted that he gets mad and that "yelling and cursing" is not uncommon around the plant.

Finally, I have taken into consideration the Company's failure to adduce documentary evidence, such as employee timecards, which were admittedly in existence, and which could have been produced to corroborate critical portions of Charles Gissel's testimony which were contrary to claims made by witnesses for the General Counsel. *N.L.R.B.* v. *Collins & Aikman Corporation,* 146 F. 2d 454, 456 (C.A. 4). There had been ample time to obtain records for there was a 10 day adjournment prior to the day on which Gissel testified and some documentary evidence was offered by Respondent and received into evidence that day. Therefore, I can only assume that the cards were not offered because they would not have supported Gissel's statements. *Interstate Circuit* v. *U.S.* 306 U.S. 208, 225–226; *N.L.R.B.* v. *Conlon Bros. Mfg. Co.,* 187 F. 2d 329, 332 (C.A. 7); *N.L.R.B.* v. *A.P.W. Products Co.,* 316 F. 2d 899, 903 (C.A. 2); *N.L.R.B.* v. *Wallick,* 198 F. 2d 477, 483 (C.A. 3).

B. Background

In late 1960 or early 1961, the same Union claimed to represent a majority of Gissel's employees and filed a representation petition with the Board. A hearing was held and the Board issued a Decision and Direction of Election on January 27, 1961 (Case No. 9-RC-3966), in which it found the following unit appropriate for the purpose of collective bargaining:

> All production and maintenance employees of the Employer at its Huntington, West Virginia, plant including truck drivers, truck driver salesmen and the janitor, but excluding office clerical employees, salesmen, professional employees, guards, officers of the Employer, the salesmen foreman, the truck salesmen foreman, the working foremen of the processing and packaging department, the slaughter house, the freight and

delivery department, and the maintenance department, and all other supervisors as defined by the Act.[3]

An election was subsequently held and the Union lost.

The Union filed unfair labor practice charges against Gissel, apparently in 1960, a hearing was held in May, 1960, and on July 21, 1960, a Trial Examiner issued an Intermediate Report, to which no exceptions were filed, in which it was found that Respondent's president, Paula Gissel (Mrs. R. E. Gissel) informed the employees in a speech that the Company would not recognize the Union even if the employees desired representation, that she would close the plant or greatly curtail its operations rather than accept the Union; and "clearly implied" that the employees would be given the benefit of group insurance if they rejected the Union.[4] It was also found that her son, Vice President Herbert Gissel, told a group of employees that the Company would not accept the Union, that there would be discrimination against employees who joined the Union, and that management might close the plant or run it on a smaller basis if the Union came in.

In addition, it was found that another son, Vice President Edward Gissel, told a group of employees

[3] This is the unit set forth in the complaint as appropriate for bargaining. An issue was raised in the 1961 proceeding concerning the truck driver salesmen and the Board found that they "like the truck drivers, have sufficient interest in common with the production and maintenance employees" to warrant including them in the unit. As set forth *infra*, the Company contended in the instant case that the unit for which the Union sought to bargain was inappropriate because the truck driver salesmen were included.

[4] This Intermediate Report was received and has been considered only as the Union's explanation of why it did not file a representation petition during the 1965 Union campaign.

that Mrs. Gissel would close the plant before she would let a union represent them. The foregoing conduct was found to violate Section 8(a)(1) of the Act. Allegations that the Company engaged in other conduct violative of Section 8(a)(1) were found unsupported by the record. *Gissel Packing Company*, Case No. 9-CA-2068.

C. The refusal to bargain

(1) *The request and refusal*

The Union began its second campaign among Respondent's employees about the middle of January, 1965. As set forth *infra*, there are, at most, 47 employees in the unit alleged by the complaint to be appropriate for collective bargaining and 31 of them signed authorization cards between January 13 and January 22, 1965.

On January 22, Union Representative Sherwood Spencer made a telephone call to Company Vice President Charles Gissel. He asked Gissel if the latter remembered him and Gissel said that he believed he did.[5] Spencer then told Gissel that the Union represented a majority of the employees and requested recognition and bargaining. Gissel replied that Spencer would have to talk to the Company's attorneys and gave Spencer the name of at least one of them. (According to Gissel, when Spencer said he "wanted to talk about the Union, I refused to answer him, I refused to answer his questions.")

That same day, Spencer wrote Charles Gissel:

> This letter will confirm our telephone conversation earlier today in which I requested recognition and bargaining for the eligible employees in your plant. Our Union represents a majority of your eligible employees and we are prepared

[5] Spencer was apparently involved in the 1960–1961 campaign and hearing.

to deliver to you our signed application cards for the purpose of checking them against your payroll so that there will be no possible doubt as to our majority status. We stand ready and willing at any time to deliver these to you or to your representative for the purpose of ascertaining our majority status.

P.S. Eligible employees of your plant includes [sic] truckdrivers.

By letter dated January 26, Vice President Charles Gissel told Spencer:

> We acknowledge your letter of January 22 and your telephone conversation of the same date at which time you advised us you would contact us further about your Union's interest in representing employees of our Company.
>
> We refuse to recognize your Union as the representative of our employees because you do not represent a majority of them. At an earlier election conducted by the National Labor Relations Board you contended that you represented a majority of our employees, but when the election was held an overwhelming majority of the employees rejected your Union and we do not believe that there has been any change in circumstance or opinion of our employees since that time.
>
> We are advised that it is the current organizing technique of your Union to obtain signatures on so called application cards by a variety of means and representations which are not compatible with a free exercise of an employee's choice. We are advised of instances of direct misrepresentation in obtaining employees' signatures by your Union under such circumstances. Employees' signatures are not a free expression of employees' sentiments with respect to Union representation as provided for under the National Labor Relation Act.
>
> Your letter of January 22 suggests that you desire to represent certain employees of our

plant including truck drivers and we do not know who "eligible employees" are as used in your letter and we further do not think that the truck drivers are a part of any appropriate bargaining unit.

If you really represent in your opinion a majority of the employees of our plant, we think that you would have heretofore petitioned the National Labor Relations Board to hold a fair and honest election, giving our employees the right to express their opinion as provided for under Section 7 of the Act, and their choice could be made in an appropriate bargaining unit in a fairly conducted election.

On February 10, Union Representative Spencer wrote Charles Gissel:

This letter will acknowledge your reply to our letter of January 22, showing date of January 26, 1965.

We note that you are refusing to recognize our union as a representative of the employees because you claim we do not represent a majority. You further advise us that it is your understanding that it is our current organizing technique to obtain authorization cards from the employees in order that we may claim representation. You go on further to say that we previously indicated that we represented a majority of the employees and when an election was held the Union was overwhelming defeated. All of this is true.

1. We are certain that the employees of your plant understand well what representation by our Union means to them and when they sign one of our authorization cards they are giving us the right to bargain for them.

2. There is nothing illegal in our requesting representation and bargaining without an election of the employees.

3. The coercion and intimidation and illegal interrogation and threats which occur between

the time an election is petitioned and the actual election by the employers is most difficult for us to combat. The N.L.R.B. and the courts have recognized that an election is no longer necessary when we actually represent a majority of the employees.

We are again offering to deliver to you or to your representative copies of our signed authorization cards which have been signed by a wide majority of your employees. There can be no doubt as to our position with regard to representation if you accept our offer and check these signed authorization cards against payroll records in your office.

We are certain that your claim that the employees do not know what they are doing with respect to signing these cards is in error. We hold a much greater regard for the intelligence of your employees. Therefore, we find we have no choice except to file charges against the company for failure to recognize our Union and failure to bargain with us as representatives of the employees because you can no longer express any good faith doubt as to our representation.

In his letter in reply, dated February 12, Vice President Charles Gissel stated that there was nothing "illegal" about the Company's refusal to bargain because it "honestly" doubted the Union's majority. He repeated that an election should be conducted by the Board and further declared that the Union's reference to "coercion", "intimidation", "illegal interrogation", and "threats" by employers did not apply to Gissel. The Union's "approach", the letter went on, "bolsters our opinion that you do not really honestly represent a majority of the employees." In addition, Gissel charged that the Union was using "These pressures and scare tactics in order to get around [the] expression of the true wishes of our employees * * *." Fi-

nally, the Company said that although it regretted the possibility of unfair labor practice charges, it still doubted the Union's majority and therefore saw no alternative except to allow the matter to be "determined according to the law."[6]

In its reply of February 16, the Union reiterated its offer to submit the signed cards to the Company and its belief that the employees knew what they were doing when they signed the cards.

Neither the Union nor the Company filed a representation petition as provided for by Section 9 of the Act.

Vice President Charles Gissel testified that upon receipt of the Union's request for recognition

> We talked it over among ourselves and decided maybe they might not have a majority because the other time [the Union did not have a majority]. They lost the election.

As for its contention that the unit for which the Union was seeking to bargain was inappropriate, Gissel testified that the Company regarded the "peddle drivers" as salesmen who should not be in the

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[6] Although all of the Company's letters to the Union are signed Karl (or Charles) Gissel, on or about February 12, the following notice was posted at the plant:

February 12, 1965.

"NOTICE"

ALL EMPLOYEES ARE NOTIFIED THAT NO ONE IS AUTHORIZED TO REPRESENT THE VIEWS OF THE COMPANY [ON] ANY LABOR OR UNION MATTERS, EXCEPT ALFREDA CLOSTERMAN. IF ANYONE ATTEMPTS TO DO SO, YOU ARE TO REPORT IT AT ONCE TO ALFREDA CLOSTERMAN IN WRITING.

GISSEL PACKING CO., INC.,
KARL GISSEL

unit.[7] When asked on cross-examination whether Union Representative Spencer said "anything about selling," Gissel answered, "I don't know, I would have to study the letter and see. I didn't read it that far."[8]

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[7] Some of Respondent's regular rank-and-file employees occasionally drive trucks locally and it apparently does not object to their inclusion in the unit. Peddle drivers, who are at times referred to as truck driver salesmen, do not work the fixed schedule of the other employees. In addition, they are paid a salary plus commission whereas the production and maintenance employees are paid by the hour. Of course, the peddlers spend most of their time away from the plant.

[8] Respondent introduced evidence concerning alleged misconduct which, presumably, was offered to justify its refusal to bargain. Employee Rush Moore was asked about "incidents" which began "in January" and told about a stolen coat which was soiled in a vulgar manner. The owner of the coat was not a witness nor was any evidence offered indicating who had committed the act. Moore also listed the appearance of a newspaper clipping about the Union campaign. Both Moore and employee Daniel Ellis testified that several trucks blew up and that when they "felt" the oil it "felt" as if there was sand in it. Both Moore and Ellis testified that samples of the oil, which was purchased from the Pure Oil Company, were sent to that company for analysis but that no report had yet been received, *i.e.* in August. I do not believe that a company like Pure Oil would *delay 6 months* in analyzing the oil and reporting the results, a request which cast doubt on the purity of its product. No doubt employees Moore and Ellis believed that no report had been received, but I am convinced that Pure Oil sent a report and that it was not introduced into evidence because it did not substantiate the company's claim. See cases cited *supra*. I note, also, that Ellis recommended that the Company buy its oil from another company, that this was done, and that there had been no trouble since. Ellis could not say definitely that the oil purchased from Pure Oil was new oil although he said that it "shouldn't" have been used oil. In the light of the above facts, I cannot find that there was sand in the oil.

(2) *The unit and the authorization cards*

As set forth *supra,* the unit established by the Board in 1961 included truck drivers and "truck driver salesmen" (or peddlers) but excluded, *inter alia,* office clerical employees, salesmen, officers of the Employer, the foremen of various named departments, and "all other supervisors as defined by the Act."

Respondent is a family business of which Mrs. R. E. (Paula) Gissel is president. Her sons and daughters, including Charles (K. H.) Gissel, Herbert Gissel, E. W. Gissel, and Edith Gissel Lewis are vice presidents of the Company. Alfreda Closterman is the secretary-treasurer. Charles Gissel is also supervisor of the shipping department and admittedly hires and fires employees in that department; Herbert Gissel is the supervisor of the sausage department and also hires and fires employees in that department; Leoris Gissel also has authority to hire and fire employees in her department; W. R. Mollohan is foreman of the boning department; R. B. Simon is a supervisor in the shipping department; and Clifford Carley is sales supervisor.[9] These 10 persons are therefore "officers of the Employer" and/or supervisors and, as such, are excluded from the unit. There are also two office employees (Martin and Curtis) and two salesmen (Jordan and Springle.)

When these 14 names are substracted from the 61 on the January 22, 1965 payroll, it follows that there are, at most, 47 employees in the bargaining unit.

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[9] In its 1961 Decision and Direction of Election, the Board did not pass upon the question of Mollohan's supervisory status and ruled that he could vote in the election subject to challenge. At the instant hearing, Charles Gissel identified Mollohan as "foreman of the boning department."

There are also three assistant foremen or supervisors: Alfreda Hutchison, L. R. Hutchison, and Roman Edward "Eddie" Lewis.[10] If these persons are excluded from the unit as "supervisors as defined by the Act", there would be only 44 employees in the unit established by the Board in 1961.[11]

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[10] In its 1961 Decision, the Board included L. R. Hutchison in the unit because nothing in the record indicated that he enjoyed a "special status" because he is the son-in-law of one of the vice presidents. However, at the instant hearing, Charles Gissel described Hutchison as an assistant foreman in the sausage room and said that he "takes over" when Vice President Herbert Gissel is absent. He added, however, that Herbert Gissel is not absent very often. In its 1961 Decision, the Board held that the record was insufficient to enable it to determine whether Alfreda Hutchison and R. E. Lewis should be excluded from the unit and allowed them to vote subject to challenge. Charles Gissel testified at the instant hearing that Alfreda Hutchison is a "supervisor" in her mother's absence, and expressed the opinion that, during such periods, she "would probably have about the same authority as her mother." When asked if Alfreda Hutchison could "hire and fire and so forth" in her mother's absence, Gissel answered, "I think so, yes." (Alfreda Hutchison's mother is one of Mrs. Gissel's children.) R. E. "Eddie" Lewis is the son of Vice President Edith Lewis and Charles Gissel described him at the instant hearing as "a sort of assistant foreman" and said that he has the right to discipline employees who do not obey orders. R. E. Lewis was only 21 or 22 at the time of the hearing in August, 1965, and had only worked full time for 2 or 2½ years. This means that he was only 17 or 18 years old and a part-time employee in 1961 and it seems unlikely that he had any supervisory authority at that time.

[11] It has been assumed, for the purpose of determining the question of the Union's majority, that persons whose names appear on the payroll and who are not identified in the record are employees. Of course, they are not in fact in the unit if they come within any of the classifications excluded by the Board.

The record contains 31 cards. On each is the handwritten name of an employee who was in fact on the payroll on January 22 and a date, also handwritten. Only a few of the cards were identified by the employee whose name appears on the card. Most of them were identified by an official Union representative who testified that he saw the employee (whose handwritten name is on the card) sign the card on the date appearing on it.[12] The testimony of none of the Union representatives was disputed at the hearing and I find that the employees signed the cards on the dates which appear thereon. The persons on the January 22 payroll, their status, and the dates on which 31 of them signed cards are set forth in Appendix A, *infra*.

The cards, each of which bears a date no earlier than January 13 and no later than January 22, 1965, read as follows:

APPLICATION

FOOD STORE EMPLOYEES UNION, LOCAL #347

P.O. Box 2751, Charleston, W. Va.

The undersigned hereby authorizes this Union to represent his or her interest in collec-

[12] One card was identified by a fellow employee. The card of R. H. Hysell is marked with an "X" and is witnessed by Union Organizer Spitzer. Although Respondent presented evidence, which I credit, that Hysell can and does print his name, there is no evidence that he can write it. I also note that he was still employed by Respondent at the time of the hearing but was not called to deny Spitzer's testimony. Accordingly, I credit Spitzer's testimony and find that Hysell placed his "X" on the card as described by Spitzer. Kenneth Adkin's card is clearly dated January 19, 1965. Hysell's "signature" was the only one challenged by Respondent.

tive bargaining concerning wages, hours, and working conditions.

(Employer's name)	(Your name)
(Employer's address)	(Your street address)
(Date)[13]	(City and state)
	(Your telephone number)

Although Respondent asserted in its January 26th letter to the Union that it had been "advised of instances of direct misrepresentation in obtaining employee's signatures" on the cards, it introduced not a scintilla of evidence at the hearing in support of its assertion. And Respondent's witness, employee Rush Moore who did not sign a card, testified, "Of course, I knowed, you know, that all the guys, you know the biggest majority of them was for it." Moore is not a supervisor and his knowledge is not attributable to the Company. However, his testimony clearly reveals that he was aware of no conduct by the Union which caused him to believe that the employees who signed cards did so because of misrepresentations or pressures or for any other reason than the one stated on the card, *i.e.* that they wanted the Union to represent them in collective bargaining.

Furthermore, there is no evidence that, with one possible exception, any of the employees who signed cards changed his mind later. On the contrary, there is evidence that a substantial number of them, perhaps all but three, attended a Union meeting in April. (See *infra.*)

[13] In some cases, the date appears in the right-hand column and the line for the employee's telephone number is omitted.

D. Respondent's questioning of and statements to the employees

As noted *supra,* there was an unsuccessful Union campaign among Respondent's employees in 1960-1961.

In September, 1964, employee Jerry Lee Frye was in the office on business and Vice President Charles Gissel told him to shut the door and then asked if anyone had talked to Frye about the Union. Frye said "No" and Gissel told him, "Well, if you do or if I think you're talking to a stranger, that is a Union man, * * * I will fire you right now."[14] During the same period, Charles Gissel saw employee Herbert Mount, Jr. talking to a loan company representative at the plant and asked Mount if the man was a Union representative, stated that he did not believe that the man was from a loan company, and told Mount that employees "caught talking" to a Union representa-

[14] Frye impressed me as a forthright and reliable witness and I have credited his testimony generally. Gissel finally denied having made any such statement after asking, "Why should I * * * there was no union campaign going on back then." Gissel's testimony indicates, however, that he was aware of a campaign by the same Union in the summer of 1964 at the plant of another, Huntington packing company, S. S. Logan Packing Co. A hearing was held in the summer of 1964 in a case involving that Company arising out of a charge filed by the same Union. *S. S. Logan Packing Co.*, 152 NLRB No. 40. A hearing was also held in Huntington on September 8 and 9, 1964 as the result of an unfair labor practice charge filed against a third local packing company by the same Union. *Sehon Stevenson & Co., Inc.*, 150 NLRB No. 64. In short, it is probable that Gissel knew that Union representatives were in town in the summer and fall of 1964. Gissel's testimony discloses that he talked to one of the Logans about the Union sometime in 1965. And a joint union meeting of Gissel, Logan, and Sehon Stevenson employees was held in April, 1965.

tive would be "fired."[15] Frye and Mount signed Union cards in January, 1965, attended a Union meeting on April 17, and were discharged on April 22. (See *infra*).

As set forth *supra*, 31 employees signed cards between January 13 and 22, 1965 and on the latter date, the Union told Charles Gissel that it represented a majority of the employees and requested bargaining.

In the early part of February, employee Frye heard Charles Gissel ask employee Rush Moore, who does a "little bit of everything" and works all over the plant, if he knew or had heard anything about the Union, if

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[15] It often required a number of questions before Gissel denied having asked the questions or made the statements attributed to him by witnesses called by the General Counsel. See, for example, the following:

By Mr. JENKINS:

"Q. Back in September of 1964, Frye testified that in the office you asked him about the Union and made the statement to the effect that you would fire him if he had anything to do with the Union.

Did you make any such statement to Frye back in September of 1964.

"The WITNESS: Why should I, Your Honor, there was no Union campaign going on back then.

"Trial EXAMINER: Answer the question.

By Mr. JENKINS:

"Q. Would you answer my question?

"A. Well, like I said, there was no union campaign going on back then.

"Q. Then you did not have any conversation with him like that?

"A. No."

Having found that Gissel made the above statements in September, 1965, I find that Gissel told Mount in 1963, *i.e.* shortly after he was hired, that the shop was non-union and employees "caught" talking to a Union representative would be discharged. Of course, this statement has been considered only as background. See *N.L.R.B.* v. *Craig-Botetourt Electric Cooperative*, 337 F. 2d 374, 374–375 (C.A. 4).

any Union man had been around to sign him up. Moore answered "No" and Gissel then asked Frye if he knew anything about employee Don Kidd and asked Moore if he knew whether or not employee Don Kidd was the "leader of the Union." Moore again answered, "No," whereupon Gissel said that he would fire Kidd "right there" if he found out "for sure" that Kidd was the "leader." [16]

Although I doubt Mount's reliability in some respects, after serious consideration, I have credited his testimony that, during the same period, he heard Charles Gissel ask Moore "to find out all he could about the Union, who had signed cards, to report back to him." My decision to credit Mount's testimony in this respect and to discredit that of Gissel and Moore is based in considerable part upon Gissel's answer when questioned about the statement attributed to him

[16] I do not credit Mount's testimony that, during the same period, he heard Gissel tell one of the Company's suppliers that "maybe the Union was doing them a favor, that they could cut the slaughter house out * * * and have their meat shipped in." Although employee Kenneth Adkins testified that he heard Gissel say that it would be cheaper to have the meat shipped in and "get rid of most of the men in the back," Adkins stated that Gissel did not mention the Union during his conversation with the supplier. Gissel testified that the suggestion that the Company buy dressed hogs had been under consideration for 4 or 5 years. It is possible, of course, that the idea originated at the time of the 1960–1961 Union campaign. However, I do not find that Gissel indicated in his conversation with the supplier that the Company might close part of its operations because of the Union. In this case, Gissel's testimony was definite and clear. In a number of cases, Gissel was asked only if he "remembered" or "recalled" having made the statements attributed to him.

by Mount.[17] I have also considered Moore's testimony which discloses that the employees were reluctant to talk in his presence. In Moore's words, "Whenever, I walk around the plant if anybody is talking they all shut up and walk away from me." Finally, the admitted presence of a member of the Gissel family at a hotel just before a Union meeting in April (see *infra*) convinces me that the Company set out to learn the identity of the pro-union employees.

The afternoon after the Gissel-Moore-Frye conversation, Gissel asked Frye if he knew anything about the Union and Frye answered, untruthfully, that he did not. Gissel then wanted to know, "What did they offer you?" When Frye said that "they" did not offer him anything, Gissel told him, "I can offer you more than * * * they can."[18]

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[17] When asked the following question by Company counsel, Gissel gave the following answer:

"Q. Now * * * the testimony of Mr. Mounts was that you asked Rush Moore to find out about the Union and report back to you.

"Did you ever make that statement to Mr. Moore?

"A. Let me put it this way.

"During the time we had this Union trouble or however you want to put it, a Government man who handled the election * * * cautioned us not to comment, not to mention the Union at all.

"He said when any of the employees mentioned [the] Union, not to say anything.

"When any employee did mention the Union, I walked away."

There are too many such answers for me to believe that they were unintentional. (See *infra*.)

[18] Frye testified that he was interviewed at the plant by Respondent's attorney who said "something about he was from Cincinnati—had something to do with the Labor Board" or "was working [on] something about the Labor Board." Although I am convinced that Frye so understood Jenkins' statements, I credit the latter's denial that he identified him-

Tommy Lee Burchell, who was employed by the Company at the time he testified, heard about the Union from another employee shortly after he was hired. About a week after he began working, he talked to employee Mount on breaktime.[19] When Burchell

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self as connected with the Board. However, Jenkins did not testify about what he said exactly and I do not doubt that he mentioned the Labor Board and Cincinnati, where the Board's Regional Office is located. Jenkins testified that he introduced himself and a court reporter but could "not recall" whether or not he told Frye that he was the attorney for the Company. Nor could Jenkins "remember" whether he told Frye that he was "working for Gissel Packing Company or not," adding, "It is my recollection that I did but I am not sure that I did." He stated that the reporter "reduced to writing" every word that was said, including his "introduction", and admittedly had a copy of the transcript. However, he refused the Union representative's request that he produce it. Under these circumstances, I am convinced that Jenkins did not make it clear that he was an attorney for the Company. There were other cases of "mistaken identity" such as employee Adkins' belief that a Board representative was a Union representative. Nor am I impressed by Frye's inability to recall the name of the Union, *i.e.* Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. I have also considered Frye's inability to find the notes he made. No one had instructed him to keep the notes and they were in a little book which, unlike the check-stubs in the same box, could be used for some other purpose and disappear without intent to destroy the notes. If Frye wanted to conceal the notes, he had only to deny having made them.

[19] Burchell testified (in August) that he had been working for the Company "about seven month or a little longer." At another point, Burchell testified that he began working in February and that the above conversation was in February. However, Respondent's records indicate that Burchell was not hired until the first week in March. His inability to recall exactly when he was hired does not cause me to discredit his testimony. I also not that Burchell waited until May to sign

went back to work, Charles Gissel took him to the second floor and asked him where he met Mount. Burchell said that he had met Mount through the latter's wife. Gissel also asked if Mount said anything to Burchell about "a Union." Burchell answered in the negative and Gissel told him that Mount would be "bad" for him and that Burchell should stay away from Mount. In crediting Burchell's testimony I have considered Charles Gissel's testimony that Company Counsel Jenkins and Mr. Logan of the Logan Packing Company advised him "to watch the men coming in because the Union usually put men in to make trouble."

In April, Burchell stopped to talk to employee Lawrence Hysell who owed him some money. Burchell made a note of the amount and a few minutes later, Charles Gissel stopped Burchell and asked if Hysell was trying to get Burchell to go to a Union meeting or to sign a card. Burchell answered in the negative.

Employee Elmer Maynard was still employed by Respondent at the time of the hearing. He signed a Union card in January and Gissel asked him on one occasion if he was going "to walk out" if the others did.[20] (The Board's 1961 Decision and Direction of Election indi-

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a Union card which suggests that he was not sufficiently pro-union to risk his job by testifying falsely against his employer.

[20] Maynard's pre-hearing affidavit dated February 24, 1965 does not state that Charles Gissel asked him if he had been "brainwashed" and I do not credit his testimony in this respect. Although Maynard testified that Gissel asked him about "brainwashing" on several occasions, and the questions may have asked after he gave the affidavit, I am unwilling to so find. Maynard also testified that when Mount was discharged in February, Gissel told Mount that he did not "give a damn about the Union, he could stick it * * *." However, I think Maynard was mistaken about the date and that Gissel made the statement when he discharged Mount and Frye in April. (See *infra.*)

cates that there had been an economic strike sometime earlier.

Elisha Watts, who disclosed that he was strongly prounion, had been hired and fired a number of times over a period of 8 years. In February, he heard Charles Gissel tell a group of employees, "The hell with the Union * * * I'm going to leave [the plant] and turn it over to them." On a later occasion, Watts heard Vice President Herbert Gissel say in the presence of several employes, "I don't want to hear anymore about this Union stuff. If you can't do your work, get out." [21]

Kenneth Adkins, who was employed by the Company at the time of the hearing, signed a Union card in January. During that month, he heard Charles Gissel say that "If the Union got in, he'd just take his money and let the Union run the place the way they wanted to." Also in February, Adkins heard Vice President Herbert Gissel "bawling out" Watts and tell him that the Union was not going to "get in", that it would have to "fight him first." [22]

The notice posted by the Company in February stating that no one except Secretary-Treasurer Closterman was authorized to express the Company's views on Union matters has been considered in determining whether the two Gissel vice presidents engaged in the conduct attriubted to them. The notice suggests that Vice President Charles Gissel, whose name is signed to the notice,

[21] Watts was discharged about May 1, 1965. He admitted on direct examination that he did not hear Vice President Herbert Gissel say that he knew that Watts was "head" of the Union. This is not the testimony of a witness who was willing to testify falsely in order to establish a case against his employer.

[22] Herbert Gissel admitted that he gets "mad" and that both the Gissels and the employees engage in "yelling and cursing." Having considered his demeanor and his testimony as a whole, I cannot credit his testimony that he "never talked about the Union in the plant," testimony which he himself refuted later.

was seeking "to have his cake and eat it too," *i.e.* to make illegal statements and to avoid responsibility for them by posting a self-serving notice. It would surely require more than a notice of this type to convince employees that the actions of two vice presidents did not reflect Company policy. It would also be a naive employee who would submit written reports to Secretary-Treasurer Closterman concerning the things being said by Vice President Charles Gissel and Vice President Herbert Gissel.[23]

E. The Company's conduct in connection with a Union meeting on April 17

A Union meeting was scheduled for Saturday afternoon, April 17, at a local hotel, for employees of three Huntington packing companies, *i.e.* Gissel, Logan, and Sehon Stevenson. On Thursday before the meeting, employee Frye heard Charles Hutchinson, a member of the Gissel family, tell Charles Gissel that there was going to be a Union meeting on Saturday and asked Gissel if he knew about it. Gissel said that he did and that "there would be somebody there watching to see who all went in." Mount and Fry worked in the shipping department under Charles Gissel's supervision and Mount also heard the Gissel-Hutchinson conversation.[24]

The meeting was held as scheduled and it is undisputed that Terry Lewis, the grandson of President Gissel, the son of Vice President Edith Gissel Lewis, and a nephew of Vice Presidents Charles Gissel and Herbert Gissel, was at the hotel as the employees were

[23] All references herein to an individual Gissel are to Charles Gissel unless stated otherwise.

[24] In discredting contrary testimony, I have considered, *inter alia*, that Terry Lewis was at the hotel before the meeting. See *infra*.

arriving for the meeting and was heard making a telephone call to his aunt, Secretary-Treasurer Alfreda Closterman, at the plant.

Lewis is a high school student who works only part-time. He testified that he saw a notice at the plant about the meeting and that it stated that there would be a meeting of "all employees" of Gissel, Logan Packing Company, and Sehon Stevenson, at 2 p.m., Saturday at a Huntington hotel. He did not claim that no member of management knew that he was going to the hotel and asserted that he decided to go to the meeting but "changed his mind" because he was "afraid of the employees; so—I figured they would say something about it." He was asked the following questions by Respondent's counsel and gave the following answers:

> Q. What made you worry when you got down there?
>
> A. I figured I didn't have a right to be there really because——
>
> Q. Well, did anybody say anything or do anything that [led] you to that conclusion; *did they give you any funny looks or anything?*
>
> * * * * *
>
> A. Elisha Watts made a smart remark, he asked me what I was doing down there and gave me a dirty look.[25] [Emphasis supplied.]

Lewis admitted that, after calling his girl friend, he called his aunt, Secretary-Treasurer Alfreda Closterman, at the plant, told her where he was, and that she told him "to come on back." (It was Saturday afternoon and Lewis did not explain why Mrs. Closterman told him to come to the plant.) He also testified that he really called Mrs. Closterman

[25] Lewis was asked, "What is a dirty look?" and answered, "He made a face * * *. Just an ordinary face."

to find out whether his mother, Edith Gissel Lewis, was at the plant but he "was so scared" that he did not ask Mrs. Closterman about his mother. At another point, Lewis said, "I didn't want to go down there in the first place" but he later claimed that he wanted to go "at first" but changed his mind when he saw the employees. He said he was scared because employee Watts "made this face" and invited him to a "beer joint" with a bad reputation.[26] He later admitted that he was in the phone booth when Watts made the "face."

Although Mrs. Closterman was a witness for Respondent, she was not asked about Lewis' telephone call, *i.e.* what he said and what she said. Charles Gissel asserted that neither he nor any other Company representative "sent" Lewis to the meeting but no other member of the Company denied having sent Lewis to the hotel. And no Company representative, including Charles Gissel, denied knowledge that Lewis was going to the hotel.

Lewis was a very uncomfortable witness who frequently had difficulty in recalling what had gone on. When asked if he gave a report on the employees who attended the meeting, Lewis answered, "I don't remember what I said to her [Alfreda Closterman]. I just told her I was up there and she told me to come on back."[27] On cross-examination, he repeatedly an-

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[26] Much later, Lewis said that Watts accused him of stealing a coat and stated that he would get a warrant. Vice President Herbert Gissel admitted that he did not know what was meant by a "dirty" look.

[27] Lewis did say that he did not report on what went on at the meeting but there is no claim that he attended the meeting.

swered questions with such statements as, "I don't remember." [28]

Having considered the entire record, I am convinced and find that, as Lewis testified at one point, he did not want to go "down there," that he did not go on his own initiative, and that he did not go without prior Company knowledge. If no member of the Gissel family sent him to the hotel and none knew that he was going, they would surely have so testified but none did except Vice President Charles Gissel who stated only that no one "sent" Lewis to the hotel. Similarly, no management representative claimed that Lewis did not report the names of the employees he saw at the hotel.

On the basis of the foregoing facts, I find that Lewis was sent to the hotel for the purpose of learning the identity and number of employees who attended the meeting and did report which employees he saw there.

As stated *supra*, Lewis' presence at the hotel is a major reason why I have discredited the testimony of Charles Gissel and others that the Company did not engage in any conduct violative of the Act. As noted above, Charles Gissel repeatedly sought to "prove" his testimony by asserting that the Company had learned its lesson during the 1961 election and the previous unfair labor practice proceeding. However, the presence of Lewis corroborates and lends credence to the testimony of the witnesses for the General Counsel, especially that which indicates that Respond-

[28] The record discloses that employees, other than the two whose discharge is an issue in this proceeding, were discharged. When Lewis was asked on cross-examination if he had told an employee that the Company was "getting rid of the people one by one," he answered "What, I mean, not as far as I can remember, no." Upon being pressed on the point, Lewis gave answers such as, "I don't remember, sir", "I say, it is not as I can remember", and "I don't remember saying it."

ent sought, by questions and other means, to find out which employees were involved in the Union campaign.

According to employee Elisha Watts, all "but three" Gissel employees attended the meeting.

Lowell W. Bailey, who signed a card in the presence of Union Representative Spitzer, was a witness for Respondent. He did not deny having signed the card nor did he claim that he did so as the result of any kind of pressure or misrepresentation. Bailey was clearly unhappy because management had learned that he had signed a Union card, pointing out that the "two guys" who signed him up said that the Company would not know who signed cards. He said also that "they made it sound easy" and that he "would make more money." He went on to say that the Company knew he had signed a card but did not say how it learned that fact. Bailey also failed to explain the circumstances under which he told Vice President Herbert Gissel that he attended the meeting but he conceded that he also told Gissel that he was not having anything to do with the Union "now." However, Bailey refused to say that he was in fact "against the Union."

As a witness for Respondent, he was asked by Company counsel, "The question, Mr. Bailey, is what did [the speaker at the Union meeting] say down there on the subject of what you all were to do at the various companies; what was said?" Bailey answered, "He was talking about breaking glass in a parking lot and nails or something in a parking lot, sir." However, Bailey admitted that he did not know whether the broken glass and tacks happened "in Charleston or Parkersburg or where it was." According to Bailey, sometime after the meeting, he "figured" that the Union wanted Gissel employees to commit similar

acts at the plant. Bailey added that the speaker said something about men working during a strike and that the Union "was going in and get them."

Bailey's demeanor convinced me that he was a witness under pressure to give answers consistent with the questions and I do not believe that his "interpretation" of the remarks at the meeting originated with him. Under these circumstances, I cannot find that the speaker made any statements which could reasonably be interpreted as a suggestion that the employees present break glass or scatter tacks at the plants where they worked.

F. The allegedly discriminatory discharges

Herbert Mount, Jr., began working for the Company in April, 1963 and Jerry Lee Frye was hired in June, 1963. Both worked in the shipping department which is supervised by Charles Gissel. Each signed a Union card and each was questioned by Gissel who also told them that employees engaging in Union activity would be discharged. Both attended the Union meeting on April 17 where they were seen by Terry Lewis.

Mount and Frye normally worked from 6 a.m. to 5 p.m. or later. On Monday, April 19, they left the plant at 11:30 a.m., the beginning of the lunch period. As they passed Charles Gissel's car, he was sitting in it listening to the livestock market report and he asked them to wait a few minutes. After a short wait, Gissel asked Mount if he went to the Union meeting, Mount answered in the negative, but Gissel said he knew Mount was at the meeting, adding that he had been seen there, that "Someone told me you were there." Mount then admitted that he was at the meeting and Gissel told the two men that there were going to be "different arrangements made around here" and

that Mount and Frye were to work from 5:30 a.m. to 11:30 a.m. "until further notice."

As per instructions, Mount and Frye did not work Monday afternoon and did not work Tuesday afternoon. Apparently, they helped Mount's father-in-law on a sewer job on Monday afternoon for Eddie Lewis, the assistant foreman of the department and Charles Gissel's nephew, said he thought that Mount said Tuesday morning that he had worked for his father-in-law the previous afternoon and had made "some money, twenty dollars. I would say, I am pretty sure." There is no claim that the men violated any rule by working elsewhere Monday and/or Tuesday afternoon.

On Wednesday afternoon, Mount and Frye did not return to work after the lunch break and they in fact did some work for Mount's father-in-law. Vice President Charles Gissel sent Lewis, Supervisor Carley and employees Daniel Ellis and Rush Moore to obtain "evidence" that Mount and Frye were working elsewhere.[29]

When Mount and Frye got to work at 5:30 a.m. on Thursday, April 22, their timecards were not in the rack and they went to the office and asked Charles Gissel about their cards. Gissel told them that their cards had been "pulled" because they had "walked off the job" the day before. Frye denied that he and Mount had walked off saying that Gissel had not told them to work Wednesday afternoon. Gissel said that they should have known that they were supposed to

[29] It seems unlikely that Gissel could have talked to Mount's father-in-law on the telephone, as he claimed, because the father-in-law was digging a sewer. But even assuming that Gissel talked to the father-in-law, I find that the latter said nothing which caused Gissel to believe that the two men had gone to work for him permanently.

work Wednesday afternoon but Frye told him, "No, we shouldn't have knowed * * * You told us Monday that we would work from 5:30 till 11:30 'till further notice * * *. You didn't tell us no different." Gissel only repeated that the men "should have knowed" to work Wednesday afternoon. (Mount's and Frye's testimony concerning this conversation is undenied.) Gissel then told the men to get out, that he was going to "call the law." (Gissel claimed that he threatened to call the law after the men "got to raising hell." However, he did not quote what the men said.) As they were leaving, Gissel told them, "You all can take that Union and stick it * * *."

Respondent contended at the hearing that Mount and Frye were not discharged but "quit," *i.e.* left Wednesday afternoon to go to work on another job. But it is not alleged that Mount and Frye had "quit" by working on the sewer job Monday and/or Tuesday afternoon and I do not find that they "quit" by failing to work Wednesday afternoon. They were only following instructions and, as they had done on Monday and Tuesday afternoon, they spent some of the time helping Mount's father-in-law. (For some reason, Respondent seemed to consider it necessary to establish that it took no action against the men and, in effect, denied that they were discharged "for cause" on Thursday morning.)

One of the basic questions to be decided in connection with the discharges is one of credibility, *i.e.* whether Mount and Frye were told to work mornings "until further notice," as they claim, or whether they were told to work Monday and Tuesday mornings and all day on Wednesday, as claimed by Charles Gissel. As set forth previously, I have credited the testimony of Frye which is corroborated by Mount.

In addition to the reasons noted previously for doubting Mount's uncorroborated testimony, I would also hesitate to credit his testimony concerning his instructions about his work schedule for the week beginning Monday, April 19, because of his work record. Thus, he was admittedly late for work a number of times although the record does not reveal how many times.[30] In January or February, 1965, Mount probably caused additional damage to a truck by driving it after it developed engine trouble. He also failed to put some hams in a pan although he claimed, perhaps truthfully, that he had not been told to do so. Furthermore, he was 2 days late returning to work after a vacation in February, probably in part because he had a temporary job elsewhere at which he could earn more than the $1.25 an hour he was paid by Respondent. On another occasion, he did not "shake hides" when requested, or perhaps ordered, to do so. (Shaking hides is a dirty job and the employees hired for the purpose had quit. Moreover, Mount had already worked 8 or

[30] Gissel asserted that Mount was on time "only five or six times" between November, 1963 and April 22, 1965, *i.e.*, in a period of at least 5 months. He also claimed that Mount was always late "from five minutes to forty-five minutes to an hour." Assistant Foreman Eddie Lewis testified only that Mount and Frye were late "pretty often." Although he first said they were late "a half an hour, or an hour, or a couple of hours," he admitted that he could not say "exactly two hours." However, their timecards were not introduced into evidence. Moreover, in a letter to Mount on February 19, 1965, Secretary-Treasurer Closterman stated only that "* * * you have been regularly late on a number of occasions," a statement which surely does not indicate that he was virtually never on time, as claimed by Gissel. I am convinced, therefore, that Gissel's testimony in this respect is greatly exaggerated and this conclusion is another reason why I do not credit his unsubstantiated testimony.

[31] As noted *supra*, Lewis was unsure of the amount Mount claimed to have earned Monday afternoon.

10 hours that day.) In short, I could believe that Mount might have used his "lay off" on Monday and Tuesday afternoon as an excuse for not working Wednesday afternoon if he could have earned more money that afternoon by working elsewhere.[31] In fact, Mount was discharged in February but was recalled because, according to Charles Gissel, he believed that otherwise an unfair labor practice charge would be filed. Gissel also asserted that Mount would have been discharged on another occasion but for the probability of an unfair labor practice charge.

Frye, however, had no such record. He had never been discharged and there is no claim that the Company had ever even considered discharging him. Although Gissel gave a summary statement concerning complaints against Frye, he did not give details or specify times, and his claims are not substantiated by the record generally as they are in the case of Mount.[32] This is not to say that Frye had never done anything for which he could have been criticized but there is nothing in the record which indicates that he was the type of employee who would have failed to work Wednesday afternoon if he had been told to do so. As a matter of fact, Gissel said that he was "surprised" when he learned that Mount and Frye were absent,

[32] One of Gissel's claims was that Frye rode with Mount and was, therefore, late virtually every morning. However, Frye's timecards were not introduced into evidence. Gissel also said that Frye "could read a bill as well as I could and he would come to the office there for me to read the bill for him. He would not pack the meat good in the boxes and he would not put the paper in them and sometimes he would stack them on the flat truck and leave them on the trucks, then the load would spoil." It was also claimed that Frye, like Mount, refused to "shake hides." However, it is not clear that Frye actually refused an order to shake hides. (See the testimony of Eddie Lewis who gave the orders. Gissel admittedly was not present.)

"Because they had never pulled a trick like that before."

An additional reason for crediting the employees' testimony is provided by the fact that Respondent's testimony concerning Mount's and Frye's work schedule and instructions is neither clear nor consistent. According to Charles Gissel, work had been slow for some time and he decided to have some men work Monday and Tuesday (and perhaps Friday) mornings and others work afternoons on those days, to even up the work because "some were getting more time than others."[33] All of the employees were to work all day Wednesday and Thursday, Gissel said, these being the busy days.

Gissel stated that he had been working on the "new" schedule for two weeks and although it had not been set up "completely at that time," some men had worked half days the week before. At another point, Gissel was asked by Company counsel, "In fact, there was—*In fact [Mount's and Frye's] work schedule was not changed, was it?*" and he answered, *"No."* (Emphasis supplied.) However, no records in support of these statements were introduced.

On the other hand, Eddie Lewis, the assistant foreman of the department and the nephew of Charles Gissel, apparently knew nothing about a decision to set up a split schedule and clearly refuted Charles Gissel's testimony that the split schedule was in effect, at least to some extent, the week before. Thus,

[33] Gissel did not explain why he decided to split the work day instead of having all of the employees come in and work the same number of hours with everyone leaving when the day's work was done. This appears to have been the custom in the past. There is no evidence that any employee benefited by the change.

when questioned by Company counsel about the work schedule, he answered:

> They were *working full weeks* but at that time the business, I think, had slacked off and they were *sent home a half day early* the day [Mount] had made the twenty dollars * * * [*i.e.* Monday, April 19]. [Emphasis supplied.][34]

The schedule, Gissel further asserted, applied to three men besides Mount and Frye, *i.e.* Assistant Foreman Eddie Lewis, Supervisor Simon, and employee Maynard. But if Lewis worked half days either the week of April 19 or the week before, he did not say say so at the hearing. In fact, it is clear from Lewis' testimony that he had heard nothing about a change in his schedule.[35] Simon, who worked in the same department, was also a witness and said nothing about a "new" schedule for himself or anyone else.

Maynard who, like Mount and Frye, attended the Union meeting on April 17, claimed that he was told

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[34] At another point, Lewis said that the men had been "let off" at 11:30 a.m. on previous occasions but he would not even estimate when that had happened. As Lewis put it, "I could not say to that, just that he had, in the weeks before *maybe*, just laid them off a half day." [Emphasis supplied.]

[35] When Lewis was asked on cross-examination, "At the same time [Mount and Frye] were told to come in at 5:30 and work until 11:30, there were others * * * who were told to come in at 12:00 and work until some time in the afternoon, were they not?", he answered, "I don't know about that. I know about they were told to come in at 5:30 and work until I don't know when." Lewis also said, "I don't think they were told to work from 5:30 to 11:00. I think they were told to go ahead, the way it is usually done, they tell them when to come in and then if the work is slacked up, they are told then to leave." After a leading question on redirect examination, ("There were two others, were there not?), Lewis said that the schedule "worked out" for Mount and Frye also applied to Maynard.

to and in fact did work afternoons the week of April 19 until after Mount and Frye were discharged, *i.e.* through Wednesday. Although Maynard was not sure of the dates, Respondent was well aware that the General Counsel was claiming that Maynard did not work Wednesday morning and that Maynard's testimony was offered to support Mount's and Frye's assertion that their instructions to work half days likewise applied to Wednesday as well as to Monday and Tuesday.

Charles Gissel also recognized that the Company's case, *i.e.* that he told Mount and Frye to work all day Wednesday, would be strengthened if it could be established that Maynard understood that his instructions to work afternoons did not apply to Wednesday. Accordingly, he stated emphatically that Maynard was wrong, that he worked all day Wednesday and that his timecard would prove it. However, Maynard's timecard was *not* introduced into evidence even though there had been ample time to obtain it, due to a 10 day adjournment, and Respondent in fact introduced other records into evidence the same day that Gissel testified. Cf. *N.L.R.B.* v. *Collins & Aikman Corporation,* 146 F. 2d 454, 456 (C.A. 4). And Assistant Foreman "Eddie" Lewis could not and did not say that Maynard worked all day Wednesday.

I am convinced that Maynard's card was not introduced because it would have established that, as I find, he worked Wednesday afternoon only, a fact which adds support to the General Counsel's claim that Mount's and Frye's instruction to work mornings also applied to Wednesday. Cf. *Interstate Circuit* v. *U.S.,* 306 U.S. 208, 225–226; *N.L.R.B.* v. *Condon Bros. Mfg. Co.,* 187 F. 2d 329, 332 (C.A. 7); *N.L.R.B.* v. *A.P.W. Products Co.,* 316 F. 2d 899, 903 (C.A. 2); *N.L.R.B.* v. *Wallick,* 198 F. 2d 474, 483 (C.A. 3).

In addition, Gissel's testimony concerning his instructions to Mount and Frye is far from precise. Thus, his testimony on direct examination was as follows:

> Q. Now, had Mount and Frye been told or had they not been told as to their hours of work on Wednesday and Thursday?
>
> A. Right.
>
> Q. They had been told?
>
> A. Right.

Nor did Gissel say on direct examination when or where or under what circumstances he told Mount and Frye about their new hours. He was asked on cross-examination when he told Mount and Frye about their new schedule and first said "on Monday morning," which would have been after they attended the Union meeting and had been seen by Terry Lewis. The question was immediately repeated and Gissel answered, "Every Friday, we were laying off at noon on Friday and I would send them home on Tuesday and sometimes on Monday; but never on Wednesday or Thursday."

Finally, Gissel did not deny the testimony of Mount and Frye that when they insisted on Thursday morning that he had not told them to work all day on Wednesday, Gissel replied only that they should have known they were supposed to do so. In other words, Gissel did not claim that he told the two men on Thursday that he had given them explicit instructions to work all day Wednesday and Thursday.

Gissel, an intelligent and experienced business man, revealed that he expected that an unfair labor practice charge would be filed. Under these circumstances, he should have been able to give a detailed account, in his own words, about what he told Mount and

Frye. However, he gave few answers on direct examination in which he independently described what actually happened. Instead, much of his testimony consisted of affirmative or negative answers to what amounted to statements by Company counsel.[36] Moreover, Gissel's assistant and nephew, "Eddie" Lewis, should have been able to corroborate Gissel's testimony concerning the new schedule which, allegedly, also applied to Lewis himself. Instead, it is clear that Lewis knew nothing about the schedule changes which are basic to Respondent's case and which Respondent

[36] Questions of this type include the following: "Then you did not have any conversation with [Frye]" as described by Frye; "In fact [Mount's and Frye's] work schedule was not changed, was it?"; "I will ask you whether or not I told you * * * that it was a method of this Union * * * to put people in the plant to make statements and misquote you; did I not warn you against this eventuality?"; "Now, had you been working on this schedule for some time or not?"; "You asked me how long you had to put up with [Mount's work habits] did you not?"; "Now, had you been working on this schedule for some time before that, or what?"; "You asked me how long you had to put up with this, did you not?"; "Was [Union Representative] Spencer or was he not insisting that these peddle drivers * * * be in the unit?"; "This was not your first trouble with Mount, was it?" Other witnesses were asked similar questions, among them: "There were two others [affected by the schedule change] were there not?"; Now about [January or February] * * * did you have any problems with any vehicles that were operated by Herbert Mount * * *." When the Examiner asked one witness about a date, counsel answered, "I said in January * * *."; "If an employee had wanted to put sand [in the oil] would it have been possible; was it open in such a way that they could have gotten in there?" "* * * did they give you any funny looks or anything?"; "What did the [Union Representative at the April 17 meeting] say with respect to things that you were supposed to do at the various companies?"; "Did he make any threats to you, did he threaten to beat up on you, did he do anything like that or make any statements that you would object to?"

sought to establish by Gissel's testimony. If the schedules for the week of April 19 and the previous week were those alleged by Gissel, Respondent should have been able to produce records which would have proved that the schedules were those described by Gissel. However, no records were introduced.

In short, my conclusion that Mount and Frye were told to work mornings "until further notice" is based in considerable part upon the failure of the testimony of Respondent's witnesses to withstand scrutiny and the absence of documentary evidence which was available and which, I am convinced, would have been produced if it would have supported Gissel's claims, including his assertion that Maynard worked all day Wednesday.[37]

G. Analysis and conclusions

1. *Respondent's conduct which violated Section 8 (a)(1) of the Act*

In this case, it was chiefly Vice President Charles Gissel, not a minor supervisor, who questioned the employees in an effort to learn the identity of the Union adherents and frequently, in the same conversations, threatened the immediate discharge of employees who were found to be involved with the Union.

[37] Even had I found that Gissel did not use the words "until further notice," having considered, *inter alia*, Mount's and Frye's undenied testimony concerning Gissel's statements on Thursday morning and the generalized nature of Gissel's testimony about what he told them originally, I would have found: (1) Gissel did not tell them to work all day Wednesday but assumed that they understood that the half-day schedule did not apply to Wednesday because they knew that it was a busy day; and (2) that Mount and Frye honestly believed that Gissel's instructions to work mornings meant that they were to do so until notified otherwise.

In addition, Gissel's remarks were clear and unequivocal and were followed by action consistent therewith. For example, he announced that a Union meeting would be kept under surveillance and Terry Lewis was in fact at the hotel and placed a telephone call to Secretary-Treasurer Closterman at the plant. Moreover, Gissel's conduct was not limited to one or two remarks but continued off and on from early September, 1964 into the third week in April, 1965 and coincided closely with the periods of known or suspected Union activity.

Having considered Respondent's questions, statements, comments, and actions "in connection with the position of the parties, with the background and circumstances in which they were made and with the general conduct of the parties," I find that the acts set forth below were "part of a general pattern or course of conduct" which interfered with, restrained, and coerced the employees in violation of Section 8(a)(1) of the Act. *N.L.R.B.* v. *Kropp Forge Co.*, 178 F. 2d 822, 829 (C.A. 7), certiorari denied, 340 U.S. 810.

1. Vice President Charles Gissel's questioning of employee Jerry Frye in September, 1964 about whether anyone had talked to him about the Union and his statement in the same conversation "* * * if I think you're talking to a stranger, that is a Union man * * * I'll fire you right now." And Gissel's similar questioning of and statement to employee Mount, also in September, 1964.

2. Charles Gissel's order to employee Rush Moore in February, 1965 "to find out all he could about the Union, who had signed cards, [and] to report back to him."

3. Charles Gissel's interrogation of employee Moore, in the presence of employee Frye, concerning what he knew or had heard about the Union, about whether a

Union representative had tried to sign Moore up, his asking if employee Frye knew anything about employee Don Kidd, his questioning of Moore about whether Kidd was the "leader of the Union," and Gissel's statement, in the same conversation, that he would fire Kidd promptly if he found out "for sure" that Kidd was the Union leader.

4. Vice President Charles Gissel's questioning of Frye in February as to whether he knew anything about the Union, a question which Frye answered untruthfully, his asking Frye what the Union had offered him and Gissel's statement, "I can give you more than they can." Cf. *N.L.R.B.* v. *Camco, Incorporated,* 340 F. 2d 803, 804 (C.A. 5).

5. Vice President Charles Gissel's asking of employee Burchell, shortly after the latter was hired, *i.e.* in late February or early March, 1965, about where he met Frye and Gissel's warning, in the same conversation, to stay away from Mount, that Mount would be "bad" for Burchell.

6. Vice President Charles Gissel's statement in February, "The hell with the Union * * * I'm going to leave [the plant] and turn it over to them" and his statement that if the Union "got in", he would take his money and let the Union run the plant the way they wanted to.

7. Vice President Herbert Gissel's statements during the same period, *i.e.* that he did not want to hear anymore about "this Union stuff," if the employee could not do his work, to "get out," and that he was not going to have the Union "get in," that it would have to "fight him first." Although these statements might not constitute interference, restraint and coercion if they stood alone, their effect must be considered in the light of what had gone before and what came after. See *Daniel Construction Company* v. *N.L.R.B.*,

341 F. 2d 805, 811 (C.A. 4), in which the court pointed out that words which would be lawful if considered separately, can "unite in such a fashion as to yield an improper end product." And the court said in *Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F. 2d. 100, 103–104 (C.A. 5), that in cases in which the Company "makes no bones" about its opposition to the Union, the Board may, "with ample justification * * * regard" statements of "anti-union attitude" as "background" against which "to measure statements, conduct, and the like made by other management spokesmen, especially in terms of the interpretation which the employees reasonably could put on such actions. More specifically, this would bear on the question whether, from the listeners' point of view, these statements by subordinate management constituted forbidden coercion, threats, or intimidation."

8. Charles Gissel's statement that he would have someone at the Union meeting on April 17 to report on who was there and his statement that Mount had been seen at the meeting. *N.L.R.B.* v. *Community Motor Bus Co.*, 335 F. 2d 120, 122 (C.A. 4); *Hendrix Mfg. Co.* v. *N.L.R.B.*, 321 F. 2d 100, 104, n. 7 (C.A. 5); *N.L.R.B.* v. *Prince Macaroni Mfg. Co.*, 329 F. 2d 803, 805–806 (C.A. 1).

9. The presence of Terry Lewis, a member of the Gissel family, at the hotel on April 17, as the employees were arriving for a Union meeting, and his call to Secretary-Treasurer Closterman at the plant. In *N.L.R.B.* v. *Collins & Aikman Corporation*, 146 F. 2d 454, 455 (C.A. 4), the court said that "Any real surveillance by the employer over the Union activities of employees, whether frankly open or carefully concealed, falls under the prohibitions of the Act." In view of all of the circumstances, the employees could not fail to believe that Lewis was sent to the hotel

to see who came to the meeting and could not fail to believe that he would and did report the names of the employees he saw there. Cf. *N.L.R.B.* v. *Champa Linen Service Company,* 324 F. 2d 28, 30 (C.A. 10). That he in fact did so is established by Gissel's statement to Mount on Monday, when the latter denied having attended the meeting, that Gissel had been told that Mount was at the meeting.

10. Gissel's interrogation of Mount on April 19 about whether he attended the Union meeting, his telling Mount that he was not telling the truth when he answered in the negative, and Gissel's statement to Mount and Frye, in the same conversation, that there would be changes in their working hours.

11. Gissel's statement to Mount and Frye when they were discharged on April 22, about what they could do with the Union. Cf. *Hendrix Mfg. Co., supra.*

2. *Respondent's refusal to bargain in violation of Section 8(a)(5) of the Act*

As set forth *supra,* the Union filed a representation petition in late 1960 or early 1961, a hearing was held, and the Board issued a Decision and Direction of Election in January, 1961 in which it established the unit appropriate for collective bargaining. It included, over Respondent's objection, the truck driver salesmen or peddlers. There being no claim and no evidence that there had been any change in the status of the peddlers between 1961 and 1965, I regard myself as bound by the Board's 1961 unit determination.[38]

[38] As the court said in *Florence Printing Co.* v. *N.L.R.B.*, 333 F. 2d 289 291 (C.A. 4), "Even if the company entertained doubt [about the appropriateness of the unit], it is no defense to a refusal-to-bargain charge where the unit is proper."

Furthermore, as also set forth *supra,* 31 of the 47 (or even fewer) employees in the unit signed cards in mid-January, 1965 which state unequivocally that the "undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions."

Thus, when Union Representative Spencer notified the Company on January 22 that the Union represented a majority of "eligible" employees, it did in fact represent a substantial majority of the employees in the unit found appropriate by the Board.[39] It is admitted, of course, that Respondent refused to bargain with the Union.

At the hearing, the only basis asserted for the Company's doubt of the Union's claim that it represented a majority was Charles Gissel's statement that "We talked it over among ourselves and decided that maybe they might not have a majority" because the Union had lost an election 4 years earlier after having claimed to represent a majority. However, employees are entitled to and at times do change their minds and a similar argument was rejected by the court in *Overnite Transportation Company* v. *N.L.R.B.,* 308 F. 2d 279, 283 (C.A. 4). The court also commented in *Overnite* that the employer "unmistakably demonstrated" that it gave some credit

[39] Although Vice President Charles Gissel stated in his first letter to the Union that the Company did not know who the "eligible" employees were, he did not mention the unit question in his later letters. Moreover, at the hearing, Gissel disclosed that the only question concerning the unit was that raised by the inclusion of the peddlers. He also made it clear that he recognized that the Union's reference to "truck drivers" in its letter referred to peddlers rather than to its regular employees, some of whom occasionally drive trucks locally. In other words, Gissel understood that the Union was requesting the Company to bargain for the employees in the unit established by the Board in 1961.

to the Union's claim by embarking upon a course of "illegal" conduct, including interrogation and speeches. Such conduct, according to the court, constituted an "absolute refutation" of the Company's good faith claim.

Further proof that Respondent was willing to assert unfounded claims to justify its refusal to bargain is provided by its statement in its letter of January 26 that it had been "advised of instances of direct misrepresentations" used by the Union to obtain signatures on the cards. At the hearing, however, Respondent introduced not a scintilla of evidence that the Union had made misrepresentations to the employees or had obtained the signatures by any other method which might create a doubt about whether the employees signed the cards for any reason other than that they desired Union representation.

It is also significant that Respondent did not file its own representation petition with the Board as it is empowered to do by the Act. It would surely have been quick to do so if it had good reason to believe that the Union could not establish its majority in a Board-conducted election. Cf. *Florence Printing Co.* v. *N.L.R.B.*, 333 F. 2d 289, 292 (C.A. 4); *Overnite Transportation Company* v. *N.L.R.B.*, 308 F. 2d 279, 283 (C.A. 4). (The first unfair labor practice charge was not filed until February 11, *i.e.* nearly 3 weeks after the Union's bargaining request.)

At the same time, Respondent ignored the Union's offer to submit, for examination and comparison with payroll signatures, the signed cards upon which the Union was relying. Nor did it question at the hearing the signature on any card except the one signed with an "X" by Ralph Hysell. (As noted *supra*, Hysell was not called as a witness, Respondent's evidence consisting of testimony that Hysell could print his

name.) Thus, as the court said of the employer in *N.L.R.B.* v. *Inter-City Advertising Co.*, 190 F. 2d 420, 421–422 (C.A. 4), Respondent made no attempt to determine whether the Union's claim was justified but instead engaged in unfair labor practices "in an attempt to get rid of it as a bargaining representative." See also *N.L.R.B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 180 (C.A. 2).

Having considered Respondent's failure to file its own representation petition, its failure to make any reply to the Union's offer to submit the cards on which it was relying, its wholly unsupported charge that it had been advised of instances of misrepresentation by the Union, and its efforts to destroy the Union's majority by coercive conduct such as interrogation, threats, and surveillance, I find that its refusal to bargain was not due to a good faith doubt of the Union's majority "but to a positive rejection by the company of the principle of collective bargaining." *N.L.R.B.* v. *Inter-City Advertising Co.*, 190 F. 2d 420, 422 (C.A. 4). That this was Respondent's attitude was revealed by Vice President Charles Gissel, who answered the Union's letters, when he gave the following reply to a question about one aspect of the Union's first letter, "I don't know. I would have to study it and see. I didn't read it that far." It follows, therefore, and I find that Respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain upon request, with the majority representative of its employees in an appropriate bargaining unit.

Finally, there is no evidence that any of the employees who signed cards, with one possible exception, thereafter changed his mind. On the contrary, there is evidence indicating that all but three of the employees attended the Union meeting on April 17. In short, this is not a case in which the Union subsequently lost

its majority and in which it must be inferred that its loss was attributable to the Company's unfair labor practices.

Apparently, Respondent's position is that a Union can never establish its majority on the basis of cards but can do so only in a Board-conducted election. But the courts have repeatedly affirmed the Board's holding that an employer does not have a "vested right" to an election, especially in situations in which the employer's unfair labor practices have made a fair election impossible.[40] As the Supreme Court pointed out in *United Mine Workers of America* v. *Arkansas Oak Flooring Company*, 351 U.S. 62, 74–75, the Act "says nothing as to how the employees' representative shall be chosen * * *" and "It does not make it a condition that the representative * * * shall be certified by the Board * * *." In other words, the Act "leaves open the manner of choosing such representatives" and in cases in which a clear majority of the employees have, by means of cards, designated the Union to represent them, the employer is obligated to recognize that Union. In the words of the court, "A Board conducted election is not the only method by which an employer may satisfy itself as to the Union's majority status." 351 U.S. 73, 8, n. 8.

Two of the alternative methods open to the employer in a situation such as this one were mentioned by the court in *Overnite Transportation Company* v. *N.L.R.B.*, 308 F. 2d 279, 283 (C.A. 4), where it stated:

> If the company * * * sincerely doubted the Union's majority status, it could have challenged the Union to substantiate its claims *by checking the*

[40] See, for example: *N.L.R.B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179 (C.A. 2); *N.L.R.B.* v. *Wheeling Pipe Line, Inc.*, 229 F. 2d 391, 393 (C.A. 8); *N.L.R.B.* v. *Trimfit of California, Inc.*, 211 F. 2d 207, 209 (C.A. 9).

> *union cards against the payroll or by requesting the Labor Board to hold a representation election* as is its right under Section 9(C)(1)(B) of the Act. [Emphasis supplied.]

Another method was approved by the court in *Florence Printing Co.* v. *N.L.R.B.*, 333 F. 2d 289, 282 (C.A. 4), in which the court noted that the Company could have agreed to the private election suggested by the Union. An employer who not only fails to take any steps to check the Union's claims but also attempts "to defeat the Union by means of conduct violative of Section 8(a) (1) and (3)" of the Act may not later claim that it has a right to such an election. "Such a rule," the court said, "would encourage employers to commit unfair labor practices rather than promote the freedom of employees to decide for or against a union in an atmosphere free from restraint or coercion * * * ." *Overnite*, 308 F. 2d at 283.

Respondent may also argue that each employee who signed a card should have been called and personally authenticated his card. But in a case such as this in which there is not the slightest evidence that the employees whose handwritten names (or in one case an "X") appear on the cards did not in fact sign them on the date appearing thereon, the undisputed testimony of the persons in whose presence the cards were signed is sufficient. Cf. The *Colson Corporation* v. *N.L.R.B.*, 347 F. 2d 128, 134 (C.A. 8), in which the court recognized that

> the law permits alternative methods of authentication. Thus the courts have approved the authentication of such cards by a witness to their execution. *N.L.R.B.* v. *Economy Food Center*, 7 Cir., 1964, 333 F. 2d 468, 471, or by comparison with a known specimen of the person's handwriting. *N.L.R.B* v. *Philamon Laboratories*, 2 Cir., 1962, 298 F. 2d 176, 179–180, certiorari denied, 370 U.S. 919 * * *

In other words, when a Union has obtained signed cards from a majority of the employees, the employer is under a duty to bargain unless he "has a good-faith doubt as to the reliability of the authorization cards." (*Ibid*) [41]

3. *Respondent's discriminatory discharge of employees Mount and Frye*

As set forth *supra,* Herbert Mount, Jr. began working for the Company in April, 1963 and was told shortly thereafter that the plant was "non-union" and

[41] Although it has been found that Respondent's refusal to bargain was not motivated by a good faith doubt of the Union's majority, there is language in *International Ladies' Garment Workers Union* v. *N.L.R.B.*, 366 U.S. 731, 738–740, which suggests that a good faith doubt concerning the Union's majority is no defense to a refusal to bargain if the Union in fact represented a majority. There, the Court affirmed the Board's holding that the Company violated the Act by bargaining with a Union which it believed in good faith, though mistakenly, represented a majority of the employees. After noting that the employer's action "invaded" the employees' rights, the Court went on to say, "More need not be shown * * *. It follows that prohibited conduct cannot be excused by a showing of good faith." If the Union in fact represents a majority, it would seem that the employees are similarly denied their rights under the Act if the employer refuses to bargain even if he acts in good faith. This appeared to be the Court's view for it stated:

"Assuming that an employer *in good faith* accepts or *rejects a union claim of majority status*, the validity of his decision may be tested in an unfair labor practice proceeding. *If he is found to have erred in* extending or *withholding recognition, he is subject only to a remedial order* requiring him to conform his conduct to the norms set out in the Act * * *." *Cf.* the court's statement in *Florence Printing Co.* v. *N.L.R.B.*, 333 F. 2d 289, 291 (C.A. 4), that "Even if the company entertained doubt [as to the appropriateness of the unit], it is no defense to a refusal-to-bargain charge where the unit is proper."

that employees "caught" talking to a Union representative would be discharged. Mount worked in the shipping department under the supervision of Vice President Charles Gissel as did Jerry Lee Frye who was hired in April, 1963. Both men signed Union cards in January 1965, both were questioned and threatened by Gissel who clearly suspected that they were involved in the Union campaign. In April, they attended the Union meeting kept under surveillance by the Company. The next working day, Gissel told Mount that he had been seen at the meeting, and told Mount and Frye that they were to work mornings "until further notice." Then, on April 22, their timecards were "pulled" and they were accused of walking off the job because they did not work Wednesday afternoon and, instead, helped Mount's father-in-law for an undisclosed period. In addition, Gissel made a vulgar suggestion about what the men could do with the Union and threatened to call the police.[42]

Needless to say, if an employer first directs employees to work from 5:30 a.m. to 11:30 a.m. "until further notice" and then discharges them for not working in the afternoon, his motive must be something other than the employees' failure to work or their disregard of orders.

Furthermore, the discharge of Mount and Frye cannot be considered in a vacuum but must be considered in the light of all that had gone before. "While union membership in itself is no bar to the discharge of employees, it sometimes discloses the

[42] As noted previously, Respondent's basic contention at the hearing was that it had taken no action against Mount and Frye, *i.e.* that they had quit. For some reason, Respondent refused to contend that the two men were discharged for cause and seemed to feel that it must establish that it was in no way responsible for the fact that they did not work for the Company after 11:30 a.m. on April 21.

real motive actuating an anti-union employer in discharging such employees, notwithstanding other asserted reasons." *N.L.R.B.* v. *Nabors,* 196 F. 2d 272, 275 (C.A. 5), certiorari denied, 344 U.S. 865. And the same court stated in *N.L.R.B.* v. *Houston & North Texas Motor Freight Lines,* 193 F. 2d 394, 398 (C.A. 5), that in cases in which the Company's opposition to the Union is clear, "* * * every equivocal act that was done may be properly viewed in the light of [the Company's] animus toward the efforts to organize its men."

Similarly, the courts, as well as the Board, hold that discharges which "coincide" with the intensification of organizational activity, in this case the Union meetings, must be examined with special care. Cf. *N.L.R.B.* v. *Jones Sausage Company,* 257 F. 2d 878, 882 (C.A. 4); *Angwell Curtain Company, Inc.* v. *N.L.R.B.,* 192 F. 2d 899, 903 (C.A. 7); *Sardis Luggage Co.* v. *N.L.R.B.,* 234 F. 2d 190, 196–197 (C.A. 5).

The series of events which ended with the discharge of Mount and Frye have been set forth previously. They began in September, 1964 at about the time a Board hearing was being held in Huntington as the result of an unfair labor practice charge filed by the same Union against another local packing company. At that time, Vice President Charles Gissel warned that employees "caught" talking to a stranger, who was a Union representative, would be discharged promptly. However, there was no Union activity among Gissel employees at that time and Charles Gissel had nothing more to say about the Union until the following January or February, *i.e.* until after the Union claimed to represent a majority of the employees and requested bargaining.

The Company's response and attitude toward the Union's claims and request have been discussed *supra,*

including its failure to file its own representation petition or to examine the cards which the Union offered to submit. Even more significant is the Company's wholly unsupported assertion in justification of its refusal to bargain that it had been advised of "instances" in which the Union had obtained the signatures on the cards by misrepresentations. For if Respondent would assert a reason for its refusal to bargain which had no basis in fact, it might also be willing to assert (or create) an equally unsupported reason to justify its discharge of Union adherents.

After the Company's refusal to bargain, Charles Gissel repeatedly questioned employees about the Union and threatened reprisals against the employee leaders of the Union campaign. Among other things, Gissel asked employee Rush Moore what he knew about the Union, asked if employee Kidd was the "leader" of the Union movement, and said that he would fire Kidd immediately if he found out "for sure" that Kidd was the Union leader. Gissel also directed Moore to find out all he could about the Union, about who had signed cards, and to report what he found out. Gissel also asked Frye what he knew about the Union, what it had offered him, and told Frye that the Company could offer him more than the Union could. In addition, Gissel asked employee Burchell where he met Mount, whether Mount had said anything to him about the Union, and warned Burchell to stay away from Mount.

There is no evidence of any Union activity between January, when the cards were signed, and April, when the Union meeting was held. Similarly, Respondent had little if anything to say about the Union between January–February and April. Then when the Union meeting was announced, Gissel let it be known that he knew about the meeting and that some one

would be there to report on who attended it. And Terry Lewis was at the hotel on Saturday, April 17, and called his aunt, Secretary-Treasurer Closterman, at the plant. It was also in April that Gissel asked employee Burchell if employee Hysell had tried to get Burchell to go to a meeting or to sign a card.

The admitted presence of Lewis at the hotel is one of the most significant facts in the record both generally and in connection with the discharge of Mount and Frye. As noted *supra,* it disproves the Company's repeated assertion that it was determined not to commit any unfair labor practice during the Union's 1965 campaign. It also discloses that Respondent was determined to learn the identity of the pro-union employees, a subject in which it could have had no legitimate interest. *N.L.R.B.* v. *Martin Sprocket & Gear Co.,* 329 F. 2d 417, 420 (C.A. 5).

Perhaps most important of all, by keeping the Saturday meeting under surveillance, Respondent learned that Mount, Frye, Maynard and probably most of the employees who had signed cards in January were still pro-union. This information revealed that the Company's refusal to bargain, its interrogation and threats, and its announced plan to keep the meeting under surveillance had not been effective, *i.e.* its prior conduct had not caused the employees to defect from the Union and to abandon their efforts to obtain Union representation.

On Monday, Gissel made a change in working hours which affected only employees who attended the Union meeting, *i.e.* Mount, Frye, and Maynard. Although the alleged purpose of the change was to spread the work more evenly, there is no evidence that any employee benefited by the change, only that the hours of Mount, Frye, and Maynard were reduced. Then, when Mount and Frye did not work Wednes-

day afternoon, after having been told to work from 5:30 a.m. to 11:30 a.m. "until further notice," they were discharged, threatened with the police, and advised what they could do with the Union.

The relationship in time between Mount's and Frye's presence at the hotel, the change in their work schedule and their discharge a few days later is a fact which does not depend upon the credibility of any witness. Presumably, Respondent will argue that these events were wholly unrelated, *i.e.* were merely coincidental. Coincidences do happen but a finding of "coincidence" in view of the parallel series of events summarized above would be warranted only if Respondent's testimony was clear and precise and was corroborated by available documentary evidence. However, as noted *supra,* Charles Gissel was either unable or unwilling to state in detail and in his own words what he told the men when he notified them about their new schedule. No timecards were introduced although they were clearly available. Finally, Gissel's nephew and assistant, "Eddie" Lewis, refuted rather than corroborated Gissel's testimony about the schedule changes which, allegedly, applied to Lewis as well as to Mount, Frye, and Maynard. The failure of Respondent's testimony to stand up under scrutiny provides further evidence that something more was involved than the straightforward discharge of two employees for good cause and adds support to and strengthens the inference that they were discharged because of their Union activity. *N.L.R.B.* v. *Griggs Equipment, Inc.* 307 F. 2d 275, 278 (C.A. 5).

Having considered the record as a whole, including Gissel's instructions to Mount and Frye to work from 5:30 a.m. to 11:30 a.m. "until further notice," the Company's refusal to bargain, and its unsupported explanation for its refusal, its efforts to learn the

identity of the Union adherents, its threats of reprisal against the employee leaders of the Union campaign, its surveillance of the Union meeting, the timing in relation thereto of the change in the schedule of the two men and their discharge, Gissel's statements at the time of the discharges, and the failure of Respondent's explanation of its action to stand up under scrutiny, I conclude that a preponderance of the evidence establishes that Respondent discharged Mount and Frye because of their Union activity, both generally and their presence at the meeting on April 17 in particular. It follows, therefore, and I find that Respondent thereby violated Section 8(a) (3) and (1) of the Act.

Furthermore, the conclusionary finding set forth above would not be different had it been found that there was a genuine misunderstanding about Mount's and Frye's hours on Wednesday, *i.e.* that Gissel believed that they understood that they were to work all day Wednesday and they misunderstood Gissel's instructions. If the men were expected to work, their absence no doubt caused some inconvenience. However, there is no claim that their absence meant that the day's work was not completed and there is no evidence that their absence caused the other employees to work later than usual to get the work done. And the fact remains that four men could be spared in the middle of the afternoon to go looking for Mount and Frye and to obtain "evidence" upon which Respondent could take action against them.

Moreover, there is no claim and no evidence that the Company has a firm and well-known rule that men absent on Wednesday, without good cause, are automatically terminated. Nor does it claim that it always checks on the activity of an absent employee. Perhaps, Respondent will argue that it set about obtaining "evi-

dence" about what Mount and Frye were doing because it had reason to believe that they had "quit" and gone to work for someone else. This argument, however, would ignore the fact that Gissel knew that the men had done similar work on Monday and/or Tuesday afternoon only because they had been laid off at 11:30 a.m. on those days. Under these circumstances, Gissel might at least have considered the possibility that they were working elsewhere Wednesday afternoon for the same reason, *i.e.* because they believed that they were not supposed to work at the plant Wednesday afternoon. (Respondent did not claim that it did not expect the men to report to work Thursday morning.)

Instead, Gissel clearly decided to discharge Mount and Frye without waiting to hear their explanation and he refused to give any weight to Frye's insistence on Thursday morning that he did not understand that he was supposed to work the afternoon before. Although Gissel might justifiably have doubted Mount's word, he had no reason to believe that Frye was not telling the truth when he asserted that, at most, he misunderstood Gissel's instructions. (As noted *supra*, Gissel did not testify that he told Mount and Frye Thursday morning that he had given them explicit orders to work all day Wednesday. On the contrary, Frye testified without denial that Gissel said only that he and Mount should have *known* they were supposed to work all day Wednesday.) And, as Gissel admitted, the two men had never "pulled" such a "trick" before.

When to these facts are added Gissel's anger, his threat to call the police, and his vulgar suggestion about what the two men could do with the Union, it is apparent that Gissel's actions and reactions were not prompted primarily by their absence the previous afternoon even assuming, *arguendo*, that they had misunderstood Gissel's instructions. Moreover, even if the

Company had grounds for which it could have discharged Mount and Frye validly, it does not follow automatically that they were discharged for this reason alone or for this reason primarily. On the contrary, as the court stated in *Nachman Corporation* v. *N.L.R.B.*, 337 F. 2d 421, 422 (C.A. 7),

> it is well settled that the presence of valid grounds for an employee's discharge does not legalize it where "other circumstances indicate that the union activity weighed more heavily in the decision to fire him than did dissatisfaction with his performance." [Case citations omitted.] [42]

Applying the above test to the instant case, I would conclude, in the light of the entire record, that Mount and Frye would not have been discharged but for their Union activity even had it been found that Gissel believed that Mount and Frye understood that his instructions did not apply to Wednesday and that they, in turn mistakenly believed that they did. Even under these circumstances, I would find that Gissel seized upon their absence as a pretext not only to rid the plant of two active Union adherents but to indicate what could happen to other employees who continued to disregard Respondent's warning that Union activity would not be tolerated. Cf. *N.L.R.B. v. Link-Belt Co.*, 311 U.S. 584, 602, in which the Court recognized that an employer's purpose may be to make an "example" of employees whose conduct *vis-a-vis* the Union has displeased him.

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[42] See also: *Wonder State Mfg. Co.* v. *N.L.R.B.*, 328 F. 2d 835, 837 (C.A 6); *N.L.R.B.* v. *Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *N.L.R.B.* v. *WTVJ, Inc.*, 268 F. 2d 346, 347-348 (C.A. 5) and cases cited therein.

Conclusions of law

1. Gissel Packing Company, Inc., is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

2. Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of Respondent employed at its Huntington, West Virginia, plant including truck dirvers, truck driver salesmen and the janitor, but excluding office clerical employees, salesmen, professional employees, guards, officers of Respondent, the salesmen foreman, the truck salesmen foreman, the working foremen of the processing and packaging department, the slaughter house, the freight and delivery department and the maintenance department, and all other supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. On and after January 22, 1965, the date on which the Union requested recognition and bargaining, the Union represented in fact and in law a substantial majority of the employees in the bargaining unit set forth in paragraph 3 above.

5. Respondent's admitted refusal to bargain with the Union, on request, with respect to the wages, hours, and working conditions of the employees in a unit found appropriate for bargaining by the Board was not motivated by a good faith doubt about the Union's majority and, therefore, violated Section 8(a) (5) and (1) of the Act.

6. By interrogating employees concerning their Union activity and the Union activity of other em-

ployees, by threatening employees with reprisals for engaging in Union activity, by directing an employee to find out who had signed cards and to report the information to. Vice President Charles Gissel, by asking an employee what the Union had offered him and by telling him that the Company could offer him more than the Union could, by announcing its intention to have someone at a Union meeting to report on who attended it, by keeping a Union meeting under surveillance, by making disparaging and vulgar remarks about the Union, the latter in a context of interrogation, threats, and surveillance, the Company engaged in conduct which constituted interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

7. By discharging employees Herbert Mount, Jr., and Jerry Lee Frye because of their Union membership and activity, Respondent violated Section 8(a)(3) and (1) of the Act.

8. Respondent did not violate the Act except by engaging in the conduct summarized in paragraphs 5, 6, and 7 above.

The Remedy

Having found that Respondent engaged in the unfair labor practices set forth above, the recommended order will direct Respondent to cease and desist therefrom and to take the affirmative action normally required in such cases. Any backpay found to be due to Herbert Mount, Jr., and Jerry Lee Frye shall be computed in accordance with the formula set forth in *F. W. Woolworth,* 90 NLRB 289, and *Isis Plumbing & Heating Co.,* 138 NLRB 716. Since the Union has at all times material herein represented a majority of the employees, in law and in fact, in an appropriate bargaining unit, the recommended order will require that it bargain with the Union on request.

In view of the broad range of Respondent's illegal conduct, including its discriminatory discharge of Mount and Frye, action which goes to the very heart of the Act (*N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4)), I am convinced that Respondent would interfere with the employees' statutory rights under similar circumstances in the future. As a result, the recommended order will direct Respondent to cease and desist from engaging in conduct which in any manner denies its employees the rights guaranteed them by the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended order:

Recommended Order

Gissel Packing Company, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in the Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, or in any other labor organization, by discharging employees or by discriminating against them in any other manner because of their Union membership and activity.

(b) Refusing to bargain, on request, with the above-named Union, the majority representative of its employees in the following appropriate bargaining unit:

> All production and maintenance employees of the Employer at its Huntington, West Virginia, plant including truck drivers, truck driver salesmen, and the janitor, but excluding office clerical employees, salesmen, professional

employees, guards, officers of the Employer, the salesmen foreman, the truck driver salesmen foreman, the working foremen of the processing and packaging department, the slaughter house, the freight and delivery department, and the maintenance department, and all other supervisors as defined by the Act.

(c) Coercively interrogating its employees concerning their own and the Union activity of other employees, threatening reprisals for engaging in Union activity, directing employees to find out which employees have signed cards and report the information to management, stating that the Company could offer more than the Union could, announcing that it will have some one at a Union meeting to report on who attended it, keeping a Union meeting under surveillance, and making disparaging and vulgar remarks about the Union in a context of interrogation, threats, and surveillance.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to form, join, or assist Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, or any other labor organization, to bargain collectively through a representative of their own choosing, or to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activity.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Herbert Mount, Jr., and Jerry Lee Frye immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and

make them whole for any losses they may have suffered by reason of the discrimination against them in the manner set forth in the section entitled, "The remedy." Notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(b) Bargain collectively, upon request, with Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, the statutory representative of its employees in the above-described appropriate bargaining unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(c) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records and reports, and all other reports necessary to analyze the amount of backpay due under these recommendations.

(d) Post at its plant copies of the notice attached hereto marked Appendix B.[*] Copies of said notice to be furnished by the Regional Director of the Ninth

[*] In the event that this Recommended Order be adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a United States Court of Appeals, the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words, "A DECISION AND ORDER."

Region shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Ninth Region, in writing, within 20 days from the date of the receipt of this Decision what steps the Respondent has taken to comply herewith.[45]

It is further recommended that the complaint be dismissed in all other respects.

Dated at Washington, D.C.

ROSANNA A. BLAKE,
Trial Examiner.

APPENDIX A

Payroll January 22, 1965 [1]

Name	*Status*	*Card date*
Mrs. R. E. Gissel	President	
E. W. Gissel	V. Pres. (Son of Mrs. R. E. Gissel)	
H. L. (Herbert) Gissel	V. Pres. (Son of Mrs. R. E. Gissel) right to hire/fire.	
K. H. (Charles) Gissel	V. Pres. (Son of Mrs. R. E. Gissel) right to hire/fire.	
A. L. Closterman	Sec.-Treas.; right to hire/fire	
H. B. Martin	Bookkeeper	
Harriett Curtis	Clerk in office	

[1] The persons assumed to be employees are those as to whom there is no evidence in the record. The assumption is for the purpose of determining the maximum number of employees in the unit and does not constitute a finding that they are in fact in the unit if they come within any of the classifications excluded by the Board in its Decision and Direction of Election.

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[45] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply therewith."

Name	Status	Card date
Edith Lewis	V. Pres. (Daughter of Mrs. R. E. Gissel).	
Marie Snead	[Assumed to be an employee]	
Leoris Gissel	(Daughter-in-law of Mrs. R. E. Gissel) right to hire/fire.	
Siddy Caldwell	Employee	1/16/65
Nell Charles	Employee	1/18/65
Evelyn Collins	Employee	
Emogene Ellis	Employee	1/19/65
Alfreda Hutchison	(Niece of V. Pres. Charles Gissel; part-time supervisor).	
C. P. Adkins	Employee	1/18/65
K. R. Adkins	Employee	1/19/65
L. W. Bailey	Employee	1/14/65
D. F. Billups	[Assumed to be an employee]	1/20/65
J. J. Bonham	Employee	1/21/65
I. H. Caldwell	Employee	
George Collins	Employee	1/15/65
R. L. Curry	[Assumed to be an employee]	1/18/65
D. W. Ellis	Employee	1/19/65
Earl Fortner, Jr	Employee	
Francis Fortune	Employee	1/14/65
L. R. Hutchison	Grandson-in-law of Mrs. R. E. Gissel; part-time foreman.	
L. R. Hysell	Employee	1/14/65
R. H. Hysell	Employee	1/16/65
J. K. Johnson	Employee	1/19/65
D. C. Kidd	Employee	
H. C. Lewis (Terry)	(Son of V. Pres. Edith Lewis) part-time employee.	
C. F. McComas, Jr	Employee	1/18/65
E. B. Maynard, Jr	Employee	1/21/65
Donald Meadows	Employee	1/19/65
J. T. Mollohan	Employee	1/13/65
W. R. Mollohan	Foreman boning dept	
R. D. Moore	Employee	
W. D. Moore	Employee	1/19/65
Dewey Parsley, Jr	Employee	1/22/65
Curtis Queen	Employee	
P. D. Rowe	Employee	1/18/65
J. M. Vance	Employee	1/16/65
Elisha Watts	Employee	1/16/65
R. B. Simon	Supervisor	
J. L. Ellis	Truck driver	1/18/65
J. L. Frye	Employee	1/19/65
R. E. Lewis (Eddie)	(Son of V. Pres. Edith Lewis) assistant sup.; right to discipline.	

Name	Status	Card date
H. E. Mounts, Jr.	Employee	1/19/65
J. P. Robinson	Employee	1/20/65
S. H. Rowe	Employee	1/21/65
J. B. Scott	Employee	1/18/65
Clifford Carley	Sales supervisor (route salesman)	
W. W. Bowyer	Truck salesman-peddler	
N. A. Gibson	Peddler	
J. B. Harless	Peddler	
T. L. Jordan	Car salesman; lives in Logan, W. Va.	
C. R. Kitchen	Peddler	
E. M. Osborne	Peddler	
C. F. Springle	Car salesman; lives in Charleston, W. Va.	
L. E. Turpin	Peddler	1/20/65

APPENDIX B

NOTICE

PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT discourage membership in FOOD STORE EMPLOYEES UNION, LOCAL #347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or any other Union, by discharging or by discriminating in any other manner against employees because of their Union membership and activity.

WE WILL NOT coercively question employees concerning their own Union activity or the Union activity of other employees; we will not threaten to discharge employees or to punish them in any other way because they join, work for, attend meetings of, or otherwise help FOOD STORE EMPLOYEES UNION, LOCAL #347, or any other labor organization; direct employees to find out and report on which employees have signed Union cards; tell employees that we can offer more than the Union can; say that we will have someone at a Union meeting to report on who attended it; send

anyone to a Union meeting or to a place where a Union meeting is going to be held; make remarks about the Union which will make employees believe that we will take action against them because of their Union activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in their right to join, work for, attend meetings of, or otherwise help FOOD STORE EMPLOYEES, LOCAL #347, or any other labor organization.

WE WILL OFFER Herbert Mount, Jr., and Jerry Lee Frye immediate and full reinstatement to their former or substantially equivalent positions, without loss of seniority or other rights and privileges, and we will pay each of them the amount of money necessary to compensate them for any loss he has suffered because of his discriminatory discharge.

WE WILL bargain, on request, with FOOD STORE EMPLOYEES, LOCAL UNION, #347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as the representative of the employees in the unit set forth below, concerning wages, hours, and other terms and conditions of employment and, if agreement is reached, we will put the agreement in writing and will sign it:

"All production and maintenance employees employed at our Huntington, West Virginia, plant, including truck drivers, truck driver salesmen and the janitor, but excluding office clerical employees, salesmen, professional, employees, guards, officers of the Company, the salesmen foreman, the truck salesmen foreman, the working foremen of the processing and packaging department, the slaughter house, the freight and delivery department, and the maintenance department, and all other supervisors as defined by the Act."

All of our employees are free to become, remain, or to refrain from becoming or remaining members of FOOD STORE EMPLOYEES UNION, LOCAL #347, or any other labor organization, except to the extent that such right may be affected by an agreement in conformity with Section 8(a)(3) of the National Labor Relations Act.

GISSEL PACKING COMPANY, INC.

(Employer)

Dated: _____ By: _____
(Representative) (Title)

NOTE: We will notify either of the above named employees presently serving in the Armed Forces of the United States of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2023 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684-3627).

APPENDIX D

United States Court of Appeals for the Fourth Circuit

No. 11671

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

HECK'S, INC., RESPONDENT

On Petition for Enforcement of Orders of the National Labor Relations Board

(Argued January 11, 1968. Decided June 28, 1968.)

Before HAYNSWORTH, Chief Judge, and BOREMAN and WINTER, Circuit Judges

Elliott Moore, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Bernard M. Dworski, Attorney, National Labor Relations Board, on brief) for Petitioner, and Frederick F. Holroyd for Respondent.

PER CURIAM:

We decline enforcement of orders of the National Labor Relations Board [1] requiring Heck's, Inc. to bargain with Meat Cutters Local 347 in its Ashland, Kentucky store and Teamsters Local 175 in its warehouses in the Charleston, West Virginia area. Insofar as the orders proscribe other unfair labor practices and re-

[1] 166 NLRB Nos. 32 and 38.

quire the reinstatement of employee Goins, they will be enforced.

The Board's findings that Heck's, Inc. violated § 8 (a) (1) of the National Labor Relations Act[2] by interrogating employees with regard to their union sympathies, threatening reprisals against employees for their union support, creating the impression of surveillance of its employees' union activities and offering employee benefits in exchange for their union opposition, are supported by substantial evidence. There is also substantial evidence to support the finding that employee Goins was discharged for his union activities, his dismissal being a violation of §§ 8(a) (3) and (1) of the Act.

However, the Board's findings that the refusal of Heck's, Inc. to bargain with the unions was a violation of §§ 8(a) (5) and (1) of the Act cannot stand. The Teamsters and the Meat Cutters based their demands for recognition and bargaining on union authorization cards. In the Charleston area warehouses, the union had obtained 13 signed authorization cards from the employees in the requested unit of 26 members when the first demand for recognition was made. An additional card was procured the next day when a second demand was made. The Ashland store union fared a little better, obtaining 21 signed authorization cards from 38 employees in the unit, although there was some ambiguity as to the precise size of the bargaining unit requested. Heck's, Inc. refused to recognize and bargain with the unions under a claim of belief that they had not yet attained majority status in the respective bargaining units.

We have recently discussed the unreliability of the cards, in the usual case, in determining whether or

[2] 29 U.S.C. § 151, *et seq.*

not a union has attained a majority status and have concluded that an employer is justified in entertaining a good faith doubt of the union's claims when confronted with a demand for recognition based solely upon union authorization cards. We have also noted that the National Labor Relations Act after Taft-Hartley amendments provides for an election as the sole basis of a certification and restricts the Board to the use of secret ballots for the resolution of representation questions.[8] This is not one of those extraordinary cases in which a bargaining order might be an appropriate remedy for pervasive violations of § 8(a)(1). It is controlled by our recent decisions and their reasoning. See *NLRB* v. *S.S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562; *NLRB* v. *Sehon Stevenson and Co.*, 4 Cir., 386 F. 2d 551; *Crawford Mfg. Co.* v. *NLRB*, 4 Cir., 386 F. 2d 367, cert. denied ____ U.S. ____, 36 LW 3403. There was not substantial evidence to support the findings of the Board that Heck's Inc. had no good faith doubt of the union's claims of majorities.

Enforcement granted in part and denied in part.

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[8] Even the Board has agreed with our construction of the Act. "Section 9(c) of the Act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed—but rarely exercised—to utilize other 'suitable means' of ascertaining representatives." Annual Report of the NLRB for 1948 at p. 32.

320-064—68——6

APPENDIX E

United States Court of Appeals for the Fourth Circuit

No. 11671

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

HECK'S, INC., RESPONDENT

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of certain orders issued by it against Respondent, Hecks, Inc., its officers, agents, successors, and assigns on June 28, 1967, and June 30, 1967, in proceedings before the said Board known upon its records as Cases Nos. 9–CA–3356, 9–CA–3477, and 9–CA–3728; upon the answer of the Respondent, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said orders of the National Labor Relations Board be, and they are hereby, enforced as to those portions dealing with the violations of §§ 8(a) (3) and (1) of the National Labor Relations Act and requiring the reinstatement of employee Goins, and that enforcement with regard to that portion of the orders dealing with the violations of §§ 8(a) (5) and (1) of the Act is denied; and that the said Respondent, Hecks, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said orders as so en-

force contained, in accordance with the opinion of the Court field herein.

(S) CLEMENT F. HAYNSWORTH, Jr.,
Chief Judge, Fourth Circuit.

[Filed: June 28, 1968, Samuel W. Phillips, Clerk]

A True Copy, Teste: Samuel W. Phillips, Clerk. By Margaret M. Welton, Deputy Clerk.

APPENDIX F

United States of America

Before the National Labor Relations Board

Cases Nos. 9–CA–3356, 3477

HECK'S INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On November 30, 1965, Trial Examiner Thomas F. Maher issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended dismissal of these allegations. Thereafter, the General Counsel filed limited exceptions to the Trial Examiner's Decision with a supporting brief, and Respondent filed limited exceptions.

On March 23, 1966, the Board entered an order reopening the record and remanding the proceeding to the Regional Director for further hearing before the Trial Examiner to receive evidence from the parties

concerning the nature and appropriateness of the bargaining unit, the majority status of the Union, and the alleged refusal of the Respondent to bargain with it.

On March 28, 1967, the Trial Examiner issued his Supplemental Decision, in which, on the basis of the evidence adduced at the reopened hearing, he found that Respondent had engaged in certain unfair labor practices, and recommended that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Supplemental Decision. The Respondent filed exceptions to the Trial Examiner's Supplemental Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Supplemental Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified.[1]

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[1] Contrary to the Trial Examiner, we find that during the period when Ivan Vickers was employed at Respondent's Nitro store warehouse, he was not a supervisor. Although nominally in charge of shipping, Vickers worked under either Foy, the warehouse manager, or Graley, the assistant warehouse manager; his authority to direct other warehouse employees was limited to using warehouse employees who were not otherwise occupied to assist him. In loading and unloading merchandise, Vickers worked alongside the other employees with no authority to hire, fire, or discipline. Moreover, although

ORDER [2]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Heck's Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, activities, or desires.

(b) Threatening their employees with reprisals if they select the Union as their representative.

(c) Offering or granting their employees wage increases and/or promotions in exchange for their opposition to the Union.

(d) Discharging or otherwise discriminating against employees in respect to hire and tenure of employment for the purpose of discouraging union membership or concerted activities.

(e) Refusing to bargain with Chauffeurs, Teamsters and Helpers Local Union No. 175, International

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Respondent's policy was to pay its supervisors on a salary rather than on an hourly basis, up to one month prior to his leaving the job for the Air Force, Vickers was paid an hourly rate with no greater benefits than those received by other warehouse employees. Further, we note that at the hearing, in response to a question as to who were the supervisors at the Nitro warehouse, Graley replied that they consisted of himself and Foy; he failed to mention Vickers.

The Trial Examiner inadvertently excluded employee James Goins from the unit. With the inclusion of Goins and Vickers, the bargaining unit consisted of 26 rather than 24 employees on October 9, 1964, when the Union sought recognition. The record is corrected accordingly.

On Page 6, line 37 of the Trial Examiner's Supplemental Decision, the date October 12 is corrected to read October 13.

[2] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of employees in the following appropriate unit:

> All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans, and Charleston warehouses, excluding office clericals, guards, professional employees, and supervisors as defined in the Act, and all other employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the polices of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all Respondent's employees in the unit found to be appropriate and, if an agreement is reached, embody such an understanding in a signed agreement.

(b) Offer James Goins immediate and full reinstatement to his former or substantially equivalent position, and make him whole for any losses he may have suffered, together with 6 percent interest thereon, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

(c) Notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security records, time-

cards, personnel records and reports, and all other records relevant and necessary to the determination of backpay due and the reinstatement provided under the terms of this Order.

(e) Post at its Nitro, St. Albans, and Charleston, West Virginia, stores and warehouses, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 9, shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

It is further ordered that so much of the complaint in this proceding as alleges unlawful discrimination against Ivan Vickers, be, and it hereby is, dismissed.

Dated, Washington, D.C.

[SEAL] FRANK W. MCCULLOCH,
Chairman,
JOHN H. FANNING,
Member,
HOWARD JENKINS, JR.,
Member,
National Labor Relations Board.

APPENDIX

Notice to All Employees

Pursuant to

A Decision and Order of the National Labor Relations Board and its order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT unlawfully interrogate our employees concerning their union membership, activities, or desires.

WE WILL NOT threaten our employees with reprisal for engaging in union activities or for supporting CHAUFFERS, TEAMSTERS, AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization.

WE WILL NOT offer or grant our employees wage increases and/or promotions in exchange for opposition to the aforesaid Union.

WE WILL NOT discharge, or otherwise discriminate against our employees in respect to hire or tenure because they are leaders in the aforesaid Union or have participated in concerted activities protected by Section 7 of the National Labor Relations Act.

WE offer immediate and full reinstatement to his former or substantially equivalent position to James Goins, and WE WILL make him whole for any loss of pay he may have suffered.

WE WILL notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL, upon request, bargain collectively with CHAUFFEURS, TEAMSTERS, AND HELPERS LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive representative of all the employees in the bargaining unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is

> All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans, and Charleston warehouses, excluding office clericals, guards, professional employees, and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All of our employees are free to become or refrain from becoming members of the above-named Union, or any other labor organization.

HECK'S INC., *Employer.*

Dated: _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407, Federal Office Building, 550 Main St., Cincinnati, Ohio 45202 (Tel. No. 684-3686).

United States of America Before the National Labor Relations Board Division of Trial Examiners Washington, D.C.

Cases Nos. 9-CA-3356, 3477

HECK'S, INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTER, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

William C. Mittendorf, Esq., of Cincinnati, Ohio, for the General Counsel. *Gardner, Gandal & Holroyd*, by *Fredrick F. Holroyd, Esq.*, of Charleston, W. Va., and *George V. Gardner, Esq.*, of Washington, D.C. for the Respondent. *Pottenbarger & Bowles*, by *Martin C. Bowles, Esq.*, of Charleston, W. Va., for the Charging Union.

Before THOMAS F. MAHER, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a charge and an amendment thereto filed on October 23 and December 4, 1964, and a second charge filed on February 15, 1965, by Chauffeurs, Teamsters and Helpers Local Union No. 175, International

Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the Regional Director for the Ninth Region of the National Labor Relations Board, herein called the Board, issued a consolidated complaint and an amendment thereto on behalf of the General Counsel of the Board against Heck's Inc., Respondent herein, alleging violations of Section 8(a) (1), (3) and (5) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151, *et seq.*), herein called the Act. In its duly filed answer Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practice.

Pursuant to notice a hearing was held before me on June 28 and 29, 1965, at Charleston, West Virginia, where all parties were represented by counsel and afforded full opportunity to be heard, to present oral argument and to file briefs with me. Although the parties were specifically invited to file briefs with me on the issue of refusal to bargain presented herein, only Respondent complied.

Upon consideration of the entire record, including Respondent's brief, and upon my observation of each witness appearing before me, I make the following:

Findings of Fact and Conclusions of Law

I. THE BUSINESS OF THE RESPONDENT

Heck's Inc., Respondent herein, is a West Virginia corporation engaged in the retail sale of merchandise, including ready-to-wear clothing, sporting goods,

hardware, household goods, toys and cosmetics at various locations in the States of Kentucky and West Virginia, including Ashland, Kentucky, and Huntington, Parkersburg, Nitro, St. Albans and Charleston, West Virginia. It is stipulated that during the 12-month period ending in May 1965 Respondent, in the course and conduct of its business operations, had a gross volume of retail sales in excess of $500,000, and purchased directly from points outside the State of West Virginia and had shipped directly to it in West Virginia goods and products valued in excess of $50,000. Upon the foregoing I conclude and find that Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is conceded and I accordingly conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

1. The discrimination against James Goins.
2. The supervisory status of Ivan Vickers.
3. The failure of Vickers to use due prudence in seeking reinstatement.
4. Respondent's threats to and interrogation of employees.
5. The failure of proof as to the appropriateness of the bargaining unit.

IV. THE UNFAIR LABOR PRACTICES

A. Sequence of events

1. *The Union demand for recognition and Respondent's refusal.*

In the Charleston, West Virginia area, and specifically in Charleston itself, and nearby Nitro and St. Albans, Respondent operated discount department stores, each with its own warehouse, separately supervised and manned with its own distinct work force. Early in October 1964 some of these warehouse employees developed an interest in the Union, sought out the Union's business agent, Robert Jackson, and obtained from him instructions on organizing the employees together with a supply of blank authorization cards. Prominent in this initial activity were Employees James E. Goins and Virgil R. Searls, and Ivan L. Vickers, whose supervisory status is in issue. By October 9, 13 cards authorizing the Union to represent them had been signed by employees in the three warehouses and submitted to Jackson. The signers and their designated occupations were:

Charles D. Curry	Receiving and Shipping Clerk.
Charles G. Ferrell	Warehouseman.
James E. Goins	Laborer.
Edward L. Hughart	Warehouseman.
Richard Johnson	Truckdriver.
Franklin T. Lanham	Laborer.
James A. May	Laborer.
Opie G. Nelson	Warehouseman.
Samuel D. Nelson	Warehouseman.
Virgil R. Searls	Warehouseman.
Dayle Thornton	Warehouseman.
Ivan L. Vickers	Shipper.
Larry Woodall	Truckdriver-Warehouseman.

Thereafter, on October 10, Everett Nichols, Warehouse Clerk, signed an authorization card, and on October 13 Anna L. Adkins, a Cosmetics Pricer, did likewise.

On the afternoon of Friday October 9 Jackson met with Respondent's president, Fred Haddad, and informed him that a majority of employees having signed up with the Union he was requesting recognition of the Union for the truckdrivers and warehousemen employed at the warehouses in Nitro, Charleston and St. Albans. In support of his claim and request Jackson presented the cards to Haddad who inspected each one in turn. After expressing surprise at the identity of some of those who had signed the cards and some consultation with Personnel Manager Ray Darnell he suggested going through the warehouses and talking with the men involved. This idea was vetoed by Jackson.[1] Haddad then sent for Ivan Vickers whose card was among those in the pack and, showing him the card, asked him if he had signed it. Vickers replied that he had. Whereupon Haddad directed Vickers to return to work.

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[1] The foregoing is the credited testimony of Jackson. President Haddad denied having seen the cards, testifying that he only looked at the top one, Vickers', and then after "flipping through them" without looking at them he handed them to Personnel Manager Darnell whom he had meanwhile summoned to the meeting. Darnell was not questioned concerning this. I do not accept Haddad's uncorroborated denial that he saw these cards, contradicting at is does Jackson's credited account of the incident. Moreover, Employee S. D. Nelson corroborates Jackson to the extent that Haddad inspected the cards. Thus he credibly testified that Haddad told him that "the union representative had been there and showed him cards signed by the employees of Heck's" and that when Haddad saw Nelson's name "he almost passed out."

During the course of the conversation generated by Jackson's request for recognition he indicated, as noted above, that it was for the warehouses at Nitro, Charleston, and St. Albans. At this point Haddad informed him, according to Jackson, "that he also had stores in Huntington and Parkersburg, West Virginia, and Ashland, Kentucky, each of them having warehouses," but Jackson persisted in his original request for a unit limited to the local warehouses and expressed a willingness to limit the scope of the unit further.[3] Jackson added that "there was some discussion of the clerks and all and I informed him that there was no request for recognition of the clerks, that we did not historically negotiate for clerks." Haddad refused Jackson's several requests for recognition and negotiation of a contract, stating each time, "No comment."

Thereafter on October 12 or 13, in the course of a conversation with Haddad concerning the reinstatement of a recently discharged employee (*infra*, p. 5) Jackson again asked for recognition and bargaining and Haddad again refused.

2. *Interference, restraint and coercion of employees.*

Immediately following Haddad's conference with Jackson on October 9, Warehouse Manager Roy Foy called a meeting of the warehouse employees. Haddad addressed the group on this occasion telling them he was surprised at their selection of the Union and asking them as a group what it could do for them, pointed out to them the things he could do regardless of unionization. Thus he explained that he did not have to guarantee a 40-hour week, and that he could require

[3] Ivan Vickers credibly testified that at an employee meeting later the same day Haddad stated he did not believe the Union could win an election because the warehouses of all five stores would be involved.

the men to work split shifts. He then singled out an employee in the group, Charles Lewis, and asked him if he had signed a Union application. Lewis replied that he had not. Haddad concluded his remarks by assuring the employees that anyone could withdraw from the Union if he wished and that Respondent would not discharge anyone for joining.[3]

On the next day, October 10, Harry Turner, also known as Junior Turner, Department Head of Housewares at the Charleston store, drove to the Nitro warehouse, sought out Employee S. D. Nelson and invited him to his car in the parking lot where the two talked, at some length. In the course of this conversation Turner asked him to verify the fact that he and another employee, Woodall, had joined the Union. According to Turner himself, whom I credit, he said:

[3] When Personnel Manager Darnell addressed the meeting, he stated that FMC, a local industry, was in the midst of a strike, and if it were forced to move out of town Respondent's business would suffer. Counsel for General Counsel contends that this statement on the part of Darnell supports an allegation in the complaint (Par. 5(b)(i)) that the statement, coupled with another to the effect that unionization of Respondent's operations would reduce its discount potential and business, constituted an unlawful threat. There is nothing in the record to indicate that Darnell made any reference to the reduction of Respondent's discount potential.

Actually it was Warehouse Manager Foy, according to Goins, who made the statement in question, specifically that Heck's could not operate with a union and continue as a discount house. At the hearing counsel for the General Counsel was apprised of the fact that the complaint contained no allegation of statements attributable to Foy, an admitted supervisor, and he replied that "this does not go directly to any allegation of the complaint." Under such circumstances, I believe that Respondent was relieved of an obligation to refute the statement or to otherwise litigate the issue. Accordingly, I will not consider the Foy statement in any conclusion I make herein.

We got to talking about the union. I got to telling him the good points that we had at the store and what the company could do if they wanted to. They didn't have to give us the bonus and they didn't have to have these parties for us and stuff like that. I was explaining the good points to him about it.

* * * * *

Q. Did you make any threats or promises to him as to what would happen if he did or did not join the union?

A. I told him what could happen. The company could cut our raises off, cut it off short, and stuff like that. It was to your own advantages. And our vacations.

* * * * *

Q. Did you tell Mr. Nelson that if the union was voted in that the company would discontinue granting bonuses or reduce the work hours of the employees?

A. No. I said they could.

Q. Did you tell Mr. Nelson that you knew that he and another man, Mr. Woodall, had signed union cards for the union?

A. Yes, sir. (Tr. 207–209

A week later, on October 17, Employee S. D. Nelson had another significant conversation, this time with President Haddad who summoned him to his office. After telling Nelson he had seen his union card among those presented by Jackson (*supra*) Haddad offered him a salaried job of $325 per month if Nelson would help "break up the union in the St. Albans store." When Nelson refused Haddad then asked if he believed he was due for a raise. Nelson expressed doubt because of his union activity whereupon Haddad sent for Personnel Manager Darnell and the two of them checked out a list and stated their conclusion that Nel-

son was not due for his raise. Then Darnell said, "I wished that you could be on our side."[4]

A week later, on October 23, Haddad made the same proposition to Ivan Vickers who, unlike Nelson accepted it. Haddad sent for Vickers and in the presence of Personnel Manager Darnell and Merchandise Manager Ellis complimented him upon his work and said he wanted to make a "deal" with him. The "deal" was to put Vickers on a $350 per month salary to help break up the Union by exerting his influence over his fellow workers.[5]

The foregoing statements and incidents portray a pattern of interference, restraint and coercion of employees. Thus Respondent, through its officials and supervisors, in reprisal for the employees joining the Union, threatened to cut this workweek, and, tantamount to a threat in each case, stated that it *could* withdraw bonus payments, eliminate company parties and cut off raises. Similarly, and during the same period it publicly interrogated Employee Lewis concerning his union membership, and sought to bribe Employee S. D. Nelson to work against the Union.[6] Citation of authority is unnecessary to establish that such conduct violates Section 8(a)(1) of the Act and I so conclude and find.

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[4] The credited testimony of Employee Nelson. Neither Haddad nor Darnell denied the conduct or statements attributed to them.

[5] The credited testimony of Vickers. Ellis was not questioned about the incident. Haddad and Darnell both corroborate the details of Vickers' transfer to salary status, and Haddad denies any reference was made to the Union. I do not accept Haddad's denial. Darnell testified simply that nothing was said about the Union "to his recollection." I do not accept this as a denial on his part.

[6] In view of my finding that Employee Vickers is a supervisor (*infra*) I make no finding as to whether the successful bribing of him for the same purpose is violative of the Act.

3. *The discharge of James Goins.*

On the following morning, Saturday, October 10, Employee James Goins was assigned the duty of washing down the warehouse driveway with a fire hose and in the course of it became water soaked to an extent that is in serious dispute. Goins testified he was "sopping wet" from the shoulders down, as the consequence of wielding a leaky nozzle. Ivan Vickers testified merely that he was wet, whereas Goins' supervisor, Graley, testified that Goins' clothing was wet for a distance of 18 inches above the floor.[7] A synthesis of the testimony does establish, then, that Goins was wet and that his request to go home had factual justification. Whereupon, having requested and obtained Supervisor Foy's permission to leave, he did so. Upon his return on Monday, October 12, Goins found his timecard missing from the rack. He questioned Foy who first told him that he had left on the previous Saturday without permission and then stated that his work had been unsatisfactory during his 90-day probation period and that they were going to have to let him go.

The foregoing findings are based on the credited testimony of Employee Goins. I do not accept Supervisor Graley's testimony as credible, having observed him on the witness stand. Throughout his testimony he was hesitant and evasive, and on a number of occasions completely confused, all to such an extent that he inspired no confidence whatever in his testimony respecting Goins. As an example of Graley's confused testimony I would cite his insistence that he knew nothing at all about the Union campaign. It had been credibly testified to by both Goins and Vickers with-

[7] Dependent upon the length of the leg involved this would place the high water mark somewhere between Goins' calf and knee.

out contradiction, however, by any of Respondent's witnesses that President Haddad had called an employee meeting on October 9, following Jackson's request for recognition, and that Darnell and Graley were present and had spoken to the men. Under such circumstances Graley's professed ignorance of Union matters cannot be accepted. Accordingly I reject all of Graley's testimony, and particularly his testimony that he smelled alcohol on Goins' breath on several occasions, and that this was why he reported him to Foy on Saturday, October 10. Not discounting the possibility that Goins may well have exuded an odor comparable to alcohol, which could have been anything from bonbons or beer to mouthwash, Graley did not impress me as one capable of making a refined judgment in such matters. Judging from the manner in which he conducted himself when confronted with questions concerning this subject on cross-examination, indeed a complete unwillingness to give a straight-forward answer, I conclude and find that his story was a fabrication.

I can give no more credence to the report as it comes from Personnel Manager Darnell, who approved Goins' discharge. Thus Darnell testified that Supervisor Foy, in reporting the details of the entire incident to him, included Graley's report that he had smelled alcohol on Goins' breath. Darnell's testimony becomes, at best, hearsay twice removed,—and specifically, hearsay whose source I reject at the outset. I accordingly reject any suggestion in the record that Goins was ever known to have indulged in alcoholic beverages to excess or that he had the odor of such on his breath.[8]

[8] It is significant to note that Goins testified credibly that he does not drink, and that Foy, the supervisor who discharged him, has himself been discharged and cannot be located to testify.

Upon the foregoing facts and conclusions certain other conclusions emerged. Thus it appears that Goins, who had permission to leave was discharged (1) for leaving, (2) for unsatisfactory performance that was unsubstantiated on the record, and (3) inferentially for conduct, if such we may classify bad breath, that was never proven. Occurring as it did on the day following the Union's request to bargain *after* which Respondent's officials engaged in conduct which I have found to constitute unlawful interference, restraint and coercion I have no hesitation in concluding that Foy, the missing supervisor, with Darnell's knowledge, dismissed Goins for the reason that he was known, by Haddad's inspection of union cards, to be a member of the Union and, by the proximity in which he worked with such supervisors as Graley and Foy, to be the one who was soliciting Union memberships.[9] In so concluding I further find and conclude that the reasons suggested by Respondent, unsubstantiated and conflicting as they are, are but pretexts to mask Respondent's true purpose, its attempt to thwart the Union's campaign. Such conduct has consistently been held to constitute discrimination in violation of 8(a) (3) and (1) and I so find and conclude here.

4. *The failure to reinstate Ivan Vickers.*

Ivan Vickers, who has figured prominently in the Union activity described heretofore, is claimed by Respondent to be a supervisor. To this end it adduced considerable evidence in support of its contention, through testimony of President Haddad, Darnell, and Ellis. Moreover, Vickers himself testified that prior to his transfer to the Nitro warehouse he had been manager of Respondent's Lewis Street warehouse and

[9] *Wiese Plow Welding Co., Inc.*, 123 NLRB 616.

while claiming he did not consider himself to be a supervisor at Nitro because he "wasn't in charge of the warehouse," he was told he was in charge of shipping and he did, in fact, assign warehouse employees to loading and unloading trucks and directed them in filling orders. He also attended supervisory meetings. Accordingly, based upon Vickers' own description of his duties as they existed both before and after his Nitro assignment, I conclude and find him to be a supervisor within the meaning of the Act.

On December 3, 1964, Vickers left Respondent's employ to enlist in the United States Air Force. Thereafter, on December 31 he was granted a temporary medical discharge from the service and immediately sought to return to Respondent's employ. He called Merchandising Manager Ellis who took his telephone number and assured him "he thought it would be fine" and would check with Personnel Manager Darnell. Ellis never called back and Vickers heard nothing further. Ellis' testimony lends confusion to the situation. Thus he stated that he *either* referred Vickers to Darnell or said he would check with Darnell, *or* that Vickers should come in and see them. Under such confused circumstances Ellis' testimony is of little value and I rely completely upon Vickers' account. Vickers was returned to his job in March upon the intervention of officials of the United States Veterans Administration. General Counsel alleges Respondent's refusal to recall Vickers during the intervening period to be discriminatory in violation of Section 8(a)(3) of the Act.

Common prudence would suggest that an employee do something more than make a telephone call to secure the reemployment rights due him upon return from military service. Here Vickers, by his own admis-

sion, did nothing more and was content to wait for the two or three months during which the governmental wheels turned sufficiently to obtain his job for him. Under these relaxed circumstances I am not disposed to equate Vickers' disinterest with a manifestation of Respondent's discriminatory motive. If, indeed, Respondent was disposed to discriminate against him, Vickers at least had the obligation to establish a case in his own behalf. Sitting upon any rights he may have thought he had is a far cry from this. I accordingly conclude and find upon the record made by Vickers himself that he was not being deprived of employment as a supervisor[10] during the period in which he blithely waited for someone to return his telephone call. I therefore recommend that so much of the complaint as alleges discrimination against Ivan Vickers in violation of Section 8(a)(3) be dismissed.

5. *The alleged refusal to bargain.*

It is clear from the testimony of Union Representative Jackson, General Counsel's own witness, that President Haddad questioned the scope of the bargaining unit when Jackson requested bargaining on October 9. Thus Haddad told Jackson he had warehouses other than the three whose employees' cards were presented him. In elaboration Jackson testified:

> Mr. Haddad said that he had warehouses in all his stores and as a result questioned the unit. However, I told him that I was amenable to negotiate either on behalf of the Nitro Warehouse or separate contracts for the warehouses in the stores. (Tr. 35)

[10] Assuming, contrary to any conclusion herein, that the equities preponderated in Vickers' favor in this matter, it is well established that an employer may lawfully refuse to rehire a former supervisor who applies for a supervisory position. *Pacific American Shipowners Assn.*, 98 NLRB 582, 596.

At this juncture none of the events which I have detailed above, and have found to constitute violations of the Act, had occurred. Under usual circumstances it would be appropriate to inquire, therefore, whether Haddad's refusal in this context was or was not a good faith doubt, particularly in view of his and associates' subsequent conduct. But these do not appear to be usual circumstances and it would seem that as there is so much confusion surrounding the identity and composition of the unit—as sought initially by Jackson, as understood by Respondent, and as urged by General Counsel—that the element of good faith refusal to bargain in a unit appropriate for bargaining need never be reached.

Jackson concededly requested bargaining in behalf of the drivers and warehousemen at the Nitro, St. Albans, and Charleston warehouses and three days later filed a petition for an election in the same unit. Nevertheless, as quoted above, he expressed a willingness at the time *not to be bound* by the scope of the unit he requested.[11] General Counsel, on the other hand, in a consolidated complaint initially issued on April 22, 1965, alleged as the appropriate unit all truckdrivers and warehousemen at Respondent's Nitro warehouse and St. Albans store, with the usual exclusions, and by a June 3 amendment added to this unit the same classifications employed at Respondent's

[11] Cf. *Sportswear Industries, Inc.*, 147 NLRB 758, wherein the Board, at p. 760, stated:

"Once having defined the unit it claims to represent, and having made a demand on that basis, the Union has thereby established the frame of reference for measuring the validity of its demand. 'Such a requirement imposes on the union representative only the obligation to say what he means. Failing to do so [the union] cannot be considered as having made the sort of request to bargain which imposes upon an employer a legal obligation to comply' (footnote omitted)."

Charleston "store and warehouse." And finally by a document introduced into the record by counsel for the General Counsel entitled "Warehouse Employees" it is claimed that those employees listed thereon as Truck Drivers or Warehousemen at Nitro, St. Albans, and Charleston warehouses constitute the total eligibility list, plus Employee Goins who had been discharged by that time (*supra,* pp. 5–7) and was therefore not on the list. For reasons which follow the total number of employees eligible for inclusion in the unit cannot be precisely determined.

It should now be noted that a distinction exists on the so-called eligibility list between "Drivers and Warehousemen" and other classifications such as "Pricer" and "Receiving Clerk," both of whom General Counsel explicitly stated he would exclude from the unit. This distinction becomes dim, however, at certain points and to such an extent that the terms "Warehouseman" and "Warehouse Employees" are used interchangeably. Thus when Jackson was asked by me to repeat precisely the unit for which he was seeking recognition he stated to me, "Truckdrivers and warehouse employees." And when counsel for General Counsel introduced what, upon refinement, becomes the eligibility list, he referred to it as "a list of the warehouse employees." While it is true that after considerable probing on my part the purpose of this list was clarified as being relevant only had it contained the names of all the drivers and warehousemen at the three designated warehouses, nonetheless it is significant to note that ambiguity certainly attended the proceedings at this point.

Upon further development of the evidence as to the appropriate unit other elements of confusion appear. Thus, although General Counsel stated specifically that Pricers "were not to be included in the unit,"

his own witness, Franklin T. Lanham, corroborated Personnel Manager Darnell's undenied testimony that the duties of the male Pricers differed little, if any, from those of "Warehousemen," the difference being that in addition to loading and unloading trucks and stocking shelves, as do Warehousemen, the Pricers also mark the merchandise. Female Pricers are not required to do the heavy work, it being performed by the Warehousemen.

Nor does the election petition filed by the Union on October 12, 1964, add clarity. Thus, while giving the several addresses of the Employer in one section of the petition form it describes the union requested as "all employees of the Employer employed *at its places of business* as warehousemen and truckdrivers" [emphasis added].

Finally, as the hearing progressed and in the course of determining the unit eligibility of an employee in one of the warehouses (Anna Lou Adkins) counsel for the General Counsel was reminded that the employee whose card was being discussed was a "Pricer," the category previously excluded from the unit by counsel's earlier statement of position. In reply counsel stated to me:

> I am aware of that, sir. But I still have this problem of what the final unit determination is going to be. (Tr. 162)

And earlier in the record when asked by me to clarify the duties of an allegedly eligible employee to determine his inclusion as a Warehouseman counsel stated:

> I am aware of the problem you would have with this. But at the same time I am aware that we are concerned with the situation that the appropriate unit has not actually been determined as of this time. (Tr. 135)

Upon the foregoing conglomeration of scanty data the Board, through me, is being asked to conclude that the Union represented the majority of the Respondent's employees in a unit appropriate for bargaining and that President Haddad's refusal to bargain, as detailed above, was not grounded in good faith either as to his doubt of the majority, or of the appropriateness or scope of the unit requested, or both.

Section 9 of the Act provides the framework for the laboratory conditions which the Board deems so essential for the determination of employee representation. Through appropriate rules of decision and its regulations[12] procedures have historically been availed of to provide a forum to assess the duties of those sought in a bargaining unit, the extent of the unit's scope, and a myriad of complications that must be resolved to achieve a reasonable determination of the unit in which a fair election is to be held; all of this through the orderly participation and contribution of both employer and union representatives. Similarly in the conduct of the election itself, wherein eligible employees are permitted the privacy of their choice, safeguards are provided in the form of challenge available to all parties to insure that eligibility is maintained and that irregularity is eliminated.

With all due respect to able counsel participating in this proceding and with full recognition of my own procedural limitations I fail to see how the materials presented in evidence here provides an adequate substitute for the orderly procedure and determination customarily available.

The essence of this case is twofold: that Jackson claimed a majorty in an appropriate unit, and that Haddad's refusal was or was not in good faith. As to

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[12] See Rule and Regulations, Series 8, as amended, Sec. 102.61 *et seq.*

the former, upon full consideration of evidence presented and the conflicts this evidence contains, I am persuaded that General Counsel has failed to meet the burden of establishing what precisely was the appropriate unit in which the Union had its majority. Failing in this respect and thus creating for me an unresolved doubt concerning the unit, I am not disposed to conclude that Respondent's refusal or *its* doubt was any less reasonable, particularly when this refusal rested, at least in part, upon the fact that Respondent had in its employ warehousemen not included in the unit requested.

Upon all of the foregoing considerations, therefore, I would recommend that so much of the complaint as alleges Respondent's refusal to bargain be dismissed.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section IV, above, occurring in connection with its business operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

Having found that Respondent has engaged in unfair labor practices I shall recommend that it cease and desist therefrom and, because of the gravity of its conduct I shall also recommend that it cease and desist from infringing in any other manner upon the rights of employees guaranteed by Section 7 of the Act.[13]

[13] *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 433.

Affirmatively I shall recommend that James Goins, whom it discriminatorily discharged, be reinstated to his former or substantially equivalent position, if this has not already been done, without prejudice to seniority or any other rights and privileges, and that he be made whole for any loss of earnings suffered by him because of Respondent's discrimination against him, with backpay computed by access to the Company's books, records and accounts, and in the customary manner,[14] with interest added thereto at the rate of 6 percent per annum.[15]

Recommended Order

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I Recommend[16] that Heck's Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, activities or desires.

(b) Threatening their employees with reprisals if they select the Union as their representative.

(c) Offering or granting their employees wage increases and/or promotions in exchange for their active opposition to the Union.

(d) Discharging or otherwise discriminating against employees in respect to hire and tenure of employment for the purpose of discouraging union membership or engaging in concerted activities.

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[14] *F. W. Woolworth Co.*, 90 NLRB 289.

[15] *Isis Plumbing & Heating Co.*, 138 NLRB 716.

[16] In the event that this Recommended Order be adopted by the Board, the word "Recommended" shall be deleted from its caption and wherever else it thereafter appears; and for the words "I Recommend" there shall be substituted "The National Labor Relations Board Hereby Orders."

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to James Goins to his former or substantially equivalent position and make him whole in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Post at its Nitro, St. Albans and Charleston, West Virginia stores and warehouses copies of the notice attached hereto as "Appendix." Copies of said notice to be furnished by the Regional Director for the Ninth Region shall after being duly signed by the Respondent, be posted immediately upon receipt thereof, in conspicuous places, including places where notices to employees are customarily posted, and be maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director in writing within 20 days from the receipt of this Decision what steps the Respondent has taken to comply therewith.[17]

(d) Notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

[17] In the event this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

It is FURTHER RECOMMENDED that so much of the complaint in this proceeding as alleges unlawful discrimination against Ivan Vickers and Respondent's unlawful refusal to bargain with the Union be dismissed.

Dated at Washington, D.C.

THOMAS F. MAHER,
Trial Examiner.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT unlawfully interrogate our employees concerning their union membership, activities, or desires.

WE WILL NOT threaten our employees with reprisal for engaging in union activities or for supporting CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization.

WE WILL NOT offer or grant our employees wage increases and/or promotions in exchange for this opposition to the aforesaid union.

WE WILL NOT discharge, or otherwise discriminate against our employees in respect to hire or tenure because they are leaders in the aforesaid union or have participated in con-

certed activities protected by Section 7 of the National Labor Relations Act.

WE offer immediate and full reinstatement to his former or substantially equivalent position to James Goins, and WE WILL make him whole for any loss of pay he may have suffered, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

WE WILL notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All of our employees are free to become or refrain from becoming members of the above-named union, or any other labor organization.

HECK'S, INC., *Employer.*

Dated: _____ By: _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2023 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684-3627).

320-064—68——8

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Washington, D.C.

Cases Nos. 9–CA–3356, 3477

HECK'S INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

William C. Mittendorf, Esq., of Cincinnati, Ohio, for the General Counsel; *Gardner, Gandal & Holroyd*, by *Fredrick F. Holroyd, Esq.*, of Charleston, W. Va., and *George V. Gardner, Esq.*, of Washington, D.C. for the Respondent; *Pottenbarger & Bowles*, by *Martin C. Bowles, Esq.*, of Charleston, W. Va., for the Charging Union.

Before: THOMAS F. MAHER, Trial Examiner

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

Statement of the Case

On November 30, 1965, a Decision was issued by me in this proceeding finding and concluding that Respondent herein, Heck's Inc., had not unlawfully refused to bargain collectively with Chauffeurs, Teamsters and Helpers, Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as the Union Company, and I accordingly dismissed the Section 8(a)(5) allegation, for the reason that the General Counsel had failed to meet the burden of

establishing what precisely was the appropriate unit in which the Union had its majority. In addition, I made certain findings of violations of Section 8(a) (1) and (3) of the Act and recommended that specified remedial action be taken with respect thereto. The case was transferred to the National Labor Relations Board, herein called the Board, on the same day. Thereafter counsel for the General Counsel and Respondent filed exceptions to my Decision and counsel for the General Counsel filed a brief in support of his exceptions.

In due course the Board, upon review of my Decision, the exceptions, supporting briefs and the record, on March 23, 1966 issued its Order Reopening Record and Remanding Proceeding to Regional Director for Further Hearing. The Board found "on the basis of the entire record that the General Counsel was plainly contending that the appropriate unit consisted of all truckdrivers and warehouse employees at the Nitro, St. Albans and Charleston warehouses" of the Respondent. It ordered that the hearing be reopened for the purpose of adducing additional evidence concerning the nature and appropriateness of the bargaining unit, the majority status of the Union, and the alleged refusal of the Respondent to bargain with it, and directed that I prepare and serve upon the parties a Supplemental Decision containing findings of fact, conclusions of law and recommendations to the Board based upon the evidence contained in the entire record.

Pursuant to notice issued on September 28, 1966, by the Regional Director a further hearing was held before me in Charleston, West Virginia. All parties appeared and were afforded full opportunity to be heard, to adduce relevant evidence, to examine and cross-examine witnesses, to present oral argument and to file briefs. Briefs were filed with me on Decem-

ber 15, 1966, by counsel for Respondent and the General Counsel.

Upon the entire record, including the evidence adduced at both the original and subsequent hearings, and all briefs submitted by the parties, I make the following:

Findings of Fact and Conclusions of Law

A. THE SCOPE OF THE REMAND

In its Order of Remand the Board specifically found "on the basis of the entire record that the General Counsel was plainly contending that the appropriate unit consisted of all truckdrivers and warehouse employees of the Nitro, St. Albans and Charleston warehouses," these being the three stores and warehouse locations established in the Charleston area, and discussed and identified in further detail in my original Decision.[1]

Because the Board deemed the record before it inadequate "to determine the unit and majority questions" I have been directed to adduce evidence as to (1) whether the unit sought by the Union was in fact "appropriate" for the purposes of collective bargaining, (2) whether the Union represented a majority of employees in said unit, (3) whether the Respondent's refusal in said unit was lawful.

B. THE UNIT CLAIMED BY GENERAL COUNSEL

As determined by the Board in its Order of Remand the General Counsel contends that the unit appropriate for collective bargaining herein consisted of

> All truckdrivers and warehouse employees at the Nitro, St. Albans and Charleston ware-

[1] Reference to my original Decision at a designated page will be indicated herein as TXD, p. 6.

houses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees.[2]

C. THE APPROPRIATE UNIT

In response to the Board's inquiry in its Order of Remand as to the appropriateness of the bargaining unit sought by the Union there is a basic difficulty. It has not been established by the record that when the Union made its demands it did so in a given unit. Thus, as previously found, Union Representative Jackson credibly testified at one point

> Mr. Haddad said that he had the warehouses in all his stores and as a result questions the unit. However, I told him that I was amenable to negotiate either on behalf of the Nitro Warehouse or separate contracts for the warehouses in these stores. (Tr. 35)

Prescinding from this for purposes of determining the appropriateness of the unit which the General Counsel contends for, that unit may be identified as comprising the employees at the several warehouses of the Respondent's retail chain stores located in the Charleston, West Virginia, geographical area.

As to the retail stores themselves it is settled that all of such located in a geographical area may constitute a single bargaining unit.[3] It is equally well settled that a unit of employees in the retail industry engaged in warehouse functions, including the truckdrivers,

[2] The excluded categories were not set forth in the General Counsel's original contention but appeared for the first time in his most recent brief to me. At the further hearing counsel for the General Counsel indicated on the record as intent to set forth an alternate unit position. As the Board has specifically ruled on the nature of the unit being contended for I precluded counsel from further discussion of alternatives.

[3] *Sav-On Drugs Inc.*, 138 NLRB 1032.

constitutes an appropriate bargaining unit.[4] *A fortiori,* two or more groups of employees constituting all of the employer's warehouse employees in the geographical area would likewise constitute an appropriate unit.

The record in the instant proceeding discloses that in the respective warehouses there is a complete separation of functions of the warehouse employees and the selling personnel, and no interchange between either group. Thus the respective warehouse areas are completely partitioned off from the selling areas, inter-access being by door; the individuals employed in the warehouse are separately supervised there; they perform the usual warehousing functions such as a truck unloading, unpacking, pricing, storing, and the delivery of items to the selling floor. There is, however, a dispute as to whether certain Pricers should be included in the unit, it being stipulated, nevertheless, that those at the Nitro store be included. The General Counsel would exclude the Clothing Pricers at the St. Albans and Charleston warehouses, Employees Taylor and Russe, while on the other hand the Company would include them. Everyone agrees the Pricers at Nitro should be included. Both Taylor and Russe, each of whom price clothing exclusively, work in warehouse areas, but in each case in a section partitioned off from the rest of the warehouse. In the course of their duties each of them receive pricing instructions from the supervisor of the Clothing Department. Each employee is carried on Respondent's personnel records as a warehouse employee and there is no evidence that they are engaged in selling functions as part of their usual duties.

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[4] *The May Department Stores Company*, 153 NLRB 341; *Loveman, Joseph and Loeb*, 152 NLRB 719.

From the credited testimony of Employees Larry Woodall and Doyle Thornton, called as witnesses by the General Counsel, and of Personnel Manager Ray Darnell, it is clear that except for the segregated work areas provided for Clothing Pricers at each warehouse the nature of their duties does not differ substantially from that of other pricers, and indeed the separation at St. Albans was explained by the existence of such a separate room in the warehouse when first the building was acquired. Certainly the inherent character of clothing merchandise should itself explain why warehousing it separately from the general stock would be prudent practice, avoiding soilage and spoilage. And finally it is evident that the instructions which the Clothing Pricers receive from the Clothing Department supervisors would constitute a reasonable source of pricing information. Nor is there anything in the record to suggest why the Clothing Pricers at two warehouses should be treated differently from those at the third warehouse, Nitro.

Upon review of all of the foregoing considerations it is apparent that the elements of community of interest and integration of the Clothing Pricers at St. Albans and Charleston with the other warehouse employees are not lessen by any routine contacts these employees may have with personnel in other areas of the store anymore than would the truckdrivers' like community of interest be destroyed by their regular absence from the warehouse, driving about the city. On the contrary, the Pricers in question, both female employees, have warehouse supervision, do the same general type of work, excepting the heavy lifting, wear clothing appropriate to their duties, and associate occupationally with the warehouse employees, meeting with others only on an "emergency" or sporadic basis. I would

therefore conclude and find that *all* Pricers are appropriately a part of the warehouse unit.

Upon all of the foregoing I would conclude and find as a unit appropriate for the purposes of collective bargaining

> All truckdrivers and warehouse employees, including all pricers at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees.

D. MAJORITY STATUS OF THE UNION IN THE ABOVE-DESCRIBED UNIT FOUND TO BE APPROPRIATE

As previously found by me (TXD, pp. 2–3), by October 9, 1964, thirteen employees in the three warehouses had signed cards authorizing the Union to represent them and submitted them to Union Representative Jackson. These cards presented to President Haddad as evidence of the Union's claim and inspected by him were for the following:

Charles D. Curry
Charles G. Ferrell
James E. Goins
Edward L. Hughart
Richard Johnson
Franklin T. Lanham
James A. May
Opie G. Nelson
Samuel D. Nelson
Virgil R. Searls
Doyle Thornton
Ivan L. Vickers
Larry Woodall [5]

[5] Everett Nichols, Warehouse Clerk, and Anna L. Adkins, Cosmetic Pricer, signed the cards on October 10 and 13 respectively. Obviously these were not included among the cards submitted to Haddad.

All cards received in evidence were identified by the respective employees or by Jackson in whose presence they were signed. There is no contest as to either their authenticity or to the fact that each was signed for the purpose of selecting the Union as bargaining representative.

As I have previously found and concluded that Ivan Vickers was a supervisor at all relevant times herein (TXD, p. 7) his card cannot be included among those cards availed of by the Union to support its claim of majority status on October 9. I accordingly conclude and find that upon that date, on the occasion of Union Representative Jackson's request of President Haddad that Respondent bargain with the Union (TXD, p. 3), the Union represented 12 employees, as evidenced by cards in its possession.

As a means of establishing the composition of the bargaining unit claimed by General Counsel to be appropriate a list of warehouse employees at Nitro, St. Albans and Charleston, supplied by Respondent, was admitted into evidence. The list is as follows, excluding four individuals, Graley, Vickers, Elbert Ferrell, and Overton, who have either been found by me or stipulated to be supervisors:

Nitro, West Virginia:

Anna Lou Adkins	Pricer.
James A. Cooper	Warehouseman.
Charles D. Curry	Warehouseman.
Charles F. Ferrell	Warehouseman.
Sheila V. Hostein	Pricer.
Richard Johnson	Driver.
Earl Keeney	Driver.
Franklin T. Lanham	Pricer.
Charles E. Lewis	Pricer.
James A. May	Warehouseman.
Opie Nelson	Warehouseman.
Dallas T. Queen	Warehouseman.
Virgil Searls	Warehouseman.
Lloyd J. Slack	Driver.
Roger Stackey	Warehouseman.

St. Albans, West Virginia:

Wayne Baker	Warehouseman.
Samuel D. Nelson	Warehouseman.
Everett Nichols	Warehouseman.

Evelyn Taylor	Pricer.
Larry Woodall	Driver.
Charleston, West Virginia:	
Charles G. Ferrell	Warehouseman.
Edward L. Hughart	Driver.
Ernestine Russe	Pricer.
Doyle Thornton	Warehouseman.

A tabulation of this list indicates that there are a total of 24 eligible employees in the bargaining unit claimed by General Counsel and found by me to be appropriate.

Of the foregoing it is apparent that on October 9, 1964, when Union Representative Jackson presented the cards for Supervisor Vickers and the 12 warehouse employees to President Haddad and requested recognition and bargaining the Union represented only 12 of the 24 eligible rank-and-file employees in the unit which I find herein to be appropriate. It did not *at that time* represent a majority.

E. SUBSEQUENT ACTIVITY RELATING TO THE BARGAINING UNIT

Two more cards came into the possession of the Union after it had shown the original group of cards to Haddad; the cards of Nichols and Adkins, signed on October 10 and 13, respectively. Meanwhile a number of events had transpired. Harry Turner, Department Head of Housewares at Charleston, engaged in conversations on the following day, October 10, which I have already found to contain unlawful threats to cancel wage increases and discontinue bonuses if the Union got in. (TXD, pp. 4–5). A week later President Haddad offered a promotion to one of the employees who had joined the Union on condition that the employee would agree to work against the Union (TXD, p. 5). And again a week later he offered a

similar inducement to Supervisor Vickers for the same purpose (TXD, pp. 5, 7). These incidents I have already found to constitute unlawful interference, restraint and coercion. Additionally I found that on October 10 Respondent discriminatorily discharged Employee James Goins (TXD, pp. 5–7).

Meanwhile, on October 12, the Union filed its petition in Case No. 9–RC–6097, later withdrawn, seeking an election among

> all employees of the Employer employed at its places of business as warehousemen and truckdrivers; excluding all office clerical employees, all guards, professional employees and supervisors, and any others excluded in the Act, as amended.

The petition indicates the Union's belief that there were 19 employees in the bargaining unit, and it makes no reference to Pricers, all of whom I have found (over General Counsel's objection as to those in St. Albans and Charleston) to be included in the appropriate unit (*supra,* p. 4).

While it is evident that the Union did not have a majority of the 24 employees when it requested recognition on October 9 it did achieve this majority on October 10, with Nichols' card, and it increased it by one more with Adkins' card on October 12. If, then, on October 10, and thereafter, the Union continued to claim recognition the issue of Respondent's refusal becomes a real one indeed.

During the week after his initial request for recognition, "about the 12th or 13th of October," Jackson, as I have already found (TXD, p. 4), in the course of seeking the reinstatement of the discharged Employee Goins (TXD, p. 5), asked President Haddad a second time to recognize and bargain with the Union, and again received the same reply: "No comment."

I would conclude and find that Jackson's request for recognition first made on October 9, 1964, became a continuing request thereafter for the reason that (1) it was followed by the filing of a representation petition the next day,[6] (2) it was followed immediately by an effort on the part of Supervisor Turner to procure defections from the Union, and finally (3) on October 12, a new request was made of Haddad by Jackson and refused, to be followed thereafter by Haddad's efforts to induce union members to defect from the Union.

In summary, therefore, it is apparent that during the pendency of its claimed majority status prior to October 12, the Union possessed the cards of 13 of the total complement of 24; and that after October 13, upon receipt of Adkins' card and after Jackson's second request for bargaining, and at a point when a further request would be deemed futile,[7] I would conclude and find that in support of its continuing demand for recognition the Union then had 14 valid designation cards, of a possible total of 24, in its possession. Thus there is conclusive evidence that during the period in question the Union had established and maintained its majority status in a unit which I find to be appropriate for the purposes of collective bargaining.

F. THE LEGALITY OF RESPONDENT'S REQUEST TO BARGAIN

Jackson's demand of Haddad for recognition has, at first glance, the appearance of a flexible one. Thus

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[6] See *Ivy Hill Lithograph Co.*, 121 NLRB 831, 835, fn. 13; *Automotive Supply Co., Inc.*, 119 NLRB 1074.

[7] *America Compressed Steel Corporation*, 146 NLRB 1463, enfd. 343 F. 2d 307 (C.A., D.C.).

after testifying at several points that he requested recognition and bargaining for truckdrivers and warehousemen at the *three* local facilities he then testified in response to questioning of counsel for the Union, as follows:

> Mr. Haddad said that he had warehouses in all of his stores and as a result questioned the unit. However, I told him that I was amenable to negotiate either on behalf of the Nitro Warehouse or separate contracts for the warehouses in the stores (Tr. 35).

It is true, of course, that an employer cannot be held to have refused to bargain collectively with the representative of an appropriate unit until the representative has first sought or indicated a desire to bargain for the unit.[8] Thus any variance between the unit requested and that found appropriate raises an issue in this respect. It has long been held by the Board, however, that to be fatal any variance must be a substantial one.[9] Such is not the case here. Indeed there is no variance, but rather an alternative, if even that could be spelled out. Jackson made his demand for truckdrivers and warehousemen, the latter being deemed by me to include Pricers. In an effort to accommodate he then suggested the alternative of separate contracts. But he certainly cannot be said to have abandoned his original claim. Therefore, I do not view this offer of accommodation to be the substantial variation intended by the Board and I see no other variance. Accordingly, I would conclude and find that a valid demand in the appropriate unit was made on October 9, and for reasons already stated continued thereafter.

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[8] *N.L.R.B.* v. *Columbian Enameling and Stamping Co.*, 306 U.S. 292, 300.

[9] *Barlow-Maney Laboratories*, 65 NLRB 928.

It is apparent from Respondent's intervening and subsequent conduct which I have already found to be violative of the Act (TXD, *supra*) that it was engaging in a course of conduct calculated to undermine the Union and reflected a rejection of the principles of collective bargaining. I am persuaded therefore, that its refusal to bargain with the Union as a majority representative of the employees in the unit which I have found to be appropriate was not grounded upon any element of good faith but constituted a refusal to bargain in violation of Section 8(a)(5) of the Act, thereby interfering with restraining and coercing its employees in violation of Section 8(a)(1).[10]

G. THE REMEDY

I have already found that the Respondent has engaged in certain unfair labor practices which I recommend be remedied by the issuance of an order that Respondent cease and desist from the conduct found and that it further cease and desist from infringing in any other manner upon the statutory rights of its employees and an affirmative order reinstating Employee James Goins with backpay (TXD, p. 10–12). I shall reaffirm these recommendations by appropriate reference in my Supplemental Recommendations herein. In addition, I shall recommend that Respondent bargain collectively with the Union in the unit which I have found to be appropriate for bargaining purposes, and I shall further recommend that it be required to post a notice of compliance which consolidates the matters contained in both my original and supplemental recommendations.

[10] *The Great Atlantic and Pacific Tea Company, Inc.*, 162 NLRB No. 110.

SUPPLEMENTAL RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, and the National Labor Relations Board's Order of Remand issued to me in this proceeding, I hereby reaffirm my recommendations contained in my Decision issued on November 30, 1965, and I further recommend [11] that Heck's Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from refusing to bargain with CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION No. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTER, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive representative of employees in the following unit found to be appropriate for the purposes of collective bargaining:

> All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request bargain collectively with the above-named labor organization as the exclusive representative of all Respondent's employees in the unit found to be appropriate and, if an agreement is reached, embody such an understanding in a signed agreement.

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[11] In the event that this Supplemental Recommended Order be adopted by the Board, the words "RECOMMENDED" shall be deleted from its caption and wherever else it appears thereafter; and for the words "I RECOMMEND" or "I FURTHER RECOMMEND" there shall be substituted "NATIONAL LABOR RELATIONS BOARD HEREBY ORDERS."

(b) Post at its Nitro, St. Albans and Charleston, West Virginia, stores and warehouses copies of the notice attached hereto as "Appendix," it being a consolidation with the notice previously recommended be posted in this proceeding.[12] Copies of said attached notice to be forwarded by the Regional Director for Region Nine shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof, in conspicuous places, including places where notices to employees are customarily posted, and be maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director in writing within 20 days from the receipt of this Supplemental Decision what steps the Respondent has taken to comply therewith.[13]

Dated at Washington, D.C.

THOMAS F. MAHER,
Trial Examiner.

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[12] In the event that this Supplemental Recommended Order be adopted by the Board the words "A Decision and Order" shall be substituted for the words "THE SUPPLEMENTAL RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a United States Court of Appeals, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[13] In the event that this Supplemental Recommended Order is adopted by the Board, this provision shall be modified to read "Notify the said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Supplemental Recommended Order of a Trial Examiner of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(*as amended*)

we hereby notify our employees that:

WE WILL NOT unlawfully interrogate our employees concerning their union membership, activities, or desires.

WE WILL NOT threaten our employees with reprisal for engaging in union activities or for supporting CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization.

WE WILL NOT offer or grant our employees wage increases and/or promotions in exchange for this opposition to the aforesaid union.

WE WILL NOT discharge, or otherwise discriminate against our employees in respect to hire or tenure because they are leaders in the aforesaid union or have participated in concerted activities protected by Section 7 of the National Labor Relations Act.

WE offer immediate and full reinstatement to his former or substantially equivalent position to James Goins, and WE WILL make him whole for any loss of pay he may have suffered, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

WE WILL notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

WE WILL upon request bargain collectively with CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive representative of all the employees in the bargaining unit described below concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is

> All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All of our employees are free to become or refrain from becoming members of the above-named union, or any other labor organization.

HECK'S INC., *Employer.*

Dated: _____ By: _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly

with the Board's Regional Office, Room 2407, Federal Office Building, 550 Main St., Cincinnati, Ohio 45202 (Tel. No 684-3686).

United States of America

Before the National Labor Relations Board

Case No. 9-CA-3728

HECK'S INC.

and

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

DECISION AND ORDER

On March 30, 1967, Trial Examiner Sidney Sherman issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.[1]

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[1] The Respondent excepts to the Trial Examiner's finding that the Union authorization card of employee Morris was properly authenticated, and, by motion incorporated in its brief, moves that the record be reopened and a subpoena be issued, requiring the Trial Examiner to appear and testify concerning his qualifications as a handwriting expert. The Respondent contends that failure to grant its motion should result in the rejection of Morris' card, inasmuch as Morris did not testify at the hearing and no other witness testified that he saw Morris sign the card.

After the hearing the parties stipulated that Morris was unavailable to testify, his whereabouts being unknown. The

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations[2] of the Trial Examiner.

Trial Examiner (Section III, C, 3, b, 4 of his Decision), after comparing the purported signature of Morris on the Union authorization card with a specimen signature taken from the Respondent's payroll records, concluded that the card was signed by Morris, and found that such a comparison is a proper method of proving the authenticity of a signature (see footnote No. 29 of the Trial Examiner's Decision and the authorities cited therein). The Trial Examiner further found that it is proper to presume that the card was signed on the date shown thereon. (footnote No. 30 of the Trial Examiner's Decision).

We agree with the Trial Examiner's finding that Morris' card was properly authenticated. (See also, *Combined Metal Mfg. Corp.*, 123 NLRB 895; *Philamon Laboratories, Inc.*, 131 NLRB 80, enfd. 298 F. 2d 176, (C.A. 2)). In any case, we note that even without Morris' card the Union had a majority of employees in the appropriate unit when it made its recognition demand. Accordingly, as we find the Respondent's motion to reopen the record lacking in merit, it is hereby denied.

[2] We agree that the Respondent's polling of its employees was in the circumstances of this case violative of Section 8(a)(1) of the Act. Therefore, we find it unnecessary to rely on or adopt the Trial Examiner's additional or alternative grounds for that finding, as set forth in the last sentence of footnote No. 10 of his Decision.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Heck's Inc., Ashland, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommeded Order.

Dated, Washington, D.C.

[SEAL] JOHN H. FANNING,
Member,

HOWARD JENKINS, Jr.,
Member,

SAM ZAGORIA,
Member,

National Labor Relations Board.

United States of America Before the National Labor Relations Board, Division of Trial Examiners, Washington, D.C.

Case No. 9–CA–3728

HECK'S, INC.[1]

and

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO

Cassius B. Gravitt, Jr., Esq., and *James K. Lawrence, Esq.*, for the General Counsel. *Frederick Holroyd, Esq.*, Charleston, W. Va., for Respondent.

[1] Respondent's name appears as amended at the hearing.

Messrs. Sherwood M. Spencer and *Woodrow R. Gunnoe*, Charleston, W. Va., for the Charging Party.

Trial Examiner's Decision

Sidney Sherman, Trial Examiner: The instant charge was served upon Respondent on October 22, 1965,[2] the complaint issued on December 16, and the case was heard on February 1, 1967. The issues litigated related to allegations of unlawful interrogation, threats of reprisal, creating the impression of surveillance, and unlawful refusal to bargain. After the hearing briefs were filed by Respondent and the General Counsel. On March 16, 1967, an order was issued proposing certain corrections in the record and the incorporation therein of certain exhibits, and disposing of certain other matters. No objection has been received to this order, and it is hereby affirmed.[3]

Upon the entire record, and my observation of the witnesses, I adopt the following findings of fact and conclusions:

I. The Business of Respondent

Heck's, Inc., herein called Respondent, is a West Virginia corporation, engaged in the operation of retail stores at various locations in the States of West Virginia and Kentucky. The Respondent annually has gross sales of more than $500,000, and annually purchases from out-of-State points goods valued in ex-

[2] All events herein occurred in 1965, unless otherwise stated.

[3] In addition, it is now ordered (1) that Respondent's motions to strike appearing at pp. 24 and 28 of the transcript, as to which ruling was reserved at the hearing, are hereby granted, and (2) that Respondent's objection to evidence, which objection appears at page 100 of the transcript, and as to which ruling was reserved at the hearing, is hereby granted and the evidence objected to is hereby struck.

cess of $50,000. Respondent is engaged in commerce under the Act.

II. The Labor Organization Involved

Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, hereinafter called the Union, is a labor organization under the Act.

III. The Unfair Labor Practices

A. ISSUES

The pleadings, as amended at the hearing, raise the following issues:

1. Whether Respondent's president, Haddad, told employees on or about May 24, that he had discharged an employee when she admitted signing a union card?

2. Whether the interrogation of employees on October 8, by Respondent's operations manager, Darnell, violated Section 8(a)(1) of the Act or was privileged under the Board's *Blue Flash* doctrine?

3. Whether Respondent's assistant store manager, Mitchell, unlawfully created the impression of surveillance?

4. Whether Mitchell told an employee that another supervisor had been discharged because of the Union, and invited the employee to resign?

5. Whether Respondent's admitted refusal to recognize the Union violated Section 8(a) (5) and (1) of the Act?

B. SEQUENCE OF EVENTS

Respondent operates a chain of discount stores in Kentucky and West Virginia. The instant case involves only its Ashland, Kentucky store.

The instant organizing campaign began early in 1965, and by October 8, the Union had obtained a number of signed cards from persons working in the Ashland store. On May 24, during the foregoing campaign, Respondent's president Haddad, addressed the assembled store employees, and, after telling them, in effect, that the signing of a union card would not immunize them from disciplinary action, cited an incident involving the discharge of an employee in another store who had volunteered to him the information that she had signed a union card. There was some conflict in the testimony at the hearing, which will be considered below, as to the precise reason given by Haddad for the discharge of that employee.

On October 8, Union Agent Spencer called Respondent's counsel, Holroyd, stated that he had obtained signed cards from a majority of Respondent's Ashland employees, and requested recognition. Holroyd suggested that Spencer write him a letter to that effect. On October 8, Respondent's operating manager, Darnell, asked virtually all the employees in the Ashland store, whether he (or she) wanted to be represented by the Union. In a letter of October 11, to Holroyd Spencer repeated the substance of the foregoing oral demand, offering to show Respondent the Union's cards. On October 13, Holroyd replied by letter, declining to recognize the Union because of an alleged ambiguity in the Union's definition of the unit, and because a poll taken by Respondent demonstrated that the majority of the Ashland employees did not wish to be represented by the Union. On October 25, Spencer again wrote Holroyd, renewing the Union's demand, but received no reply.

There was uncontradicted testimony by employee Clare that early in October, Assistant Store Manager

Mitchell, an admitted supervisor,[4] told her that Respondent knew which employees had signed, and which had not signed, Union cards, and that the Union had attained majority status when Clare signed a Union card (on October 6).

C. DISCUSSION

1. Union animus

Respondent's union animus is amply attested by the Board's findings in 150 NLRB 1565 (Ashland store), 156 NLRB No. 73 (Parkersburg store), 158 NLRB No. 21 (Parkersburg store), 159 NLRB No. 104 (Huntington store), and 159 NLRB No. 127 (Huntington store). Perusal of these cases shows that at the foregoing stores Respondent reacted to a union organizational campaign by mounting a counteroffensive of interrogation and threats, did not hesitate to resort to discriminatory discharges, and that it consistently rejected requests for recognition. Thus, in 150 NLRB 1565, involving a campaign in 1964 by a different union (Retail Clerks) to organize the instant store, it was found that Respondent, through its president, Haddad, and operations manager, Darnell, engaged in extensive interrogation, that a supervisor threatened employees with discharge for union activity, and that an active union adherent was, in fact, discriminatorily discharged.

2. The 8(a)(1) issues

a. The Haddad speech

Riffe testified that on May 24, President Haddad told the assembled employees at the Ashland store

[4] The denial in the Respondent's answer of Mitchell's supervisory status was withdrawn at the hearing.

that they could sign all the union cards they wished, but they still had to do their work, and that he then mentioned the case of a girl in Respondent's Parkersburg store who, after volunteering to him the information that she had signed a union card, had been "fired on the spot." Menshouse testified to the same effect, and Maynard corroborated this version with only the minor embellishment that Haddad asserted that the Parkersburg employee had "flaunted" the fact that she had signed a union card. While agreeing otherwise with Riffee, Clare testified that Haddad interpolated the explanation that the girl in Parkersburg had been discharged because she took the position, in effect, that, having signed a union card, she was free to neglect her work, and Carter testified to substantially the same effect.

All the foregoing employee witnesses were called by the General Counsel, and were apparently sincere. Their testimony may be reconciled on the assumption that Haddad, purposely or otherwise, cast his remarks in such a form that they were susceptible of different interpretations. Thus, if he stated, as Maynard testified, that the employees could sign all the Union cards they wanted, but still had to do their work, and, that he had discharged a Parkersburg employee for flaunting the fact that she had signed a union card, it was understandable that some of the employees, like Clare, would interpret the last remark, taken in context, as implying that the case of the Parkersburg employee was given as an illustration of Haddad's thesis that the signing of a union card did not relieve the employees of their obligation to do their job. However, if, as Menshouse, Riffe and Maynard testified, Haddad did not make it clear that the discharge of the Parkersburg employee was for any reason other than her avowal of union adherence, it was expectable that

some, at least, of the employees would construe his remarks as implying, if not that all Union adherents would be summarily discharged, that Respondent, at the very least, would be quick to discharge Union adherents who gave it any offense. Moreover, in resolving the foregoing conflicting versions of Haddad's remarks, I deem it particularly significant, that Respondent, without offering any explanation at the time, failed to call Haddad to testify, notwithstanding that it was pointed out to Respondent's counsel at the hearing that such failure would invite the inference that Haddad's testimony would not aid Respondent.[5]

In view of this, I am constrained to find that, as indicated by the testimony of Menshouse, Riffe and Maynard, Haddad's remarks were couched in such a way as to lead his listeners to believe that adherence to the Union would subject them to reprisals, and that Respondent thereby violated Section 8(a)(1) of the Act.

b. Darnell's interrogation

Admittedly, Darnell on October 8, systematically interrogated all the employees in the Ashland store about their desire for Union representation. According to Darnell, he approached the employees in the

[5] In his brief Respondent's counsel asserts that he did not defend the allegation relating to Haddad's speech because of his understanding that [illegible] had been struck. However, at the close of the General C[illegible]el's case I stated on the record that I was reserving ruling on Respondent's motion to strike that allegation, and in my order of March 16, 1967, that motion was finally overruled. On the same date I advised Respondent's counsel by letter that, if he deemed himself prejudiced by this ruling, I would entertain a motion to reopen the hearing to receive further evidence on the matter. No such motion was filed.

store and read the following from a sheet of paper which he held in his hands:

> You are probably aware that the Food Handlers Union are (sic) trying to organize the store. They have made a demand of the Co. stating that they have a majority of our employees who desire them (the Union) to represent them. Do you want the Union to represent you? This will in no way have any bearing on your job. You do not have to answer this.

The sheet also listed the names of the employees and opposite this list were three ruled columns captioned, respectively "Yes," "No," and "Neutral." According to Darnell he indicated in one or the other of these columns the nature of each employee's reply to his question regarding their desire for union representation.[6] He testified that the majority of the employees interrogated repudiated the Union, and the tally on the sheet, eliminating the answers of those found below to be supervisors, shows that only 12 favored the Union while 23 opposed it. The answers of three employees were not recorded.[7] While three of the employees (Clare, Smith, and Menshouse) testified that Darnell's remarks to them corresponded to the foregoing quoted matter, Riffe testified only that Darnell asked her if she wanted to be represented by the Union, and Carter and Gates were specific that, in

[6] The foregoing document was offered in evidence at the hearing as Respondent's Exhibit 1, but was received only for the purpose of showing what Darnell purportedly read to the employees. However, upon reconsideration, the document was by my order of March 16, 1967, received in evidence without any limitation, since the contents of the entire document were in effect, adopted by Darnell in his testimony.

[7] Darnell testified that he may have missed a few employees in making the round of the store.

interrogating them, Darnell gave no assurance that their answers would not affect their jobs.

As I was favorably impressed by the demeanor of the latter three witnesses, and by the circumstantiality of their version of the interrogation incident, I credit them as against Darnell, and find that he offered them no assurance against reprisals.

Respondent contends that the foregoing interrogation was permissible under the Board's *Blue Flash* rule,[8] which sanctions interrogation of employees about their desire for union representation, provided, *inter alia,* (1) that the purpose is to verify a union's contemporaneous claim to represent a majority of the employees, (2) that such interrogation is accompanied by an assurance against any reprisals for union activity, and (3) that such interrogation does not occur in a context of employer hostility to union organization.

I am satisfied that none of the foregoing conditions was met here. As to (1) it is clear from Clare's undenied testimony, related in more detail below, that Respondent already knew on October 6, which employees had signed cards and that when Clare signed a card on that date the Union had achieved majority status, and there is no evidence that Respondent believed that such majority had been obtained by improper means.[9] Accordingly, Darnell's polling of the employees was not necessary to verify the Union's claim, and it seems fair to infer that Respondent's

[8] *Blue Flash Express, Inc.*, 109 NLRB 591; *Johnnie's Poultry Co.*, 146 NLRB 770.

[9] In any event, since the record, including Darnell's own testimony, is devoid of any evidence that he asked any of the employees on October 8, about the methods used by solicitors for the Union to induce the employees to sign the cards, it is clear that Respondent had no concern on this point.

only reason for taking the poll was the expectation that some of the Union adherents would be reluctant to admit their true sentiments to Darnell, even if they were given assurance against reprisals, and that the result of such a poll would, therefore (as proved to be the case here), be more favorable to Respondent than a count of the cards known by Respondent to have been actually signed. I do not believe that to permit such a "recount" by Respondent would conform to the letter or spirit of *Blue Flash.*[10]

As to the requirement of *Blue Flash* that the interrogation be accompanied by an assurance against reprisals, it has already been found that in the case of at least three employees Darnell neglected to convey that assurance.

As to the requirement of absence of union animus, it must be remembered that Darnell's interrogation occurred against the background of President Haddad's speech of May 24, in which, as found above, he cited the case of an employee whom he had discharged on the spot, when she announced that she had signed a union card. Although this speech had been delivered more than 4 months before the polling of the employees, such a dramatic threat to their job security by the top representative of management could not have

[10] Prior to *Blue Flash*, the Board had long held that systematic interrogation of employees about their union sentiments was unlawful as an invasion of their right to privacy and freedom from coercion. In *Blue Flash*, the Board balanced the mischief of such interrogation against the interest of the employees in verifying the accurancy of a union's claim to represent a majority of his employees, and struck a balance in favor of the employer. See *Johnnie's Poultry Co., supra.* However, where as here, there is ample basis for finding that the employer is already aware from other sources of the facts as to the Union's status, no legitimate purpose would be served by permitting him even the limited invasion of his employees' rights accorded by *Blue Flash.*

failed to make a lasting impression on the assembled employees.

Moreover, it is relevant here to consider Respondent's union animus, as demonstrated by the Board's findings in the various cases cited above, particularly the Board's findings that in March 1964, at the instant store, both Haddad and Darnell engaged in unlawful interrogation, Respondent threatened discharge of all the union adherents, and did discriminatorily discharge, Menshouse, a prominent union protagonist;[11] and, so far as appears from the record, such unfair labor practices were still unremedied on October 8.[12] It is difficult to see how, under such circumstances, Darnell's poll could be deemed to meet the requirement of *Blue Flash* that such interrogation must not occur in a context of hostility to union organization.

It may be noted, finally, that, in finding interrogation of an employee to be coercive, the Board and the courts have frequently cited the fact that the employee falsely disclaimed any interest in union representation.[13] Here, according to Darnell's own testimony the vast majority of the 38 Ashland employees disclaimed any desire for Union representation, even though, as found below, 21 of them had signed Union cards, and there is no evidence that any of them had prior to October 8, sought to revoke their cards.

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[11] 150 NLRB 1565, enfd. 63 LRRM 2527 (C.A. 6, Nov. 1966).

[12] While Menshouse had been rehired by October 8, there was no evidence as to the extent to which Respondent had otherwise complied with the Board's order by that date.

[13] See e.g., 159 NLRB No. 104, at page 7 of the Trial Examiner's Decision (involving Respondent's Huntington store), which was affirmed on this point by the Board, where the variance between the result of an employee poll and the card count was cited as a reason for finding the poll coercive.

For all the foregoing reasons, it is found that Darnell's interrogation violated Section 8(a)(1) of the Act.

c. The Mitchell-Clare incidents

Clare signed a Union card on October 6. She testified that early in October, she had discussions about the Union with Assistant Store Manager Mitchell, who told her that Respondent knew what employees had and had not signed Union cards, and that the Union had gotten "over the hump" and achieved majority status, when she signed a Union card. Mitchell did not testify. I credit Clare. A statement reflecting such precise knowledge of the number of Union adherents [14] could not fail to create an impression of close surveillance by management of Union activities, through employee informers or otherwise.[15] It is

[14] Moreover, as found below, the Union did in fact get "over the hump" on October 6, when it obtained its 20th (and 21st) card. (Both Clare and Brown signed cards on that date.)

[15] While it is not clear from Clare's testimony whether this conversation took place before or shortly after the October 8 poll, it is evident that Mitchell was not referring to that poll as the source of Respondent's information regarding the Union sentiments of the employees. For one thing, that poll elicited repudiations of the Union from the vast majority of the employees, and it is not apparent, in any event, how Respondent could have determined from that poll the precise date on which the Union obtained the decisive card.

Respondent cities certain testimony by Clare to the effect that she and Mitchell were on friendly terms, that she "probably" initiated discussions of the Union with him, that she "might have" told him before the foregoing incident that she knew that most of the employees had signed Union cards; and that, on the occasion in question, she agreed with Mitchell's observation on this point. However, there is no evidence that Clare disclosed to Mitchell the identity of the Union adherents or that she herself had signed a card; and the fact that Mitchell and Clare were on friendly terms or that she initiated the

accordingly found that, by creating such an impression, Respondent violated Section 8(a)(1) of the Act.

Clare testified further that some time after Darnell's visit to the store on October 8, Mitchell referred to a rumor then circulating among the employees that Store Manager McCann had been "discharged" [16] because of "the union and the employees," and that, in this connection, on a particular Saturday evening Mitchell told the witness that the employees and the Union had "shafted" McCann, and that the employees were not going to "shaft" Mitchell. As Mitchell did not testify, I credit Clare. It is apparent from the foregoing that Mitchell attributed the actual or supposed downfall of McCann to the extent of the employees' Union activity. Such a statement to an employee, implying, as it did, that management would not hesitate to discharge a supervisor for tolerating union activity, could not fail to impress upon such employee that those engaging in such activity might share the supervisor's fate. Accordingly, I find that Respondent thereby violated Section 8(a)(1) of the Act.[17]

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discussions of the Union could not detract from the coercive effect of Mitchell's imputation to higher management of exact knowledge of the identity of the Union adherents.

[16] As McCann apparently continued as store manager at Ashland until November 1966, the foregoing discussion either must have occurred after that date, or must have been based on misinformation as to McCann's status.

[17] Had McCann in fact been discharged because of a permissive attitude toward the Union, such discharge would clearly have been unlawful. *Talladega Cotton Factory, Inc.*, 106 NLRB 295, enf. 213 F. 2d 208 (C.A. 5); *Jackson Tile Manufacturing Co.*, 122 NLRB 764, enf. 272 F. 2d 181 (C.A. 5); *General Engineering, Inc.*, 131 NLRB 648. The rationale of these cases is that such a discharge tends to instill in employees the fear that they will suffer the same fate if they persist in their union

The General Counsel alleged a further violation based on Clare's testimony concerning an invitation to her by Mitchell to resign her job. However, the most that can be made of Clare's rather confused testimony on this point is that, while this remark was made by Mitchell on the same evening that he referred to the "shafting" of McCann, the occasion for the remark was not Clare's Union activity or sentiments but a disagreement over an entirely different matter, unrelated to the Union, and that the very next day Mitchell apologized to her therefor. Accordingly, I find no violation here.

3. The 8(a)(5)

a. The appropriate unit

It was agreed at the hearing, and I find, that the following unit is appropriate for purposes of collective bargaining:

> All employees at Respondent's store in Ashland, Kentucky, excluding guards, professional employees, and supervisors as defined in the Act.[18]

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activities. Such fear is nonetheless real, where, as here, the employees are told that their union activities caused the supervisor's discharge, whether or not that was actually the case.

[18] The original complaint provided for the exclusion of office clericals from the unit. The record shows that on October 8, Respondent had only one office clerical employee—Ruth Conley. (Cahal, who also worked in the office, was classified as a department head, and is found to be a supervisor.) Conley worked in a small enclosure in a corner of the store, where, among other things, she compiled records of cash receipts and processed employee timecards. Some time after October 8, she was transferred to the cosmetic department. At the hearing, the General Counsel moved to amend the complaint to include office clerks and Respondent stipulated to their inclusion. Under all the circumstances, I find that such inclusion was proper (*Heck's*,

It was also agreed at the hearing, in conformity with the Board's finding in the prior case involving the instant store,[19] that the six department heads at Ashland were supervisors, and that the night watchman at that store was a guard. They will accordingly be excluded.

b. The Union's majority status

At the hearing Respondent presented a document containing a list of 45 names, which were identified by McCann, the former manager of the Ashland store, as the names of all employees and department heads on the payroll for that store during the week beginning October 8.[20] Of the foregoing persons, it was stipulated at the hearing that six, who were listed as department heads, were supervisors and that one who was listed as the "nightwatchman" was a guard. Of the remaining 38, there was a dispute at the hearing only as to Roger Davis, who was listed on the exhibit as a department head. The General Counsel also contended at the hearing that the list was incomplete. However, after the hearing, the General Counsel withdrew this contention,[21] and Respondent indicated that it was satified that, as contended by the General Counsel, Davis was not a supervisor on October 8, but an employee.[22] It follows that the parties are now in agreement, and it is found, that on October 8 and during the ensuing week the unit consisted of 38 employees.

Inc., 159 NLRB No. 104; *Ohrbach's*, 118 NLRB 231; *Taunton Supply Corp.*, 137 NLRB 221), particularly as it was agreed to by Respondent at the hearing (Cf. *Heck's, Inc.*, 156 NLRB No. 73, fn. 17; *Heck's, Inc.*, 159 NLRB No. 104, fn. 1).

[19] 150 NLRB 1565.

[20] Trial Examiner's Exhibit 1.

[21] Trial Examiner's Exhibit 2.

[22] Trial Examiner's Exhibit 3.

At the hearing the General Counsel offered in evidence 30 signed Union authorization cards, which bore dates prior to October 8.[23] One of these cards, signed by McGuire, was later withdrawn, another was rejected because signed by France, a supervisor, and the card of Colm is hereby rejected for the same reason. Of the remaining 27 cards, the record shows that 6 purport to bear the signatures of individuals who were not in Respondent's employ on October 8. There remain 21 cards, most of which are challenged in Respondent's brief on various grounds, as follows:

1. Twelve cards are challenged on the ground that the signatory did not testify at the hearing. However, these cards were properly authenticated by witnesses at the hearing, who attested to the signing of the card.

2. Criswell's card is contested on the ground that he was a department head. However, the record does not support this contention.

3. Clare's card is attacked on the ground that France, her department head, talked to her about the Union. While Clare initially acknowledged that, before she signed the card, she discussed the Union at some length with France, who expressed the view that

[23] An additional card, that of Linda Fields, bore the date of November 27, which was subsequent to the Union's demands for bargaining in October.

At a later point in the hearing, the General Counsel offered in evidence 19 new cards, of which 17 were shown to have been signed by persons employed in Respondent's Ashland store on various date in January 1967. The General Counsel would add these cards to those already in evidence, and contends that there was a continuing demand by the Union, in January 1967, at a time when, as allegedly shown by such cards, the Union enjoyed majority status, and that such demand was rejected by Respondent for invalid reasons. However, in view of my ultimate findings below, there is no need to pass on this issue.

it "would be a good thing" if the Union organized the employees, at a later point in her testimony she professed to be unable to recall whether France talked to her about the Union before or after she signed the card, and averred that she had little contact with him other than in connection with her work, as they were not "very fond of each other." She insisted, moreover, that she signed the card at the request of a Union agent, after discussing the pros and cons of union representation, and she denied that France's endorsement of the Union had any bearing on her decision to sign the card, explaining that she signed it because she "didn't like how things were," and she did not like France and how he "ran things." It thus appears that it was her resentment of France's conduct as a supervisor, rather than his endorsement of the Union, that impelled her to sign the card.

Moreover, in *Aero Corporation*[24] in rejecting the contention that a card was invalid because solicited by a minor supervisor, the Board said:

> * * * to permit Respondent now to rely on Johnson's activities to justify its refusal to recognize the Union designated by a majority of its employees, would encourage Respondent to have just such marginal supervisors join in the employees' organizing activity, secure in the knowledge that, if the Union should gain a majority, disclosure of the supervisor's real status would defeat that majority.

This rationale was specifically approved by the Court of Appeals in that case.

Under all the foregoing circumstances, it is found that Clare's card is valid.[25]

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[24] 149 NLRB 1283 1287, enf. 363 F. 2d 702, 708 (C.A.D.C.).

[25] *Radio Station KVEC*, 93 NLRB 618, 623.

4. The cards of Wheeler and Morris were attacked on the ground that they were authenticated at the hearing only by specimens of their signatures taken from Respondent's payroll records.[26] However, after the hearing the parties submitted a stipulation to the effect that Wheeler's card was signed by him on the date shown thereon,[27] and, in view of this stipulation, no valid reason appears for rejecting his card.[28] As to Morris, it was stipulated only that his whereabouts were unknown and that he was unavailable to testify. However, I am satisfied from a comparison of his purported signature on the Union card with the specimen referred to above that the card was signed by him.[29] While there was no testimony at the hearing that such card was signed on the date shown thereon (October 2), it is proper to presume the accuracy of that date.[30]

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[26] Tax withholding certificates.

[27] See Trial Examiner's Exhibit No. 4 and my order of March 16, 1967.

[28] At thhe hearing, ruling was reserved on the admission of his card. It is hereby ordered received in evidence.

[29] As to the propriety of proving the authenticity of a union authorization card through comparison of the signature thereon with a specimen signature, see *Aero Corporation*, 149 NLRB 1283, 1285–1286, and 28 USCA Sec. 1731, which authorizes such comparison by Federal courts, without any limitation as to the conditions under which such comparison may be made. For common law authorities to the same effect, see *Wigmore on Evidence*, 3rd ed., sec. 2016 (fn. 1).

[30] *Wigmore on Evidence*, 3rd ed., sec. 2520(b). While such presumption is rebuttable, there is no contrary evidence here; and, indeed, the only other evidence on the point is the notation made by Darnell on the sheet, on which he recorded the results of his October 8 poll (Respondent's Exhibit 1), indicating that Morris aligned himself on that date with the Union adherents. Such evidence is not only consistent with, but tends to confirm, the presumption that Morris signed a Union card on a date prior to October 8.

It is concluded therefore that on October 8, the Union had signed cards from 21 out of 38 employees in the unit, and that it represented a majority of such employees on that date.

c. The Union's request

Respondent contends that the Union did not make a proper request for bargaining. Union Agent Spencer testified that on October 8, he told Holroyd that the Union represented a majority of the "employees," whether or not department heads were included in the unit, and Spencer's letter of October 11 reaffirms the Union's claim to represent a majority of the "employees" in the Ashland store, regardless of the status of the department heads;[31] and he there prognosticates, on the basis of his experience with Respondent, that the issue of the appropriateness of the Ashland unit would probably reach the Board, but he asserts that, no matter how the Board should rule on the department heads, the Union would still have a majority.

In his reply of October 13, Holroyd acknowledges that in their October 8 conversation, Spencer claimed to represent a majority of the "employees" in the store, and the letter continues:

> Pursuant to my questioning you stated that such majority existed with or without the department heads and you were making a demand to include the department heads or to exclude them depending upon what the Board decided in their case. This answer resulted in a very confused demand and we must therefore con-

[31] In this letter and his subsequent letter of October 25, Spencer specifies the exclusion of the office employees. While the one such employee here involved has been included by me in the unit, it is well settled that such a slight variance is immaterial. See *Heck's, Inc.*, 156 NLRB No. 73.

clude that you did not demand recognition in an appropriate unit.[31a]

In his reply of October 25, to the foregoing letter, Spencer made it clear that he was presently defining the unit as either a store-wide unit including "non-supervisory department heads" or as one which excluded department heads. Spencer was thus, offering Respondent a clear, present choice between (1) a unit which included department heads, on the assumption that they were not supervisors, and (2) one which excluded them. Respondent contends that, because it was offered such a choice, Spencer's unit request was ambiguous. However, there was no ambiguity in Spencer's request in the sense that it was not clear what unit he was willing to bargain for. Each of the alternative units was precisely defined, and he made it abundantly clear that he was equally willing to bargain for either one. Essentially, the situation is the same as if Spencer had merely proposed the exclusion of supervisors, and indicated that he was willing to abide by Respondent's determination as to the supervisory status of the department heads.

Moreover, even if the Union had erroneously insisted on including the six department heads, it appears that the Board would not have deemed its bargaining request defective for that reason.[32] It is not clear why the Union should be in a worse position, because it indicated indifference to the unit placement of the department heads. Respondent had

[31a] I do not credit the foregoing self-serving, hearsay version of Spencer's demand, insofar as it conflicts with his testimony.

[32] *Heck's, Inc.*, 156 NLRB No. 73, involving the Parkersburg store. There the Board found that a request for inclusion of as many as 5 employees out of a unit of 37 was not defective, even though the 5 were found ineligible. Here, there were, as found above, 38 in the appropriate unit.

no greater burden here than it had in the case just cited, involving its Parkersburg store. Here, as there, Respondent was required only to indicate in what respect it deemed the requested unit to deviate from the one it considered proper. Moreover, here unlike there, Respondent was assured that the Union would adapt its unit request to Respondent's views.

Accordingly, I find no fatal defect in the Union's bargaining request of October 8 or any of its subsequent requests.

d. The "good-faith" issue

Respondent offered no oral testimony at the hearing concerning the reason for its decision not to recognize the Union. Darnell averred only that the authority to make that decision was delegated to Respondent's labor relations adviser, Holroyd, who was also its trial counsel, and, although the Union called upon Holroyd to take the stand, he refused to do so.[33] Accordingly, the only insight into Respondent's reason for refusing to recognize the Union is afforded by Holroyd's letter of October 13, which, after alleging that the Union's unit request was defective for the reasons noted above, continued as follows:

> Irrespective of this and in addition, we have caused a poll of all employees in that store to be conducted, the resulting answer produced an overwhelming statement that you did not represent the employees.

[33] As the Union did not press the matter further, I had no occasion to rule on the propriety of such refusal. It is clear, however, that, if, as Darnell insisted, Holroyd was vested with sole responsibility for making such a decision regarding Respondent's labor relations policy as was here involved, he was subject to examination regarding his motivation to the same extent as any other representative of management, provided only that he could not be required to disclose any communications with his client that entered into the matter.

> Accordingly, recognition is declined until such time as you have been certified as the majority representative of the employees involved by the N.L.R.B.

It has already been found, on the basis of Darnell's uncontradicted testimony, that the result of this poll was in fact adverse to the Union. However, it has also been found that such poll did not conform to the requirements of the *Blue Flash* rule and was coercive. It is well settled that, in rejecting a union's recognition request, management may not, consistently with the requirements of good faith, rely on a count of union adherents obtained under coercive circumstances.[34] Such a poll has the twofold vice that it is patently not a reliable measure of employee sentiment, and that it is calculated to deter the employees from remaining union adherents in the future. Accordingly, it is found that, by its resort to, as well as its reliance on, the foregoing poll, Respondent demonstrated its bad faith.

I am mindful of the Board's finding in 159 NLRB No. 104, involving Respondent's Huntington store, that in that case the polling of employees by management concerning their union sentiments, "while unlawful was not so flagrant that it must necessarily have had the object of destroying the Union's majority status * * * nor was Respondent's conduct of such a character as to support an inference that Respondent's refusal to bargain was made in bad faith in violation of Section 8(a) (5) and (1) of the Act."

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[34] *Preiser Scientific, Inc.*, 158 NLRB No. 133, and cases there cited. *Home Pride Provisions, Inc.*, 161 NLRB No. 47.

However, here, unlike there, it was shown that Respondent was satisfied, even before taking the poll, that the Union had achieved majority status. Respondent, therefore, could have had no object in polling the employees on October 8, other than to coerce them into repudiating the Union. Thus, there is present here an essential element found to be lacking in the Huntington case—namely, coercive conduct which "necessarily * * * had the object of destroying the Union's majority status."

Moreover, even if this be viewed as a case where Respondent engaged in no unduly coercive conduct at the time of its refusal to honor the Union's request, it would still be found that such refusal was unlawful. Such a finding would be consistent with the Board's current policy as enunciated in *John P. Serpa, Inc.*, 155 NLRB 99, *Aaron Brothers Company*, 158 NLRB No. 108, and *H & W Construction Co.*, 161 NLRB No. 7. The net effect of these cases appears to be that, where there is no prior bargaining relationship, an employer, who is confronted with a request for recognition based on cards, need only refrain from any unfair labor practices "of such a character as to reflect a purpose to evade an obligation to bargain," and that, if this condition is met, the Board will not infer that his failure to recognize the union was in bad faith—i.e., because of rejection of the principle of collective bargaining. However, in the foregoing cases the Board imposed a limitation on the foregoing rule, which is especially significant here—namely, that, even if the foregoing requirement is met, an employer's refusal to recognize a union will still be found unlawful, if it affirmatively appears that he in fact entertained no doubt of the

Union's majority status.[35] Presumably, the rationale of this is that an employer cannot have a good faith doubt, if he had no doubt at all.

Here, there was affirmative evidence indicating that Respondent was aware on October 6, only 2 days before the Union's initial demand, that it had achieved majority status on that date.[36] No attempt was made to dispute this evidence,[37] and on the basis thereof it has been found that on October 6 Respondent was in fact aware of the Union's majority status. Accordingly, on that ground alone, it would be consistent with current Board policy to find that Respondent's refusal to recognize the Union was unlawful.

Respondent contends, finally, in its brief that it was justified in refusing to bargain because of a letter

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[35] See particularly the discussion of this point in *Aaron Brothers*, *supra*, and *H & W Construction Co.*, *supra*. See, also, *Greyhound Terminal*, 137 NLRB 87, enfd. 314 F. 2d 43 (C.A. 9); *Snow & Sons*, 134 NLRB 709, enfd. 308 F. 2d 687 (C.A. 9). While the foregoing cases dealt with an inspection of cards tendered by a union, no logical reason suggests itself why a different result should apply where the employer has ascertained the union's majority status from other sources. See Member Jenkins' concurring opinion in *Aaron Brothers*, wherein he states that an unlawful refusal to bargain may be proved, *inter alia*, "by independent knowledge of the employer that a union has a majority."

[36] The last 2 of the Union's 21 valid cards were in fact signed on October 6. Thus, Mitchell's aforenoted statement to Clare that Respondent knew that the Union had obtained the decisive card when she signed one (on October 6) was factually correct on the assumption that she was the first to sign on that date. In any case, it suffices that Respondent knew by October 8 that the Union had a card majority.

[37] Respondent did not even call any representative of higher management to deny that Respondent had the knowledge of the Union's majority status imputed to it by Mitchell. This circumstance, in itself, warrants the inference that such imputation was correct.

dated October 1, received by Darnell, which read as follows:

> Mr. FRED HADDAD,
> *President, Tri-State Distributors Inc.,*
> *19th Street, Nitro, West Virginia*
>
> DEAR MR. HADAD: This is to notify you that Retail Clerks Union Local 1059 has interest in your Hecks Inc. store located 3503 Winchester Avenue, Ashland, Kentucky, therefore, we hereby inform you that any agreements with any other Labor Organization would be in contradiction to the above stated interest and we will take all necessary legal action to protect such interest.
>
> Please contact the undersigned in the event you have any questions concerning this matter.
>
> Sincerely,
>
> WILLIAM E. HARVEY,
> *President, Retail Clerks Union Local 1059,*
> *187 South High Street, Columbus, Ohio,*
> *43125.*

Admittedly, Respondent did not reply. The foregoing letter was not authenticated as having been in fact sent by Retail Clerks. Moreover, there was no testimony that such letter motivated Respondent's refusal to recognize the Union, and, significantly, Holroyd's letter of October 13, although purporting to detail the reasons for Respondent's refusal to recognize the Union, makes no mention of Retail Clerk's alleged "interest."

In addition, although a number of employees had signed cards for Retail Clerks as late as March 1964,[38] Menshouse testified, without contradiction, that no representative of the Retail Clerks had appeared at the Ashland store since the latter part of 1964, which was several months before the Union began its organ-

[38] See the findings in *Heck's Inc.*, 150 NLRB 1565.

izing campaign, and nearly a year before the Union's bargaining requests. While in the case last cited, Retail Clerks filed, *inter alia,* a refusal-to-bargain charge, that charge was either withdrawn or dismissed before the hearing held in that case on July 14, 1964; and, so far as appears from the record, the only basis for Retail Clerks' claim in the October 1 letter that it had an "interest" in the Ashland store were the cards dating back to March 1964, and the outstanding order of the Board issued in that case on February 5, 1965, requiring Respondent to refrain from discouraging, or interfering with, employee activities on behalf of Retail Clerks.[39]

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[39] That order was enforced by the Court of Appeals on November 29, 1966, 63 LRRM 2527 (C.A. 6).

Respondent cites *Blade-Tribune Publishing Co.*, 161 NLRB No. 137, apparently as authority for the continuing vitality of the Retail Clerks' 18-month old cards. However, that case is clearly distinguishable, as it holds merely that, when an organizing campaign is interrupted by the processing of unfair labor practice charges and thereafter resumed by the same union, culminating in a demand for recognition, a card signed before such interruption may be regarded as still valid, even though over a year old. Here, there was no resumption of the organizing campaign by Retail Clerks at any time after its apparent suspension or abandonment late in 1964, nor any subsequent demand by that union for recognition. This difference in the factual setting of the two cases is of prime significance. For, in *Blade-Tribune* the employer was in essence attempting to avoid its bargaining obligation by relying on the disruption of a union's organizing campaign through its own unfair labor practices. Policy considerations were clearly opposed to the employer's position and required that the otherwise stale cards be validated, so that the employer might not profit by his own wrong. Here, on the other hand, Respondent would profit by its own wrong if it were allowed to rely on Retail Clerks' 18-month old cards as a reason for not bargaining with the Union, since the only basis for validating such cards would be Respondent's own unfair labor practices in

While the Board has held that, when he is confronted with competing claims by two rival unions, which give rise to a real question concerning representation, an employer need not, and, indeed, may not, recognize either one,[40] there was here no demand by Retail Clerks for recognition or any claim to represent the employees, but only a vague assertion of an "interest" in the employees, and a caveat against negotiating any contract with the Union, and Respondent admittedly made no effort to obtain clarification of the Retail Clerks' foregoing ambiguous position. In view of these circumstances, as well as the absence of any competent evidence that the foregoing letter was actually sent by Retail Clerks, that Respondent's refusal to recognize the Union was prompted to any extent by that letter, or that Retail Clerks had any valid authorization cards on October 1, it is found that Respondent's reliance on that letter is misplaced.[41]

1964. Whether the result here reached would be prejudicial to Retail Clerks is speculative, as there is no evidence that it intended to, or did, renew its campaign at any time. There can be no doubt, however, of the prejudicial effect on the employees' interest in self-organization, if Respondent's contention is sustained, as they will then be denied the right to representation by a union to which they adhered in the face of Respondent's unremedied unfair labor practices.

[40] *The Boy's Market, Inc.*, 156 NLRB 105, 107.

[41] *Boy's Market, Inc., supra.* The Board there held that the refusal to recognize a union is not excused by a rival union's claim which is "clearly unsupportable or specious, or otherwise not a colorable claim." Here, not only was there no substantial basis for Retail Clerks' claim, but the fact that Holroyd's letter of October 13 does not even advert thereto is persuasive that Respondent recognized the speciousness of such claim. See, also, *Essex Wire Corp.*, 130 NLRB 450.

It is therefore concluded that, by refusing to recognize the Union on and after October 8, Respondent violated Section 8(a) (5) and (1) of the Act.

IV. The Remedy

It having been found that the Respondent violated Section 8(a) (1) and (5) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent refused to bargain in good faith with the Union, which represented a majority of the employees in an appropriate unit. Accordingly, I shall recommend that the Respondent be ordered to bargain, upon request, in good faith with the Union as the exclusive representative of the employees in the appropriate unit.

V. Conclusions of Law

1. All employees in Respondent's Ashland, Kentucky, store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times material the Union has been and still is the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

3. By refusing since October 8, to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

4. By interrogation of employees about their Union activities, threatening reprisals for such activities, and creating the impression of surveillance thereof, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Recommended Order

Upon the entire record in the case, and the foregoing findings of fact and conclusions of law, it is recommended that Respondent, Heck's, Inc., Ashland, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain concerning rates of pay, wages, hours of employment, or other conditions of employment with Food Store Employees Union, Local #347 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all employees in its Ashland, Kentucky, store, including office clerks, but excluding professional employees, guards, and supervisors as defined in the Act.

(b) Coercively interrogating employees about their union activities, threatening reprisals for such activities, and creating the impression of surveillance thereof.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from

any or all such activities, except to the extent that such right may be affected by the provisos to Section 8(a)(3) of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with Food Store Employees Union, Local #347 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, as the exclusive representative of all employees of the Respondent, in its Ashland, Kentucky store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its store in Ashland, Kentucky, copies of the notice attached hereto marked Appendix.[42] Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[42] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

(c) Notify the Regional Director for the Ninth Region, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith.[43]

Dated at Washington, D.C.

SIDNEY SHERMAN,
Trial Examiner.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of a Trial Examiner of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

> WE WILL bargain in good faith, upon request, with FOOD STORE EMPLOYEES UNION, LOCAL #347 AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, as the exclusive representative of all employees in the bargaining unit described below in respect to rates of pay, wages, hours, of employment, or other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:
>
> > All employees at our Ashland, Kentucky store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act.

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[43] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

WE WILL NOT coercively interrogate our employees about their union activities, threaten reprisals for such activities or create the impression of surveillance thereof.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form join or assist FOOD STORE EMPLOYEES UNION, LOCAL #347 AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos to Section 8(a)(3) of the Act.

HECK'S, INC., *Employer.*

Dated: _____ By: _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407 Federal Office Building, 550 Main St., Cincinnati, Ohio 45202 (Tel. No. 684–3663).

APPENDIX G

United States Court of Appeals for the Fourth Circuit

No. 10543

GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC., PETITIONERS,

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

On Petition to Review the Decision and Order of the National Labor Relations Board.

(Argued January 11, 1968. Decided June 28, 1968.)

Before HAYNSWORTH, Chief Judge, and BOREMAN and WINTER, Circuit Judges.

Lewis P. Hamlin, Jr., (Robert M. Martin on brief) for Petitioners, and Elliott C. Moore, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Elliott C. Lightman, Attorney, National Labor Relations Board, on brief) for Respondent.

PER CURIAM:

Petitioners, General Steel Products and Crown Flex of North Carolina, found by the Board to constitute a single employer within the meaning of the National Labor Relations Act,[1] seek review of an order of the National Labor Relations Board.[2] The order is predi-

[1] 29 U.S.C.A. § 151 *et seq.*

[2] 157 NLRB No. 59.

cated upon the Board's findings that the employer illegally coerced its employees in the exercise of their rights under the Act and had no good faith doubt as to the majority status of the union when it refused to recognize it as the authorized bargaining representative of a unit of its employees. We deny enforcement of those portions of the order dependent upon the latter finding.

The Upholsterers' International Union of North America, AFL–CIO attempted to organize the Company's employees. By letter, the union advised the company that it held signed authorization cards from a majority of the company's employees and requested recognition and a bargaining meeting. The Board found that at that time the union held valid cards from 120 of 207 employees in the unit in question. The company refused to recognize the union, stating its disbelief in the union's claimed majority status. In the meantime, the union filed a petition with the Board for a representation election. The election was held and the union was defeated.

The Board found that during the union's campaign the company engaged in coercive activity in violation of § 8(a)(1) of the Act. Substantial evidence exists on the whole record to support this finding, and we enforce those portions of the order directing the company to cease and desist from coercing its employees and to post appropriate notices. Accepting the Board's findings, however, the violations of § 8(a)(1) as found by the Board were not so extensive or pervasive as to prevent the conduct of a valid secret election.[3]

[3] Whether or not the election actually held was properly held invalid, we do not decide, but the § 8(a)(1) violations found to have occurred were not so pervasive that available remedies were reasonably calculated to assure a free exercise of the employees' choice by secret ballot rather than by resort to a count of questionable cards.

The Board further found that the company's refusal to bargain with the union upon request was not motivated by a good faith doubt as to majority status and constituted a violation of §§ 8(a) (5) and (1) of the Act. In several recent cases we have set forth in sufficient detail the reasons such a finding cannot stand in a typical case of this sort.[4] Accordingly, we deny enforcement of those portions of the order directing the company to cease and desist from refusing to bargain with the union and to bargain with the union upon request.

Enforcement granted in part and denied in part.

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[4] Crawford Mfg. Co. v. NLRB, 4 Cir., 386 F. 2d 367, cert. denied 36 L W 3404, ____ U.S. ____; NLRB v. S.S. Logan Packing Co., 4 Cir., 386 F. 2d 562; NLRB v. Sehon Stevenson Co., Inc., 4 Cir., 386 F. 2d 551; NLRB v. Heck's Inc., 4 Cir., ____ F. 2d ____ (Decided this day); NLRB v. Gissel Packing Co., Inc., 4 Cir., ____ F. 2d ____ (Decided this day).

APPENDIX H

United States Court of Appeals for the Fourth Circuit

No. 10543

GENERAL STEEL PRODUCTS, INC., and CROWN FLEX OF NORTH CAROLINA, INC., PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

THIS CAUSE came on to be heard upon the petition of General Steel Products, Inc., and Crown Flex of North Carolina, Inc., to review and set aside or modify a certain order issued against it by the National Labor Relations Board on the 11th day of March, 1966, in proceedings before the said Board entitled "General Steel Products, Inc., and Crown Flex of North Carolina, Inc., and Upholsterers' International Union of North America, AFL–CIO", numbered 11–CA–2491, 11–CA–2613, and 11–RC–2022; upon the answer of the National Labor Relations Board and cross-petition for enforcement of said order, and upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the order of the National Labor Relations Board be, and it is hereby, enforced with respect to the violations of § 8(a)(1) of the National Labor Relations Act; that enforcement is denied as to those portions of the order directing the company to cease and desist from refusing to bargain

with the union and to bargain with the union upon request, and that the said General Steel Products, Inc., and Crown Flex of North Carolina, Inc., abide by and perform the directions of the Board in said order as so enforced contained, in accordance with the opinion of the Court filed herein.

S/ CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

[Filed: June 28, 1968, Samuel W. Phillips Clerk.]

A True Copy, Teste: Samuel W. Phillips, Clerk
By Margaret M. Walton, *Deputy Clerk.*

APPENDIX I

United States of America, Before the National Labor Relations Board

GENERAL STEEL PRODUCTS, INC., and CROWN FLEX OF NORTH CAROLINA, INC.

and

UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO

DECISION AND ORDER

On November 12, 1965, Trial Examiner David London issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found merit in certain objections filed by the Union to the election conducted in Case No. 11–RC–2022 and recommended that the election be set aside. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, brief, and the entire

record in these cases,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modifications noted below.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its ORDER the Recommended Order of the Trial Examiner, as modified herein, and ORDERS that General Steel Products, Inc., and Crown Flex of North Carolina, Inc., High Point, North Carolina, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order as so modified:

IT IS FURTHER ORDERED that the petition in Case No. 11–RC–2022 be, and it hereby is, dismissed, and all proceedings held in connection therewith be, and they hereby are, vacated, March 11, 1966.

[SEAL] JOHN H. FANNING,
Member,
GERALD A. BROWN,
Member,
SAM ZAGORIA,
Member,
National Labor Relations Board.

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[1] Respondent's exceptions directed to the credibility resolutions of the Trial Examiner are without merit. The Board will not overrule the Trial Examiner's resolutions as to credibility, unless a clear preponderance of all relevant evidence convinces us that they are incorrect. Upon the entire record, such conclusion is not warranted herein. *Standard Dry Wall Products*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3).

[2] In adopting the Trial Examiner's finding that the Union obtained authorization cards from a majority of the Respondent's employees, we need not rely upon the cards of Billy Don Brown and Terry Roberson.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Washington, D.C.

Cases Nos. 11–CA–2491, 11–CA–2613, 11–RC–2022

GENERAL STEEL PRODUCTS, INC., AND CROWN FLEX OF NORTH CAROLINA, INC.

and

UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO

Yelverton Cowherd, Jr., Esq., and *Charles M. Williamson, Esq.,* of Winston-Salem, N.C., for the General Counsel; *Lewis P. Hamlin, Esq.,* of Salisbury, N.C., and *Robert L. Martin, Esq.,* of High Point, N.C., for Respondent; *Richard S. Hoffmann, Esq.,* of Philadelphia, Pa., for the Charging Union.

Before: DAVID LONDON, Trial Examiner

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a twice amended charge in Case No. 11–CA–2491 [1] filed by Upholsterers' International Union of North America, AFL–CIO, hereinafter referred to as the Union, the Board's General Counsel, on October 21, 1964, issued a complaint against General Steel Products, Inc. ("General Steel"), and Crown Flex of North Carolina ("Crown Flex"), hereafter collectively referred to as Respondent. That complaint, as amended on December 15, 1964, alleges that on specified dates between July 3 and November 6, 1964,

[1] The original charge was filed July 29, 1964; the amendments thereof on September 16, 1964, and October 15, 1964.

Respondent, in violation of Section 8(a)(1) of the National Labor Relations Act, as amended ("the Act"), interrogated its employees concerning their union activities, and threatened them with reprisals for engaging in or supporting union activities. Respondent, by separate answers, denied the commission of any alleged unfair practice.

Upon a charge filed by the Union on January 7, 1965, in Case No. 11-CA-2613, the Board's General Counsel, on March 31, 1965, issued a second complaint against Respondent, alleging that since on or about August 14, 1964, in violation of Section 8(a) (1) and (5) of the Act, Respondent has refused to bargain collectively with the Union, the duly designated representative of its employees, in an appropriate unit with respect to rates of pay, wages, and other terms and conditions of employment. By separate answers filed in this proceeding, Respondent, though admitting a refusal to bargain, denied the commission of any unfair labor practice and pleaded several specific defenses which are considered in later portions of this Decision.

On August 14, 1964,[2] the Union filed a petition with the Board in Case No. 11-RC-2022 seeking certification as collective-bargaining representative of the production and maintenance employees of General Steel. Following a hearing on that petition on September 10, the Board's Regional Director for the Eleventh Region, on October 6, issued his Decision and Direction of Election finding that General Steel and Crown Flex constitute a single employer for purposes of collective bargaining, and directing that an election be conducted among the employees of both corporations in an appropriate unit to determine whether they desired

[2] Unless otherwise noted all references to dates herein are to the year 1964.

representation by the Union. On October 13, General Steel filed with the Board at Washington, D.C., its Request for Review of the aforementioned Regional Director's Decision and Direction of Election contending that, contrary to the finding of the Regional Director in that proceeding, the record therein does not establish that General Steel and Crown Flex constitute "a single employer for purposes of the Act." On October 28, the Board issued its Order denying the aforesaid Request on the ground that "it raises no substantial issues warranting review."

At the election conducted on November 6, 83 votes were cast for the Union, 94 against that organization, and 13 ballots were challenged. On November 10, the Union filed timely Objections to that election based on Respondent's alleged illegal conduct which, it was claimed, affected the results of that election. On December 23, following an investigation of the issues raised by the Objection aforementioned, the Regional Director issued his Supplemental Decision and Direction in Case No. 11–RC–2022 overruling four of said Objections. With respect to the remainder, he found the testimony with respect thereto to be in conflict and involving questions of credibility as to substantial and material issues. Accordingly, he directed that a hearing to resolve these issues be held before a Trial Examiner to be designated by the Chief Trial Examiner.[8] Because some of the said unresolved issues raised by the Objections in Case No. 11–RC–2022 are related to the issues posed by the amended complaint in Case No. 11–CA–2491 and the complaint in Case No. 11–CA–2613, the Regional Director, deeming it

[8] With respect to the 13 challenged ballots, the Regional Director sustained two of such challenges. The remainder were not considered by him, as a determination with respect thereto would not affect the ultimate result of the election.

necessary in order to effectuate the purposes of the Act and to avoid unnecessary costs and delay, by Orders dated December 28, 1964 and March 31, 1965, ordered that all three of said proceedings aforementioned be consolidated for hearing.

That hearing was held, pursuant to due notice, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner, at High Point, North Carolina, on various dates between May 24 and June 18, 1965, inclusive. All parties to the proceedings appeared and were given full opportunity to offer relevant and competent evidence. On or about August 30, 1965, briefs were received from the General Counsel and Respondent, both of which have been duly considered.

Upon the entire record in this consolidated proceeding, and my observation of the witnesses as they testified, I make the following:

Findings of Fact

I. THE BUSINESS OF GENERAL STEEL AND CROWN FLEX, AND THEIR SINGLE EMPLOYER STATUS

The two complaints herein allege, the separate answers of General Steel and Crown Flex admit, and I find, that (1) General Steel and Crown Flex are North Carolina corporations engaged in the same premises at High Point, North Carolina, General Steel being engaged in the manufacture of metal components of dual-purpose furniture, and Crown Flex in the manufacture of insulator pads; (2) during the 12 months preceding the filing of the two complaints herein, each of said corporations purchased and caused to be shipped materials valued in excess of $50,000 to its High Point, North Carolina, plant from points outside the State of North Carolina; (3) dur-

ing the same period, both General Steel and Crown Flex sold and shipped finished products of a value in excess of $50,000 to points outside the State of North Carolina. The separate answer of each corporation admits, and I find, that each of said corporations is engaged in commerce within the meaning of the Act. For the reasons heretofore detailed in Statement of the Case, *supra,* with special emphasis on the Board's Order of October 28 in Case No. 11–RC–2022, denying General Steel's Request for Review, I also find that General Steel and Crown Flex constitute a single employer for purposes, and within the meaning, of the Act. *Pittsburgh Plate Glass Co.,* 313 U.S. 146; *Tennessee Packers, Inc.,* 154 NLRB No. 73, fn. 1; *N.L.R.B.* v. *Quaker City Life Insurance Co.,* 138 NLRB 61.

II. THE LABOR ORGANIZATION INVOLVED

Upholsterers International Union of North America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Interference, restraint and coercion

Frank D. Hoffman, Jr.,[4] executive vice president of both General Steel and Crown Flex, and "operating head" of both companies during all times relevant herein, testified that in 1962 and 1963 he "heard some talk" that a union organizing campaign was taking place among Respondent's employees, and that since June 1964 he was aware of a "real effort" to bring that campaign to a successful conclusion, a campaign which Respondent admittedly sought to defeat. In its

[4] Frequently referred to in the Transcript of Testimony as "Huffman."

effort to avoid the designation of the Union as collective-bargaining representative of its employees, Respondent engaged in the following conduct interfering with, coercing, and restraining its employees in the exercise of their right guaranteed by Section 7 of the Act:

(1) On or about July 1, 1964, approximately six weeks before the Union made its demand for recognition on the following August 14 as is hereafter found, Foreman E. L. Curry of Crown Flex, came to employee H. T. Slate while the latter was engaged at his machine and asked him whether a union representative had called on him. Curry admitted that he made the inquiry.

(2) About July 23, 1964, Curry came to the machine of William Moss and asked him if he had heard anything about the Union. Moss testified that, when he replied in the negative, Curry told him that if Hoffman "found out that anyone was for it or anything like that, that [Hoffman] would fire them." Curry admitted that he "may have" asked Moss in July whether he heard anything about the Union, he just "didn't remember whether [he] did or not, * * * [he] went around to *all of them.*" He did not deny that he told Moss that if Hoffman found out that anyone was for the Union he would fire them.

(3) Moss further testified, credibly, that on the following day, R. H. Lewis, admitted by Respondent Crown Flex's answer to be a supervisor, came to Moss' machine and told him that he "heard the Union was back out there again and if anyone tried to get [Moss] to join, or anything like that, for [him] not to have anything to do with it, [that] if Frank Hoffman found out that anybody was for it that he would probably fire them." When Lewis was asked by Respondent's counsel whether he told Moss what the

latter had attributed to him, Lewis admitted he "had a conversation like that but [didn't] remember it being with Mr. Moss *in particular.*"

(4) On or about August 8, Foreman James Rigsbee came to the machine being operated by employee Samuel Snow and asked him whether he had signed a union card. Snow replied that it was none of his business.

(5) About August 19, Rigsbee approached employee Haywood Peterson and summoned four or five other employees together as a group. Rigsbee told the assembled employees *that he had just come from the office where Hoffman* had told him that the union was coming in, "and if it did come in, that a nigger would be the head of it, and he was putting in 10 new machines on that line, and that if the Union did come in, the niggers would be operators of them." Rigsbee admitted that he told the group that "they're going to get 10 new machines and 10 new niggers to run them" but that "it was all a joke." He testified, however, that he knew of only one Negro employed in the entire plant at that time, "there might have been one in the shipping department."

(6) About four or five weeks before the election, Bobby Simpson, then the foreman of the shipping department, called James Hutchins and other employees in that department to the shipping office. He there told the group that it would be their privilege to vote as they pleased and that he could not tell them which way to vote. He added, however, that "if the Union came in * * * maybe a lot of people wouldn't buy [Respondent's] products" because they were union made; that "in case [they] left and went to work some place else that it might be hard for [them] to find a job because [they] had been working for a union outfit." Simpson admitted he "might"

have made a statement to the effect that if the employees "left and went somewhere else that it would be hard to find a job because of working for a union outfit * * * that people in this area did not recognize the Union * * * there was a possibility of some of them holding against hiring people that were associated with the Union."

(7) Two or three weeks before the November 6 election, Foreman Richard Davis came to the worktable of Eugene Heaton and Walter Lewis and asked them how they were going to vote. Upon receiving a reply that they would vote "yes," Davis said: "If you do I will fire you," laughed, and walked off. Davis admitted that he "probably" made the statements attributed to him but sought to minimize its effect by asserting that he and the employees "kidded around all the time." Heaton, however, testified that while he had no fear that he would be terminated *before* the election because of its proximity, he believed that once the election was out of the way and Respondent "knew that [he] had voted for the Union, * * * they would have fired [him]."

(8) During the morning of the election, Foreman Davis came to the worktable of employee James Byrd and asked him how he intended to vote. Byrd replied that he had not made up his mind. Tiny Micheaux (Mishoe), who was working nearby, told Davis that another employee, Jack Ledford, might vote for the Union if he did not get transferred to another job to which Davis replied: "If I find out that he voted for the Union, I will fire him," and then added: "I will fire him for not doing his work."

(9) On the morning of the election, Foreman Parish told employee William Poore that the employees did not need a union and that it would do them more harm than good. Parish admitted that he

said something "like that" to Poore, not on election day, but "maybe the day before that, or so."

The findings pertaining to these nine violations are based on the testimony of the employees who were the subject of the cited interrogation and to whom the described threats were addressed. Some of the accusations were admitted, expressly or impliedly, and others remained undenied. Where conflict exists and where resort must be had to all the existing circumstances and the demeanor of the respective witnesses as they testified in order to resolve that conflict, I have no hesitation in crediting the version thereof offered by the employees against the denials of Respondent's supervisors. While many of the employees were illiterate, some of them pitifully so, I was impressed by their sincerity. The supervisors, on the other hand, impressed me as being obsessed with the desire to vindicate their employer regardless of the truthfulness of their testimony.

At this stage in the administration of the Act, I deem it unnecessary to cite authorities establishing the illegality of the threats directed to employees by Respondent's supervisors concerning their union membership or sympathies as found above. Interrogation of the employees during the Union's campaign, of which campaign Respondent was well aware, and which interrogation took place *before* August 14, the date of the Union's demand for recognition, can certainly not be deemed, as Respondent contends, to be "questioning which the employer was entitled to carry on for the purpose of assessing the Union's claim of majority." Nor was there any legal justification for the subsequent interrogation of employees as to *how they intended to vote* at the approaching election which the Board had ordered to be a secret election. "The most relevant factor" in determining whether

interrogation is coercive is "whether the questions seem to seek information which the employer in good faith needs—as when individuals are asked whether they belong to the Union so that the employer can check the Union's claim to represent a majority, or to the contrary seem to seek information most useful for discrimination." *N.L.R.B.* v. *Firedoor Corporation,* 291 F. 2d 328 (C.A. 2), cert. denied 368 U.S. 921. Here, the interrogation found to be violative immediately above was conducted under such circumstances as to disclose on its face that it was a kind which reasonably may be expected to impede and coerce employees in the free exercise of their statutory rights. *Mallory Plastics Company,* 149 NLRB No. 138; *Heinrich Motors, Inc.,* 153 NLRB No. 139.

I also find coercive Rigsbee's statement to Peterson made immediately after he left Hoffman's office as described in III A (5) *supra,* that, if the Union came in, a "nigger" would be the head of that organization.[5] I regard this statement "as a threat that working conditions would not be as pleasant after the advent of a union. There are large areas and many localities in this country, [fortunately diminishing in size and number], where those of Anglo-Saxon stock regard themselves as an elite segment of society with the same arrogance and as little reason as Hitler so regarded Nordics. I cannot read into [Rigsbee's] statement * * * an expression of dedication to principles of democracy or fair employment practices. It was, rather, a direct threat that * * * if they accepted the Union, * * * the employees would suffer enforced association with [and be subjected to work-

[5] Ted Davis, the Union's International representative most active in the campaign to organize Respondent's employees, appeared to be of the Negro race.

ing conditions negotiated by], persons of supposedly inferior origins." *Petroleum Carrier Corporation of Tampa, Inc.*, 126 NLRB 1031, 1038–9. By that threat, Respondent violated Section 8(a)(1) of the Act.[6]

B. The posted notice

About September 1, Respondent posted on its premises a large notice "To All Employees" reading, in part, as follows:

> Because of the campaign which the union is putting on to get into the plant, several questions have come up on which you will want to know how the Company stands. We have decided to state the Company's position clearly for the benefit of everyone.
>
> (1) This is a matter of concern to the Company, of course, and it is also a matter of serious concern to you. It is our firm belief that if this union were to get into this Company it would not benefit you but would work to your serious harm.
>
> (2) It is our positive intention to oppose the union and by every proper means to prevent it from coming in here.

The Board has on several prior occasions found and concluded, as I do herein, that this identical notice to employees predicting that the advent of a union "would not benefit you but would work to your serious harm" is violative of Section 8(a)(1) of the Act. *Overnite Transportation Company*, 154 NLRB No. 98; *Burlington Industries, Inc.*, 144 NLRB 245; *Owens-Corning Fiberglas Corporation*, 146 NLRB 1492, 1503; *White Oaks Acres*, 134 NLRB 1145, 1149–1150.

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[6] See also *Atkins Saw Division, Borg-Warner Corporation*, 148 NLRB No. 98.

C. The preelection speech

A day or two before the November 6 election, Hoffman assembled all the employees and delivered a speech designed to influence them to vote against the Union at the coming election. Employee Roy Edmonds testified that Hoffman "started off bringing up the Right To Work law; he said that if we went out on strike, when we hit the door we had no more job," and that while the "government said he had to negotiate in good faith, he said he would negotiate, negotiate, and keep on negotiating." Employee John Edmonds testified to the same effect but added that Hoffman said "he did not have to sign a thing," that "strikes were the only weapon the union had [which weapon, he said], was no good in North Carolina with [its] Right to Work law."

James Hutchins testified that Hoffman reminded the assembled employees of the Bottoms-Fiske strike which he said lasted two years, at the end of which the employees "lost their homes and their cars and everything they had"; that he recalled a strike at Finch Furniture nearby in Thomasville where, he said, they "lost their homes and cars and haven't gone back to work yet"; that if the Union came in Respondent's plant and went out on strike, when they "walked through that door [they] were finished, * * * [they] couldn't get back in." Hutchins also testified that Hoffman stated that although the "National Labor Board said that he would have to negotiate in good faith, he would negotiate, negotiate, negotiate, and negotiate."

Employee Wayne McCall testified that during the speech Hoffman said "he couldn't * * * and was not going to work with a union in the plant"; that in connection with a strike in Thomasville which lasted "maybe two years, * * * the men were out walking

picket lines in the cold, they lost their cars, their homes, they were still out of work, they couldn't get a job for participating with a union * * *; that one weapon that the Union has is a threat of a strike, and that in North Carolina a strike is no good to nobody (sic) because you have the Right to Work law and when you walk out the door you are *fired and finished,* and we can hire new men in your place to take your job." With reference to the duty to negotiate, McCall testified that Hoffman said "the Government requires me to negotiate a contract, and I will negotiate, and negotiate, and negotiate, but no union will get a damn thing from me." He further testified that in discussing the strike at Bottoms-Fiske "he said that they voted in the Union and had bombings and dynamitings and men were out of a job."

With respect to that speech, Hoffman testified that he read from two lengthy letters written to all the employees on October 28 and November 3 but admitted that there was *"some added speech * * * side* comments * * * that came about from comments and questions from the employees." With respect to the duty to bargain, he denied that he said he would "negotiate, negotiate, and negotiate" and testified that he told the employees that if the parties agreed, they would "have a contract or something to that extent." Concerning strikes, he testified that he told the employees that it was his "understanding * * * of the North Carolina Right to Work law * * * that if any employee went on strike [Respondent] had the right to replace him."

I find Hoffman's reference to North Carolina's so-called Right to Work law to be a complete non sequitur. There is nothing in that law (General Statutes of North Carolina, Ch. 95, Sec. 76–84) which has any-

thing to do with the right of employees to engage in a strike, or a loss of employee status for engaging in a strike. Judging by the various stages of illiteracy possessed by most of the more than approximately 100 employees who testified before me,[7] I am convinced that Hoffman's reference to the Right to Work law was intended, and undoubtedly did create the false impression that this law limited their right to strike beyond that possessed by employees in States where there was no such law.

Hoffman admitted that during his talk there was reference to the neighborhood strikes at Bottoms-Fiske and Finch Furniture, that employees "went greatly in debt because of the strikes," and that there had been violence in connection therewith. Though he denied that *he* made these statements and sought to attribute the warnings to some of the employees, he admitted that he "concurred" in those views when they were expressed and that in agreement and approval thereof "motioned [his] head [in affirmation] as they were talking."

On the entire record, and my appraisal of the trustworthiness of the testimony of the employees who testified that he made the statements attributed to him, I find that Hoffman made the threats so ascribed, thereby violating Section 8(a)(1) of the Act. *Bernardin, Inc.*, 153 NLRB No. 91. While much of his speech and most of the contents of the two letters aforementioned which Hoffman testified he repeated, *verbatim* or in substance, during the course of his speech, consisted of legitimate argument against the entry of the Union, the effect of the threats heretofore found compel the conclusion that the overall effect of the speech was "to restrain employees in

[7] Respondent, in its brief, also took note of the "astonishing prevalence of illiteracy among these employees."

the exercise of their right to vote freely by instilling in them a foreboding of damage through loss of employment if the Union were selected" by the employees as their collective-bargaining representative. *Daniel Construction Co., Inc.* v. *N.L.R.B.* 341 F. 2d 805 (C.A. 4); *Louisiana Manufacturing Co.*, 152 NLRB No. 131; *Rice Lake Creamery Co.*, 131 NLRB 1270, 1292; *Reed & Prince Manufacturing Co.*, 96 NLRB 850, 860, enfd. 205 F. 2d 131 (C.A. 1); *Russell-Newman Mfg. Co.*, 153 NLRB No. 105.

D. The refusal to bargain

Following a vigorous campaign to organize Respondent's employees in the spring and summer of 1964, the Union, on August 13, sent a letter to Hoffman, as president of General Steel, received by him on August 14, advising "that a majority of your employees of the High Point, N.C. plant have signed written authorizations designating [the Union] as their collective-bargaining agent for the purpose of representing them on all matters pertaining to wages, hours of work and conditions of employment." The letter further requested voluntary recognition of the Union and that a meeting be arranged for the purpose of negotiating a collective-bargaining agreement. On August 26, counsel for General Steel, by letter, advised the Union that his client did not believe that the Union represented a majority of the employees and would not, therefore, recognize the Union "until or unless it is certified by proper authority." Since that time, Respondent has continued to refuse recognition of, or bargain with, the Union.

In the meantime, on August 14, the Union filed its petition with the Board in Case No. 11–RC–2022 seeking certification as collective-bargaining representative of "all production and maintenance employees at

[General Steel's] factory at High Point, N.C." Following a hearing on that petition, conducted on September 10 by a duly designated Hearing Officer, at which Hoffman, executive vice president of both General Steel and Crown Flex, testified, the Board's Regional Director, on October 6, issued his Decision and Direction of Election finding that General Steel and Crown Flex constitute a single employer within the meaning of the Act. He further directed that an election be conducted among the following employees of both corporations which he found and concluded to be an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: "All production and maintenance employees at [Respondent's] High Point, North Carolina, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act."

As noted in the Statement of Case, *supra*, General Steel filed with the Board at Washington, D.C., its Request for Review of the aforesaid Decision and Direction of Election urging *only* that the Regional Director "had no authority to enter any order affecting its employees or grouping the employees of General Steel Products, Inc. with those of any other employer not [previously made] a party to the proceeding." On October 28, the Board issued its Order denying the aforesaid Request for Review on the ground that "it raises no substantial issues warranting review."

At the election conducted on November 6, 83 votes were cast for the Union, 94 against that organization, and 13 ballots were challenged. Being of the view that it lost the election because of Respondent's illegal conduct and seeking to set aside its result, the Union filed its Objections to that election which culminated in the Regional Director's Supplemental Decision and Direc-

tion of December 23, further described in Statement of Case, *supra*. The General Counsel now seeks to establish the Union's majority status in the instant proceeding by cards executed by a majority of the employees in the appropriate unit designating the Union as their collective-bargaining representative, and to have Respondent adjudged guilty of an unlawful refusal to bargain as permitted by the Board's rationale in *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, approved by the courts in *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *N.L.R.B.*, —— F. 2d —— (C.A.D.C., May 13, 1965, 59 LRRM 2232); *Colson Corporation* v. *N.L.R.B.*, 347 F. 2d 128 (C.A. 8).

Respondent, in its brief, correctly contends that in order to prevail on this theory the General Counsel must prove "all of the following necessary elements: There must be (1) an unequivocal demand for recognition and bargaining (2) in an appropriate unit (3) by a union actually representing a majority of employees in the unit demanded and (4) the employer must have declined in bad faith to extend recognition, having no good-faith doubt of the Union's majority."

With respect to (1) immediately above, Respondent contends that "there was no unequivocal demand for recognition and bargaining." I find nothing equivocal in the Union's demand of August 13 expressly demanding both recognition and the designation of a time and place to begin collective bargaining. Nor is there merit to Respondent's argument that this demand lost its effect by the filing of the Union's petition with the Board on the following day.[8] Equally devoid of merit is the contention that there has been

[8] *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62; *N.L.R.B.* v. *Overnite Transportation Co.*, 308 F. 2d 279 (C.A. 4).

no proper demand because the Union's letter of August 13 was addressed only to Hoffman, as president of General Steel, and that no demand has ever been made on Crown Flex. By reason of the Board's Order of October 28 denying Respondent's Request for Review more fully described above, it is now "the law of the case," insofar as I am concerned, that General Steel and Crown Flex constitute a single employer. In that state of the record, the demand of August 13 must be deemed sufficient as to both corporations.

Nor is it fatal to the General Counsel's case that the Union's demand for recognition failed to "define any unit," but merely claimed the right to represent "a majority of your employees of the High Point, N.C. plant." *Within a day or two thereafter,* Respondent received a copy of the Union's petition in Case No. 11–RC–2022 describing the unit for which representation was claimed as follows: "All production and maintenance employees employed at the Employer's factory at High Point, N.C., excluding office clerical employees, guards, professional employees and supervisors as defined in the Act." At the hearing on that petition, *no issue was raised* concerning the description or appropriateness of that unit and it was so found to be by the Regional Director's Decision and Direction of Election. Furthermore, *no question about the unit was raised* by Respondent in its letter of August 26 refusing the Union's request for recognition and bargaining, or in its Request for Review by the Board of the Regional Director's Decision and Direction of Election. On the entire record in this proceeding, as well as the *entire record* in Case No. 11–RC–2022 of which I have taken official notice as requested, I find that the variance between the description of the unit as set forth in the Union's letter of August 13 and that found by the Regional Director

in his Decision of October 6 to be without fatal effect. *Sabine Vending Co., Inc.*, 147 NLRB 1010; *Gotham Shoe Manufacturing Co., Inc.*, 149 NLRB No. 80.

To establish the third necessary element, that the Union actually represented a majority of the employees in the unit, there were received in evidence General Counsel's Exhibit 4 A–B, being lists prepared by Respondent showing the names and "occupations" of 229 persons employed by Crown Flex and General Steel, respectively, during the week ending August 15, 1964.* An analysis of these two lists discloses that they contain the names of 22 persons classified as foremen, clericals, and watchmen, employees not within the unit. I therefore find that on the critical date herein, August 14, the day of the Union's demand for recognition, there were 207 employees in the unit and that 104 would constitute the majority necessary to establish the Union as the collective-bargaining representative of all the employees in the unit.

To establish that majority status, the General Counsel called more than 100 witnesses and offered into evidence 133 cards purporting to bear the signature of that number of employees in the unit, all of the cards being dated prior to or on August 13, and reading as follows:

*These two lists were submitted to the Board's Regional Director by Respondent pursuant to an Order of the United States District Court for the Middle District of North Carolina, requiring Respondent's obedience, theretofore withheld, to the Board's subpoena for "a list of persons employed by it during the week ending August 15, 1964 * * * together with *job classification* of each employee.

Upholsterers International Union
of North America
AFL–CIO

I do hereby designate and authorize the Upholsterers International Union of North America, AFL–CIO, and its representatives to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

Signed: ---------- ----------
(Name) (Date)

At the hearing, Respondent objected to the introduction into the record of practically all of the 133 cards,[10] principally on the ground that the signers thereof were *either* allegedly told, believed, or led to believe that the cards would be used *only* to get an election. Though I received all of the cards in evidence, I announced that this did not necessarily mean that I thereby deemed them to be valid designation cards for the purpose claimed by the General Counsel, and that my determination of that ultimate issue would be made in this Decision after a careful review of the entire record. Accordingly, and because I did not, during the hearing, fully explicate my reasons for overruling most of Respondent's objections to the receipt in evidence of the cards in question, objections which are again urged upon me by Respondent's brief, I deem it appropriate to here summarize the reasons for those rulings and the rationale for the conclusions that follow with respect to the cards as valid designations of the Union as collective-bargaining representative.

[10] In its brief, Respondent modified its position but still contended that 114 of such cards may not be considered valid designations of the Union by the employees whose signatures appear thereon.

Any analysis of the problem under consideration must begin with due regard for the *unequivocal* nature of the cards. Notwithstanding the clearly stated exclusive purpose of the card as so designated thereon, I am in full agreement with Respondent's contention "that if a man is told in *haec verba* that his card is 'only' for an election or 'just' for an election, then the card cannot be used to obtain recognition in any other manner." *Englewood Lumber Company,* 130 NLRB 394. Where, however, cards are solicited "for the *dual* purpose of (a) petitioning the Board for an election, *and* (b) authorizing the Union to represent the employees as their collective bargaining agent, * * * [the cards are] valid designations of the Union as bargaining representative of the employees." *The Shelby Manufacturing Company,* 155 NLRB No. 39 (November 1, 1965); *Lenz Company,* 153 NLRB No. 120; *S. N. C. Manufacturing Co., Inc.,* 147 NLRB No. 92, enfd. —— F. 2d —— (C.A.D.C., May 13, 1965); *N.L.R.B.* v. *Hyde,* 339 F. 2d 568 (C.A. 9); *N.L.R.B.* v. *Geigy Co.,* 211 F. 2d 553, 556 (C.A. 9); *Winn-Dixie Stores, Inc.,* 143 NLRB 848, enfd. 341 F. 2d 750 (C.A. 6); *Gotham Shoe Manufacturing Co., Inc.,* 149 NLRB No. 80; *N.L.R.B.* v. *Cumberland Shoe Corporation,* —— F. 2d —— (C.A. 6, Oct. 26, 1965).

Oral statements that the union intends to seek an election and intends to use the cards in support of its petition for such election, as distinguished from statements that they will be used *only* or *just* for an election, are not misrepresentations when the union in fact intends to do so. The union solicits signatures on authorization cards such as those here, *either* to request recognition when a majority of employees within the unit have signed, or to obtain a sufficient number of signatures to petition for a Board-con-

ducted election," or to do both. Cf. *N.L.R.B.* v. *Wheland Co.*, 271 F. 2d 122 (C.A. 6); *N.L.R.B.* v. *Geigy Co.*, 211 F. 2d 553, 556 (C.A. 9). It is by no means unusual for a union to seek a Board election, even after a majority of the employees have designated it as collective-bargaining representative. The union may seek such an election, rather than press for recognition, so as to obtain the special statutory benefits conferred upon certified unions. For example, a Board certification normally protects the representative status of the certified union for a minimum of one year, despite actual loss of its majority. See *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96. Such certification also accords protection to the Union, under Section 8(b)(4)(C) of the Act against raiding by rival unions. Indeed, that the Union herein intended to use the cards for the dual purpose of requesting recognition based on the cards designating it as representative and, if necessary, to secure an election, is amply demonstrated by the fact that on the *very next day* after the Union wrote the Company requesting recognition, it also filed a petition for an election with the Board's Regional Office.

Although solicitors in many cases may have mentioned a use of the cards in order to secure an election, all the cards signed are explicit and unambiguous. Each plainly states that the employee authorizes the Union "to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages,

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[11] In order to free itself from the necessity of conducting elections in which the petitioning union has no substantial likelihood of success, the Board has long held that a union seeking a representation election must demonstrate a showing of interest in union representation by at least 30 percent of the employees involved. See the Board's Rules and Regulations, Section 101.17–101.18; also *N.L.R.B.* v. *J. I. Case Co.*, 201 F. 2d 597, 598–600 (C.A. 9).

hours of employment and other conditions of employment." The language clearly designates the Union as collective-bargaining representative, empowering it to sign a contract with the Employer. The card is devoid of any reference to a Board-conducted election; the word "election" does not even appear on the card. Cf. *Morris and Associates, Inc.*, 138 NLRB 1160, 1164, 1176.

As the court emphasized in *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732, 743 (C.A.D.C.), cert. denied 341 U.S. 914, it has long been held that "[a]n employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negative the overt action of having signed a card designating a union as bargaining agent." Accord: *N.L.R.B.* v. *Greenfield Components Corp.*, 317 F. 2d 85, 89 (C.A. 1); *N.L.R.B.* v. *Gorbea, Peres & Morrell*, 300 F. 2d 886 (C.A. 1); *Whitelight Products Co.* v. *N.L.R.B.*, 298 F. 2d 12 (C.A. 1) cert. denied 348 U.S. 821; *N.L.R.B.* v. *Stow Mfg. Co.*, 217 F. 2d 900 (C.A. 2) cert. denied 348 U.S. 964; *Dan River Mills, Inc.*, 121 NLRB 648, enforcement denied on other grounds, 274 F. 2d 381 (C.A. 5). This rule is but another application of the principle expressed in *Allied Steel & Conveyers, Inc.* v. *Ford Motor Company*, 277 F. 2d 907, 913, that "[i]n the absence of fraud or willful deceit, one who signs a contract which he has had an opportunity to read and understand, is bound by its provisions." Such a rule is particularly applicable here, since almost all the employees who were asked, testified that they read the authorization card or that it was read to them before they signed it or authorized it to be signed in their behalf. Sound policy supports the application of the rule to union authorization cards. It has long been settled that such cards are an acceptable means of proving a union's

majority (*United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72), and they could hardly serve that office if they were subject to repudiation by testimony as to mental reservations.

At first glance, the distinction between representations that an election is the *sole* purpose of the cards, and representations that an election is *a* purpose may seem a fine one, but the distinction goes to the very basis for the rule. Thus, by stating that the card may or will be used to secure an election, the solicitor neither contradicts the plain statement on the card nor misstates the Union's actual intention. As the Board observed in *Cumberland Shoe Corporation*, 144 NLRB 1268, "[t]he failure of the union solicitors to affirmatively restate [the authorization contained in the card] does not indicate that it was abandoned or ignored."

Seeking to completely vitiate the unequivocal effect of the cards, counsel for Respondent, on cross-examination of most of the card-signers, sought to ascertain *only* whether they were told that their card would be kept secret, confidential, or shown only to the Board. Being of the view that a line of inquiry, so *limited*, has no relevance in the determination of the *purpose* for which the card was signed, I sustained the General Counsel's objection thereto.[12] Accordingly, I reject Respondent's contention "that if a man is told that his card will be secret, or will be shown only to the Labor Board for the purpose of obtaining election, that *this* is the *absolute equivalent* of telling him that it will be used *'only'* for purposes of obtaining an election." [Emphasis supplied.]

With the foregoing principles in mind, we turn next to a consideration of the entire record to de-

[12] This is not to say that such a line of inquiry would be irrelevant if the employee was *also expressly* told that the card would be used *only* or *just* for an election.

termine whether the cards upon which the General Counsel relies are valid designations of the Union as collective-bargaining representative. Respondent, in its brief, now concedes that cards of the 19 employees named in the attached Appendix A may be used and relied on for that purpose. With respect to the remainder of the cards, Respondent's exhaustive brief succinctly summarizes the testimony pertaining to each card and which testimony, it contends, bars or forecloses use of that card as a valid designation of the Union by the person whose signature appears thereon.

With respect to the 97 employees named in the attached Appendix B Respondent in its brief contends, in substance, that their cards should be rejected because each of these employees was told *one or more* of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face. *Lenz Company, supra; S. N. C. Manufacturing Co., Inc., supra; N.L.R.B.* v. *Hyde, supra; N.L.R.B.* v. *Geigy Co., supra; Winn-Dixie Stores, supra; Gotham Shoe Manufacturing Co., Inc., supra; N.L.R.B.* v. *Cumberland Shoe Corporation, supra.* All of these cards were read by or to each signer thereof, and were signed by or in behalf of each person whose signature appears thereon.

In arriving at my ultimate conclusion with respect to these cards, I have not been unmindful of an additional factor upon which Respondent relies with respect to at least 17 card signers as being either

"a complete illiterate," "semi-literate," or that it "was not shown * * * that this man had sufficient understanding of what he was doing." While the varying stages of illiteracy of all the employees has been considered by me in appraising its impact on the representations described in (1), (2), and (3) of the preceding paragraph, consideration of *all* the testimony pertaining to the circumstances under which the signatures were obtained convinces me that by affixing or authorizing their signature to the card all of these employees not only intended, but were fully aware, that they were thereby designating the Union as their representative. Based on their testimony and that of the witnesses who procured their signature, concerning which more will be said later, I find and conclude that the cards of the 97 employees named in Appendix B are valid designations of the Union as their collective-bargaining representative.

An additional ground relied on by Respondent for rejection of the cards of at least two employees named in Appendix B, Edward Laws 6(a)(42) and Charlie Oakley 6(a)(66), is that these employees were told, in substance, that if they waited to join the Union until after its election, they would be required to pay an initiation fee. I find no merit to this contention. "Waiving of fees during the organizational period does not smack of coercion but rather of promotional persuasion." *N.L.R.B.* v. *I. Taitel & Son*, 261 F. 2d 1 (C.A. 7), enfg. 119 NLRB 910, cert. denied 368 U.S. 938; see also *Amalgamated Clothing Workers* v. *N.L.R.B.*, 345 F. 2d 264 (C.A. 2); *N.L.R.B.* v. *Gorbea, Perez & Morell, supra; Peoples Service Drug Stores, Inc.*, 154 NLRB No. 118 (Sept. 24, 1965).

During the hearing, and throughout its brief, Respondent also repeatedly objected to reliance upon the cards for the purpose expressed therein on the

ground that the testimony pertaining to the date of execution thereof was not sufficiently established. While it is true that a number of employees, testifying approximately nine months or more after the event, were uncertain as to the exact date their signatures were subscribed or affixed to their cards, the testimony is undisputed that all of the cards offered in evidence and relied on by the General Counsel, except that of Wilma Bryant 6(a)(12),[12] were filed by the Union with the Board's Regional Office at about 10:30 a.m. of August 14, 1964, and bear the Regional Office stamp of that time and date. I therefore find that all of these cards were executed prior to that date. *Combined Metal Manufacturing Co.*, 123 NLRB 895; *Cameo Lingerie, Inc.*, 148 NLRB No. 60; *I. Taitel & Son, supra.*

Respondent also urges that the card of John W. McCarter 6(a)(79) be rejected because it is dated July 6, 1964, whereas "he did not go to work for the employer until July 8, 1964." No contention is made, however, that he was not employed by Respondent on August 14, the date of the Union's demand for recognition. It seems reasonable to infer and conclude that on or before July 6, McCarter had already made arrangements for employment by Respondent and signed the card in anticipation of that employment. On the record made here, and there being no contention that McCarter revoked his designation either prior to or

[12] Though Bryant could not recall the date she signed her card, it is dated Sunday, August 9, 1964, and there is no evidence that this was not the date of execution. Brown testified that on August 10, he was advised by Ethel Jenkins (Jennings) that she had Bryant's signed card in her possession. Because he knew that the Union already had a majority of the employees signed up, he did not pick up Bryant's card until later.

after July 8, I see no reason to reject his appointment of the Union.

The card of Jack Rozier 6(a)(76) is also attacked by Respondent, apparently on the ground that it was not delivered by Rozier to anyone for use as his designation of the Union. His card, dated July 29, 1964, was first received in evidence on the testimony of Bobby Lloyd, who testified that while sitting next to Rozier at a Union meeting, he not only saw him sign this card but also "saw him when he turned it in." Rozier later testified that he signed and "filled out" the card in question but claimed that he did so in his car in the parking lot at the mill, following which he drove to his home and left the card on the car seat. He further testified that he never saw the card again until "just now," at the hearing, that he left the signed card on the car seat because he "wanted to think about it more before [he] turned it in, or before [he] authorized them to represent [him]." I credit the testimony of Bobby Lloyd that Rozier signed his card at the Union meeting and "turned it in" at that time, not only because Lloyd impressed me as a trustworthy witness, but because of the fantastic tale offered by Rozier to explain the presence of the card in the hearing room—that he "could have knocked it out and somebody could have gotten it out of the car, * * * I just left it laying on the seat." Not only is this explanation so highly improbable, but Rozier's demeanor while testifying inspired no confidence in the trustworthiness of his testimony and leaves me no alternative other than to reject that testmony.

There remain for consideration the cards of the six employees named in Appendix C who were told, *inter alia*, that the cards would be used only, or just, for an election. In his endeavor to establish that this was represented to be the only purpose of the cards, coun-

sel for Respondent, on *voir dire* examination of a number of card signers, elicited testimony to that effect by means of leading questions. Though I am mindful that leading questions are generally permitted in the cross-examination of witnesses, I am not here persuaded that an affirmative answer so induced, by *itself* and without regard for the remainder of the record, has sufficient probative weight "to controvert the statement of the purpose and effect of [the] cards contained on the face thereof." *Cumberland Shoe Corporation,* 144 NLRB 1268, fn. 3, as amended by the Board's Order issued January 13, 1964, of which I have taken official notice, and which Order was enforced —— F. 2d —— (C.A. 6, October 26, 1965). In evaluating such suggested testimony, consideration must be given to the testimony of that witness *as a whole.* Here too, however, as in the case of the employees described in Appendix B, appraisal of such testimony cannot ignore the varying stage of illiteracy of the witnesses involved and the degree of their sophistication or lack thereof. Though entitled to consideration, I do not deem the affirmative answer of employees given in response to such leading questions as decisive or conclusive where such answers are in conflict or irreconcilable with either the rest of the testimony of such employees and/or of credible evidence negating the testimony so adduced.

Among the instances illustrative of the unreliability of testimony so elicited, is the testimony of Curtis Benson 6(a)(89). One of the first questions asked of him by Respondent's counsel, on *voir dire* examination, was whether Larry Robinson, who gave him the card, told him "that the purpose of the card was just to get an election in the plant." Benson replied: "Yes, he did." When he was then asked by the General Counsel to tell "exactly" what Robinson said when he gave

him the card, Benson testified: "I couldn't tell you exactly what was said; it has been quite a while back; he mentioned the union to me before he gave me the card." Upon being urged by me to do the "best" he could to relate "*everything* that was said at that time," he testified as follows: "Well, he brought the subject up and he asked me was I interested in it; and I asked him to tell me more about it; and he said to sign the card *that I would be signing that I wanted the union to represent me with the Company;* and it sounded right good to me; and so I signed it." He was next asked specifically, whether he could "remember anything else that was said" and he replied that he could not. Robinson, who appeared as a witness a day earlier, testified that he gave Benson the card and "told him that it was a union authorization card for the union to represent him, * * * gave him this card for him to read, and he read it aloud, and filled out the card, and signed his name," and gave it back to Robinson.

Wilma Bryant 6(a)(12), who testified that she read and signed the card, was then asked on *voir dire* examination by Respondent's counsel not what she was told by Mrs. Jennings (Jenkins) who solicited the signature, but whether she was told "that these cards were being signed up just for the purpose of getting an election" and her answer was: "Yes, sir." The General Counsel then asked Bryant to relate "exactly" what she was told and she testified as follows: "She said it would be better to have a union where we worked at," that this was "all that was said [and that she could not] remember anything else about the conversation." Respondent's counsel then asked Bryant whether it was Jennings (Jenkins) "or someone else that told [her] that these cards were just to get an election," to which Bryant replied:

"She is the one." Expressing confusion concerning her testimony and its apparent inconsistency, I asked Bryant to "tell me again what was said" and she testified as follows: "Well, she handed me the card, and I said 'well, I don't know,' and she said, 'if you sign, it would be better to have a union where we work,' and I said 'I will think about it' and then I said 'I will sign a card.'" I next asked her whether there was "was anything said at that time about an election" and she testified that Jennings (Jenkins) "said it was better to have a union where we worked at, *that is all she said.*" When I then inquired whether "nothing was said about an election at that time," she testified: "No, that is all that was said." Counsel for Respondent again asked whether it was "then or at some other time that [she was] told that these cards were just for the purpose of getting an election" and she replied: "She handed me the card and told me that it would be better to have a union where we worked and I told her I didn't know, and she said 'Think about it,' and I did. I signed the card."

Of a similar nature was the testimony of Jerry L. Furr 6(a)(103), who acted as Respondent's observer at the election. After testifying that he read, signed, and filled out the remainder of his card at the request of Ted Davis, the Union's International representative, Furr was suggestively asked by Respondent's counsel whether Davis told him "that the purpose of getting the card signed was just to get an election in the plant," and he replied: "Yes." When pressed by the General Counsel to tell *all* that he remembered of the conversion with Davis, he testified: "Well, we sat there at the kitchen table; and anyway he asked me did I think would a union help; or something like that, I don't know how it went; I don't even remember; but I know he just asked me would I sign

a card, did I want to sign a card; and at that time I said I would; he said they were getting cards to get *an* election at the plant."

James Benson 6(a)(9) also testified that at the request of Davis and Napolean Brown, another International representative of the Union, he signed the card designating the Union as his bargaining representative. On *voir dire* examination by Respondent's counsel, Benson was asked to repeat the conversation he then had with Davis and Brown and testified as follows: "They said that they were going to represent the Union, they wished us to sign a card so that they could have an election." Respondent's counsel next asked whether the two men told him "that the cards were just to get an election" and Benson replied: "Yes, sir." Upon further examination by the General Counsel, however, Benson admitted that in an affidavit previously given to the General Counsel he swore that he "was *not* told that [he] was signing a card *just* to get an election." He further testified that this affidavit "is correct * * * and true." Respondent's counsel again asked whether the two representatives told him "that signing this card was just to get an election" and Benson again replied affirmatively. I then asked him to tell "in [his] own words what was said" and he testified: "Well, they came to the house, and said that they were representing the Union, and if I wanted to sign a card, I don't know what else, because they said they would have an election." And that they did not "say anything else" in the 3-5 minutes they were there.

Though H. C. McMurray 6(c) and Samuel Snow 6(k) were not allowed to answer Respondent Counsel's question whether they were told that the only

purpose of the card was to get an election, both testified they "signed the card to get the Union in."[14]

In appraising the effect to be given to the suggestive testimony described above, consideration must also be given to the testimony of Davis and Brown who are accused of making practically all of the alleged fatal misrepresentations. Though Davis admitted that in the solicitation of signed cards mention was made to some of the employees of *a* possible use of the cards to secure an election, and/or that their cards would be kept confidential and not shown to their *foremen,* both men unequivocally denied that they ever told any employee that the card would be used *only* or *just* for an election. Davis and Brown, by their testimony and demeanor, impressed me as being most worthy of belief and I credit their denials of the alleged misrepresentation. By doing so, I do not accuse the employees who testified contrariwise of having offered false testimony wilfully. Consideration of all their testimony, their degree of illiteracy and lack of sophistication, convinces me that their affirmative answers to the leading questions under consideration were unwittingly uttered, and constituted their own erroneous conclusions derived from the statements of the Union representatives. However, such conclusions, "thoughts (or afterthoughts) as to why [they] signed a union card and what [they] thought the card meant, cannot negative the overt action of having signed a

[14] Though on several occasions I sustained the General Counsel's objections to leading questions suggesting that other employees were told that the only purpose of the cards was to secure an election, for purpose of decision herein, I will assume that these other employees, if permitted to testify, would have responded affirmatively. I have not, however, relied on the cards of any of these other employees in my determination of the Union's majority status. My ultimate conclusion that the Union *otherwise* achieved that status remains the same.

card designating a union as bargaining agent." *Joy Silk Mills, Inc.* v. *N.L.R.B.*, *supra*; *Colson Corporation* v. *N.L.R.B.*, 347 F. 2d 128, 135 (C.A. 8). By reason of all the foregoing, I find and conclude that the cards of the above-mentioned six employees, named in Appendix C, are valid designations of the Union as their collective-bargaining representative.

Having found that there were 207 employees in the bargaining unit on August 14, when the Union made its demand to bargain, and that the 122 employees named in Appendixes A, B, and C, had prior thereto validly designated the Union as their collective-bargaining representative, I further find and conclude that on the day aforementioned the Union was the duly selected bargaining representative of all the employees in the unit described in the Regional Director's Decision and Direction of Election of October 6.[15]

Turning now to the question of whether Respondent's refusal to bargain with the Union on and after August 14 was occasioned by its alleged good-faith doubt that the Union in fact represented a majority of the employees, Respondent concedes that as was its legal right, it was opposed to the entry of the Union in its plants as collective-bargaining representative of its employees.

Following receipt of the Union's demand on August 14, Hoffman called a meeting of his foremen on Monday, August 17, at which he informed them of the Union's letter. He testified that he asked them "how they felt about the employees as to whether they wanted a union to represent them or not and * * *

[15] The Union's status having been established by a substantial number exceeding the necessary majority of 104, I find it unnecessary to extend this Decision by a consideration of the remaining cards in the record, none of which have been relied on by me in finding the Union's majority status.

they said they didn't know." He then asked them to "try to find out in their department [whether] the majority wanted the Union to represent them," but *not to "interrogate the people* or in any way to threaten them." Foreman Rigsbee, testifying in behalf of Respondent, testified Hoffman *specifically* told the foreman "not to ask [the employees] if they had signed a union card."

Between that day and August 26, at meetings with his foremen, Hoffman received their "*opinions* as to how *they felt* their department stood" which, coupled with his own personal interviews or conversations with 8–10 employees, brought him to the conclusion that about 30 percent of the employees wanted the Union to represent them and about 70 percent did not. He then instructed his attorney to write the letter of August 26 declining recognition of the Union.

"By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case. But among such circumstances, two factors would seem to be essential prerequisites to any finding that the employer raised the majority issue in good faith * * *. There must, first of all, have been some reasonable grounds for believing that the Union had [never achieved majority status]. And, secondly, the majority issue must *not* have been raised by the employer in a context of illegal anti-union activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." *Celanese Corporation of America*, 95 NLRB 664, 673; *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd. as modified

on other grounds, 185 F. 2d 752 (C.A.D.C.), cert. denied 341 U.S. 914.

Because the record herein abundantly establishes that Respondent has raised the majority issue "in a context of illegal anti-union activities," I find it unnecessary to engage in any lengthy analysis of the testimony of Respondent's foremen upon which Hoffman allegedly relied in arriving at his conclusion that 70 percent of the employees were opposed to the Union. Were I required to do so, I would unhesitatingly find that the reports of the six foremen who testified that they reported to Hoffman, *and especially their testimony relating to the basis for their reports*, are so lacking in probative weight that neither they, nor Hoffman, had "*reasonable* grounds for believing" that the Union had not been designated by a majority of the employees." "A showing of such doubt * * * requires more than an employer's mere assertion of it and more than proof of the employer's subjective state of mind. The assertion must be supported by objective considerations. The applicable test, as defined in the *Celanese* case, is whether or not the objective facts furnish a 'reasonable basis' for the asserted doubt." *Laystrom Mfg. Co.*, 151 NLRB No. 144.

Here, "There is * * * affirmative evidence showing Respondent to have engaged in the unfair labor practices detailed above after the Union's request to bargain, whose foreseeable consequence was the destruction of the Union's majority status. It is, therefore, not surprising that the majority which the Union clearly possessed on [August 14] when it first demanded recognition, should have been subsequently

[16] Six other foremen employed during the week ending August 15 did not testify. These six foremen had charge of 93 employees.

lost. That such loss was attributable to the Respondent's unfair labor practice is clear. *Master Transmission Rebuilding Corporation & Master Parts, Inc.*, 155 NLRB No. 35 (October 28, 1965). By thus destroying the Union's majority, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thereby violating Section 8(a)(1) thereof. By refusing the Union's demand to bargain on and after August 14, Respondent also violated Section 8(a)(5) of the Act. Under either section of the Act, effectuation of the policies and purposes of the Act requires the issuance of a bargaining order as part of the remedy necessary to remedy the violations found herein.

Report and Recommendations in Case No. 11–RC–2022.

In accordance with the Regional Director's Supplemental Decision and Direction, and the Board's Rules and Regulations, Series 8, as amended, I find no substantial, credible evidence in the record to sustain the following Union Objections to conduct affecting the results of the election: Objections Nos. 1, 8, and 9. With respect to Objections 4, 6, "and other acts and conduct," I find that Respondent was guilty of the conduct complained of therein to the extent set forth in Section IIIA, (6), (7), (8), and (9), *supra*. Concerning Objections Nos. 5 and 6, I find, as set forth in Section IIIB, and IIIC, *supra*, that the posted notice referred to in Objection No. 5 and the speech referred to in Objection No. 6 were violative of Section 8(a)(1) of the Act. Accordingly, I recommend that Objections Nos. 4, 5, and 6 be sustained to the extent indicated above and that the election of November 6, 1964, be set aside.

Upon the entire record in this consolidated proceeding, I make the following:

Conclusions of Law

1. By interrogating and threatening employees concerning their union membership or activities, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2 (6) and (7) of the Act.

2. All production and maintenance employees employed by General Steel Products, Inc., and Crown Flex of North Carolina, Inc., at their High Point, North Carolina, location, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act, constitute an appropriate bargaining unit.

3. By refusing to recognize and bargain with the Union, the duly designated collective-bargaining representative of its employees, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a) (5) and (1) and Section 2 (6) and (7) of the Act.

The Remedy

I recommend the issuance of an Order directing Respondent to cease and desist from engaging in the conduct herein found to be violative of the Act and affirmatively, upon request, to bargain with the Union as the exclusive representative of all employees in the above-described appropriate unit, and to post appropriate notices.

According, upon the foregoing findings of fact and conclusions of law, and on the entire record herein, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

320-064——68——14

ORDER

Respondents General Steel Products, Inc., and Crown Flex of North Carolina, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with Upholsterers International Union of North America, AFL–CIO, as the exclusive representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by General Steel Products, Inc., and Crown Flex of North Carolina, Inc., at High Point, North Carolina, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(b) Interrogating employees with respect to their union membership or activities in a manner violative of Section 8(a)(1) of the Act.

(c) Threatening employees with reprisals if they designate the Union as their collective-bargaining representative.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find to be necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the above-described appropriate unit, and embody in a signed agreement any understanding reached.

(b) Post at their plants at High Point, North Carolina, copies of the notice hereto attached and marked

"Appendix D."[17] Copies of such notice to be furnished by the Regional Director for the Eleventh Region, shall, after being signed by the authorized representative of Respondent, be posted immediately upon receipt thereof, and be maintained by them for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director in writing within 20 days from the date of the receipt of this Decision what steps the Respondent has taken to comply herewith.[18]

Dated at Washington, D.C.

DAVID LONDON,
Trial Examiner.

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[17] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

[18] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Eleventh Region, in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX A

Name and General Counsel's Exhibit Number	
Mary Jo Simmons	6(w).
James B. Taylor	6(a)(2).
Jean Bodiford	6(a)(10).
Bobby Aleshire	6(a)(23).
Carrie G. Proctor	6(a)(27).
Clarence J. Jones	6(a)(34).
Robert C. Howell, Jr	6(a)(35).
John Loftis	6(a)(38).
Walter Lucas	6(a)(39).
Ralph William Mabe	6(a)(41).
A. T. Ragen	6(a)(52).
Brady Rosse	6(a)(56).
David Wayne Williams	6(a)(63).
Robert Pritchard	6(a)(69).
Bobby Lloyd	6(a)(75).
Johnny Gibson	6(a)(78).
George Harold Orr	6(a)(81).
Larry W. Robinson	6(a)(86).
George W. O'Ham	6(a)(90).

APPENDIX B

Name and General Counsel's Exhibit Number	
Haywood Earl Peterson	6(a).
Douglas Ray Beeson	6(b).
Billy Hooker	6(d).
James R. Hutchins	6(e).
Wayne McCall	6(g).
James Morgan	6(h).
James Howard Byrd	6(i).
W. Donald Jacobs	6(j).
Thomas M. Slate	6(l).
Billy Don Brown	6(m).
W. L. Chrisley	6(n).
Jonah C. Gates	6(p).
Norman Smith	6(q).
John LeRoy Jacobs	6(s).
Roy Gilliland	6(t).
Emanuel J. Mashburn	6(u).

Name and General Counsel's Exhibit Number	
Albert J. Taylor	6(v).
William D. Moss	6(x).
Eugene Heaton	6(z).
James Bodiford	6(a)(3).
Dale Jacobs	6(a)(4).
Walter Aleshire	6(a)(5).
Joseph Allen	6(a)(6).
Dwight Barlow	6(a)(8).
Murray Brim	6(a)(11).
Teddy Bullard	6(a)(13).
James R. Carlyle	6(a)(14).
Nathan Carter	6(a)(15).
Helen Causey	6(a)(16).
Lowell T. Caruthers	6(a)(17).
Roger Dale Deece	6(a)(18).
Gurney Heywood Diamond	6(a)(19).
Joe Dills	6(a)(20).
C. J. Edwards	6(a)(21).
Ralph Black	6(a)(22).
Rex Hugh Fitch	6(a)(24).
Bobby Fulp	6(a)(25).
Joe Hedrick	6(a)(26).
Walter J. Holder	6(a)(28).
John H. Holmes	6(a)(29).
Jesse F. Gibbs	6(a)(30).
Cecil Taylor	6(a)(31).
J. P. Shannahan	6(a)(32).
Richard Walker	6(a)(33).
Howard Thomas Hunt	6(a)(36).
Paul Livingstone	6(a)(37).
Alton B. Maness	6(a)(40).
Edward Earl Laws	6(a)(42).
Custer Franklin Laws	6(a)(43).
Charles Eugene Laws	6(a)(44).
Zeb Laws, Jr	6(a)(45).
J. E. Mishoe	6(a)(46).
Lloyd D. Mishoe	6(a)(47).
James D. Moncus	6(a)(48).
Carson W. Norris	6(a)(49).
James L. Randall	6(a)(50).

Name and General Counsel's Exhibit Number	
Billy J. Searcy	6(a)(51).
Irvin Reagan	6(a)(53).
Larry Leon Robinson	6(a)(54).
Terry Roberson	6(a)(55).
Douglas J. Shipp	6(a)(57).
Odell Strickland	6(a)(58).
Lonnie Teal	6(a)(59).
Henry Thompson	6(a)(60).
Rosier Watts	6(a)(61).
Rabon Wolford	6(a)(64).
James Richard Smith	6(a)(65).
Charlies Oakley	6(a)(66).
Theron B. Williamson	6(a)(67).
William W. Duggins	6(a)(68).
Raymond Clark	6(a)(70).
Roy Junior Scearce	6(a)(71).
Franklin Small	6(a)(72).
Jimmy Parker	6(a)(73).
Tony Parker	6(a)(74).
Jack Rozier	6(a)(76).
Paul Widner	6(a)(77).
John Wesley McCarter	6(a)(79).
Jimmy Monroe	6(a)(83).
Claude Mitchem	6(a)(84).
Floyd Douglas Coe	6(a)(87).
Dan T. Coe	6(a)(88).
Kelly Smith	6(a)(91).
William Ward	6(a)(92).
Thomas Ray Haire	6(a)(93).
Billy Jack Fowler	6(a)(95).
Curtis White	6(a)(96).
Willie Shores	6(a)(97).
James Robinson	6(a)(98).
Charles Robinson	6(a)(99).
Gordon Shuffler	6(a)(100).
John Lee Swaney	6(a)(101).
Frank Swink	6(a)(102).
Lenora Bryant	6(a)(104).
Lynch Whitmire	6(a)(105).
Elmer Cornett	6(a)(106).
William Billings	6(a)(107).

Appendix C

Name and General Counsel's Exhibit Number	
Curtis Benson	6(a)(89).
Wilma Bryant	6(a)(12).
Jerry L. Furr	6(a)(103).
James A. Benson	6(a)(9).
H. C. McMurray	6(c).
Samuel Snow	6(k).

APPENDIX D

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of a trial examiner
of the
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL upon request, bargain with UPHOLSTERERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO, as the exclusive representative of our production maintenance employees.

WE WILL NOT interrogate our employees as to their union membership or activity in a manner violative of Section 8(a)(1) of the Act.

WE WILL NOT threaten our employees with economic reprisals for union activity or for designating the above-named union as their collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to join or assist a union, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for mutual aid or protection.

GENERAL STEEL PRODUCTS, INC., AND CROWN FLEX OF NORTH CAROLINA INC.

Employer.

Dated: _____ By: _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate with the Board's Regional Office, 1831 Nissen Building, 310 West Fourth Street, Winston-Salem, North Carolina 27101 (Tel. No. 723-2302).

APPENDIX J

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *
>
> * * * * *
>
> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

[redacted]

No. 891

[redacted]

Petitioner,

v.

[redacted]

Respondent.

[redacted]

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. .....

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

GISSEL PACKING CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Food Store Employees Union, No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter sometimes referred to as the Union or petitioner), Intervenor in the proceedings below, petitions for a writ of certiorari, to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. The Solicitor General filed a petition for

certiorari in this case on behalf of the National Labor Relations Board on September 26, 1968.[1]

OPINIONS BELOW.

The opinion of the Court of Appeals (App. A, pp. 1a-3a) is reported at 398 F. 2d 336 (4 Cir. 1968).[2] The decision and order of the National Labor Relations Board (App. C, pp. 6a-76a) are reported at 157 NLRB 1065.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 28, 1968 (App. B, pp. 4a-5a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether unambiguous authorization cards signed by a majority of employees unequivocally designating a union to represent them in respect to wages, hours and conditions of employment, are so inherently unreliable that an employer may refuse to recognize a union so designated with-

1. The Solicitor General has petitioned for a writ of certiorari to review three judgments of the United States Court of Appeals for the Fourth Circuit, including the instant case. *(N. L. R. B.* v. *Gissel Packing Company, Inc.; N. L. R. B.* v. *Heck's; N. L. R. B.* v. *General Steel Products, Inc.).* It should be noted that this Union was a charging party in the *Heck's* case before the National Labor Relations Board but failed to intervene in the proceeding before the Fourth Circuit—which is the only reason that the Union does not petition for a writ of certiorari therein.

2. For the convenience of the Court and in order to avoid duplication of the record, references to proceedings below are keyed to the National Labor Relations Board's petition for certiorari. The term "App." shall refer to the Appendices to the Petition filed with this Court heretofore by the National Labor Relations Board. The term "J.A." shall refer to the Joint Appendix originally filed with the Court of Appeals for the Fourth Circuit, recently filed with this Court by the National Labor Relations Board.

out violating Section 8(a)(5) of the National Labor Relations Act, as amended.

2. Whether the National Labor Relations Act, as amended, imposes the duty to recognize a union upon an employer only under circumstances: (1) where the union has been certified by the National Labor Relations Board after a Board conducted election or (2) where it can be proved that an employer has *actual knowledge* (by means other than authorization cards) that a union represents a a majority of its employees in an appropriate unit.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*) are set forth in Appendix J, pp. 216a-217a and in the Supplemental Appendix, *infra*, pp. 27-30.

STATEMENT.

A. The Board's Finding of Fact.

In 1960, Gissel Packing Company, Inc., hereinafter referred to as the Company or Respondent, reacted to a Union organizing campaign by engaging in threats to refuse to bargain with the Union, to close its plant located in Huntington, West Virginia, or greatly curtail its operations, and to discriminate against employees who joined the Union; the Company also implied that the employees would be given the benefit of group insurance if they rejected the Union (App. C. pp. 14a-16a).[3] In 1963, shortly after employee Mount was hired, Company Vice President Charles Gissel told him that the shop was non-union and that any employee "caught" talking to a Union representative would be discharged (App. C, p. 27a).

3. After a hearing, a Trial Examiner found the above actions of the Company to be unfair labor practices violative of Section 8(a)(1) of the Act. No exceptions were filed to the Trial Examiner's Intermediate Report (App. C., p. 15a).

In September 1964, aware of the Union's activities at two other Huntington plants,[4] Vice President Charles Gissel individually interrogated employees Frye and Mount as to whether they had engaged in conversations concerning the Union and threatened them with discharge if either was caught talking to a suspected Union agent (App. C, pp. 26a-27a).

The Union resumed its organizing efforts in January 1965,[5] and between January 13 and 22, thirty-one of the forty-seven unit employees signed cards[6] authorizing the Union to represent them in collective bargaining (App. C, pp. 16a, 27a). In January, employee Adkins heard Vice President Gissel say that "[i]f the Union got in, he'd just take his money and let the Union run the place the way they wanted to" (App. C, p. 32a).

On January 22, Union representative Spencer advised Vice President Gissel that the Union represented a majority of employees and requested recognition and bargaining; Gissel refused "to talk about the Union" and referred Spencer to the Company's attorneys (App. C. pp. 16a-17a). The same day, Spencer confirmed his telephone request for recognition in a letter to Gissel in which he offered to submit signed authorization cards to the Company, "so that there will be no possible doubt as to our majority status" (App. C, pp. 16a-17a).[7]

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4. Unfair labor practice hearings involving *S. S. Logan Packing Co.*, 152 NLRB 421, and *Sehon Stevenson & Co., Inc.*, 150 NLRB 675, had been held in Huntington, West Virginia in the summer and September of 1964, respectively.

5. All dates hereafter shall refer to the year 1965, unless otherwise specified.

6. The cards stated: "The undersigned hereby authorizes this Union to represent his or her interests in collective bargaining concerning wages, hours, and working conditions" (App. C, pp. 24a-25a).

7. Spencer's letter noted that truck drivers were to be included in the requested unit.

On January 26, the Company rejected the Union's request in a letter which: (1) stated (a) that the Union had lost an earlier NLRB election[8] and that the Company did "not believe that there has been any change in circumstance or opinion of our employees since that time" (b) that the Company was "advised" that the Union's organizing technique involved the obtaining of "signatures on so-called authorization cards by a variety of means and representations which are not compatible with a free exercise of an employee's choice", including information "of instances of direct misrepresentation in obtaining employees' signatures", (2) denied that truck drivers were "a part of any appropriate bargaining unit", and (3) invited the Union to file for a Board election (App. C, pp. 17a-18a). At no time did the Company avail itself of the opportunity under Section 9(c)(1)(B) of the Act to petition for an election.

In the early part of February, Vice President Gissel (1) interrogated one employee as to whether he had heard anything about the Union and if any Union man had been around to sign him up, (2) asked employee Moore whether employee Don Kidd was the leader of the Union, stating that Kidd would be immediately discharged if Gissel discovered him to be such a leader, (3) requested Moore to report to Gissel all he could learn about the Union, including the names of the employees who had signed cards, (4) asked employee Frye (a) if he knew anything about the Union—(b) what the Union had offered him and (c) stated that he could offer Frye more than the Union could, (5) asked an employee if he would join in a "walk-out", (6) told a group of employees "[t]he hell with the Union * * * I'm going to leave [the plant] and turn it over to them,"

8. The election referred to was held shortly after January 27, 1961, in a unit of production and maintenance employees "including truck drivers [and] truck driver salesmen * * * (App. C, p. 14a).

(7) later in February said to a group of employees that he did not want "to hear any more about this Union stuff"—to "get out"—if they could not do their work, and (8) to another employee, Gissel threatened that the Union would have to "fight him first", stating that it would not "get in" (App. C. pp. 26a-33a).

In this context, on February 10, Spencer by letter renewed the Union's request for recognition, pointing out that "[t]he coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election by the employers is most difficult for us to combat" (App. C, pp. 18a-19a). Spencer again offered to deliver the signed cards to the Company for check against payroll records to prove the Union's majority (App. C, pp. 18a-19). Vice President Gissel answered on February 12, asserting that the Union's "approach * * * bolsters our opinion that you do not really honestly represent a majority of the employees." No other reason for doubting the Union's majority was given (J. A. 241). Replying on February 16, the Union made a final unsuccessful attempt to achieve recognition from the Company, again offering the authorization cards for inspection (App. C, p. 20a).

In March and April the Company continued its anti-Union campaign (1) by interrogating employee Burchell as to whether employee Mount had said anything about a Union, directing him to stay away from Mount, who would be "bad" for him (App. C, p. 31a), (2) by further inquiring of Burchell as to whether employee Hysell had induced Burchell to attend a Union meeting or sign a card (App. C, p. 31a), (3) by engaging in surveillance of a Union meeting (App. C, pp. 33a-36a), (4) by asking Mount, in the presence of Frye, whether he attended the meeting, telling him Gissel had knowledge of such Union meeting attendance (App. C, p. 38a), and (5) by changing the hours

of work of Mount and Frye and subsequently discharging them with a profane reference in respect to what they could do with the Union (App. C, pp. 38a-40a).

Majority.

As noted above, thirty-one employees signed Union authorization cards in a unit of forty-four to forty-seven employees (App. C, pp. 16a, 27a). There is no evidence that any of the employees later changed his mind about designating the Union to represent him, but the record reflects evidence that a substantial number of employees, "perhaps all but three," attended a Union meeting in April (App. C, p. 37a).

B. The Board's Conclusion and Order.

The Board concluded that the Company interfered with, restrained and coerced employees in violation of Section 8(a)(1) of the Act by interrogating employees about their Union activities and the conduct of the Union, asking them to learn of the Union activities of others, threatening them with discharge, promising economic benefits, and creating the impression of and engaging in surveillance; the Board also concluded that employees Mount and Frye were discriminatorily discharged in violation of Section 8(a)(3) and (1), and further concluded that the Company violated Section 8(a)(5) and (1) of the Act in respect to its refusal to recognize the Union which had been designated by a substantial majority of employees by their execution of unequivocal authorization cards in a clearly appropriate unit (App. C, pp. 67a-68a).

The Board rejected the claim that the Company had a

good faith doubt as to the Union's majority status[9] for the reasons that (1) it ignored the Union's offer to submit for examination and comparison with payroll signatures the signed authorizations upon which the Union relied; (2) it failed to file an employer's representation petition with the NLRB; (3) its asserted reasons for refusing to recognize the Union were unsubstantiated or insubstantial;[10] (4) its course of unfair labor practice conduct both before and after the Union's request for recognition constituted (a) an "absolute refutation" of the Company's good faith claim, (b) a program to destroy the Union's majority, and (c) "a positive rejection by the Company of the principle of collective bargaining." The Board also

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9. The Trial Examiner, after finding that the Company's refusal to bargain was not motivated by a good faith doubt of the Union's majority, noted that "there is language in *International Ladies' Garment Workers Union (Bernhard-Altmann)* v. *N. L. R. B.*, 366 U. S. 731, 738-740, which suggests that a good faith doubt concerning the Union's majority is no defense to a refusal to bargain if the Union in fact represented a majority." (App. C, p. 58a.) The Board stated that it "need not" rely upon the Trial Examiner's interpretation of the *Bernhard-Altmann* case, *op. cit.*, in concluding that Respondent violated Section 8(a)(5) of the Act (App. C, p. 7a, fn. 2).

10. (1) No evidence was presented to support the Company's charge that authorization cards were obtained by misrepresentation or other means incompatible with a free exercise of an employee's choice (App. C, p. 54a).

(2) The Company understood that the Union's requested unit was the same as that found by the Board to be appropriate in 1961. The Board, citing *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 291 (4 Cir. 1964), held further "that 'even if the company entertained doubt [as to the appropriateness of the unit], it is no defense to a refusal to bargain charge where the unit is proper'" (App. C, p. 52a).

(3) The Company's evidence that its representatives "decided that maybe they [the Union] might not have a majority" because it lost an NLRB election four years earlier was inconsistent with the frequently exercised right of employees to change their minds. The Board further found that a similar argument had been rejected by the Fourth Circuit in *N. L. R. B.* v. *Overnite Transportation Company*, 308 F. 2d 279, 283 (4 Cir. 1962) (App. C, pp. 53a-54a).

rejected the contention of the Company that a Union can never establish its majority on the basis of cards but can do so only in a Board-conducted election[11] (App. 1, pp. 52a-58a).

The Board ordered the Company to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to the employees discriminatorily discharged, to bargain with the Union upon request, and to post appropriate notices (App. C, pp. 71a-76a).

C. The Decision of the Court of Appeals.

The Court held that substantial evidence supported the Board's findings that the Company coerced its employees in the exercise of their rights in violation of Section 8(a)(1) of the Act and discriminatorily discharged two employees because of their Union membership and activity in violation of Section 8(a)(3) and (1) (App. A, p. 2a). The Court rejected the Board's conclusion that the Company had refused to bargain in violation of Section 8(a)(5) and (1). *Inter alia*, the Court said (App. A, p. 3a):[12]

> In recent cases we have had occasion to point out that

11. In finding a violation of Section 8(a)(5), the Board relied upon this Court's decision in *United Mine Workers of America* v. *Arkansas Oak Flooring Company*, 351 U. S. 62, 74-75 (1956); the Fourth Circuit's decisions in *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 291, 292 (4 Cir. 1964); *N. L. R. B.* v. *Overnite Transportation Company*, 308 F. 2d 279, 283 (4 Cir. 1962) and *N. L. R. B.* v. *Inter-City Advertising Co.*, 190 F. 2d 420, 422 (4 Cir. 1951); and the following decisions in other circuits: *N. L. R. B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179 (2 Cir. 1962); *N. L. R. B.* v. *Wheeling Pipe Line, Inc.*, 229 F. 2d 391, 393 (8 Cir. 1956); *N. L. R. B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206, 209 (9 Cir. 1954) (App. C, pp. 56a-58a).

12. The Court made reference to the Company's claimed doubt of the Union's majority "buttressed by the fact that a few years earlier the Union had lost a valid secret election after a similar claim of majority status." The Court made no mention of the unfair labor practices of the Company which antedated the election (App. A, p. 3a).

authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election.[3] The reasoning elaborated in those decisions applies with equal force here * * *.

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3. *Crawford Mfg. Co.* v. *NLRB*, 4 Cir., 386 F. 2d 367, cert. denied, 36 LW 3403, ... U. S. .....; *NLRB* v. *S. S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562; *NLRB* v. *Sehon Stevenson Co., Inc.*, 4 Cir., 386 F. 2d 551; *NLRB* v. *Heck's Inc.*, 4 Cir., ... F. 2d ..... (decided this day).

1. The Alleged Unreliability of Authorization Cards.

To appreciate the full impact of the cryptic decision of the Fourth Circuit herein, it must be considered in the light of the cases cited in its opinion[13] and other of its recent decisions.[14] The Fourth Circuit's doctrine was first and most fully enunciated in *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 565, where the Court held that "[i]t would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check' * * *", that "[t]he unreliability of the cards * * * is inherent * * *" and that [386 F. 2d at 566]:

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13. Particularly inapposite is *Crawford Mfg. Co.* v. *N. L. R. B.*, 386 F. 2d 367 (4 Cir. 1967), certiorari denied, 390 U. S. 1028. That case presented issues involving the Board's *Cumberland Shoe* doctrine (*Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F. 2d 917 (6 Cir. 1965)), and *Bernel Foam* doctrine (*Bernel Foam Products, Inc.*, 146 NLRB 1277) neither of which are involved in the instant case. In addition, in *Crawford op. cit.*, the Court found that considerable misapprehension in the minds of employees in respect to the purpose of the authorization cards was generated by representations of the Union's organizer—a fact not extant herein.

14. Such additional cases include: *General Steel Products, Inc.* v. *N. L. R. B.*, 398 F. 2d 339 (4 Cir. 1968); *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4 Cir. 1968).

> An employer could not help but doubt the results of a card check as an indication of the wishes of employees, for there is nothing in the process to allay it. Unless the employer is extraordinarily gullible and unimaginative, he will at least suspect unreliability in the cards and their signatures.[15]

In *Logan, op. cit.* at pp. 567, 568, the Court suggested that upon the receipt of a Union's claim of majority and a request for recognition "[t]he natural response of an employer entertaining real doubt of the Union's claim is an affirmative investigatory one," and "[a] finding of a § 8(a)(1) violation out of such investigatory conduct of an employer tends to confirm his claim of good faith doubt of the Union's majority * * * But in typical cases, subsequent unfair labor practices have a tendency to prove only the employer's opposition to the Union's organizational efforts; they throw no light on his belief or disbelief of the Union's claim of majority status."[16]

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15. "In *N. L. R. B.* v. *Logan Packing Co.*, [386 F. 2d 562 (4 Cir. 1967)] decided this day, we have considered at some length the serious unreliability of signed authorization cards as an indication of the wishes of a majority of the employees. Because of the unreliability, they should not be accepted as proof of the union's claim of majority status, and an employer is entitled to doubt the union's claim as long as it is so unreliably founded." *N. L. R. B.* v. *Sehon Stevenson & Co., Inc.*, 386 F. 2d 551, 553 (4 Cir. 1967).

16. The Court specifically rejected its holding in *N. L. R. B.* v. *Overnite Transportation Co.*, 308 F. 2d 279 (4 Cir. 1962) that violations of § 8(a)(1) or (3) subsequent to a bargaining demand may constitute "a refutation of any good faith doubt of the union's claim of majority status." *Logan, op. cit.* at p. 568, fn. 23. In *N. L. R. B.* v. *Sehon Stevenson & Co., Inc., op. cit.*, after finding the employer guilty of two illegal discharges, restraint and coercion in violation of Section 8(a)(1) and (3), the Court said [at p. 554]:

> If we had no more in this case than the cards and the finding of violations of §§ 8(a)(1) and (3), the Board's order to bargain would not be enforced for the reasons we state today in *Logan*.

In *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998, 1000, 1002

2. The 1947 Amendments.

The Court further holds that the elimination in the 1947 amendments of the Act of the phrase "any other suitable method" from Section 9(c) withdrew from the Board the authority to order an employer to bargain with a union, absent an NLRB certification, unless factually the employer has no doubt (based upon evidence other than authorization cards) that the union represents a majority of the employees.[17]

(1968), the Fourth Circuit sustained the Board's findings that the employer had engaged in coercive interrogation, surveillance and threats in violation of Section 8(a)(1) and had discriminatorily discharged six employees in a unit of fifty-six, but held that such illegal conduct did not "undercut the substantiality of its [the employer's] doubts [of the Union's majority status]."

17. In *N. L. R. B.* v. *Sehon Stevenson & Co., Inc., op. cit.*, the Court specifically held that the employer's polling of employees gave him such actual knowledge of majority. Analyses of *N. L. R. B.* v. *Preiser Scientific, Inc.*, 387 F. 2d 143 (4 Cir. 1967) and *N. L. R. B.* v. *Lifetime Door Company*, 390 F. 2d 272 (4 Cir. 1968) and the corresponding Board decisions (*Preiser Scientific, Inc.*, 158 NLRB 1375 and *Lifetime Door Company*, 158 NLRB 13) disclose that the Fourth Circuit sustained each refusal to bargain order of the Board on the Court's view of actual knowledge of majority in each case.

REASONS FOR GRANTING THE WRIT.

1. Every Court of Appeals has accepted designation by a majority of the employees based upon signed authorization cards as a valid basis for imposing upon an employer the duty to recognize such union pursuant to Section 8(a)(5).[18]

Indeed, before 1967, the Fourth Circuit accepted the determination of the National Labor Relations Board, concurred in by all other Circuit Courts, that the request for recognition by a union possessing authorization cards executed by a majority of eligible employees in an appropriate unit impresses a duty upon the employer to recognize

18. This rule was accepted by the Courts before the 1947 amendments to the Act: *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 60 S. Ct. 918 (1940); *N. L. R. B.* v. *Clinton Hobbs Co.*, 132 F. 2d 249 (1 Cir. 1942); *N. L. R. B.* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756 (2 Cir. 1940); *N. L. R. B.* v. *Schmidt Baking Co.*, 122 F. 2d 162 (4 Cir. 1941); *N. L. R. B.* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552 (6 Cir. 1940); *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. 2d 780 (9 Cir. 1940); see also: *Continental Oil Co.* v. *N. L. R. B.*, 113 F. 2d 473 (10 Cir. 1940), as well as thereafter: *N. L. R. B.* v. *Greenfield Components Corp.*, 317 F. 2d 85 (1 Cir. 1963); *N. L. R. B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176 (2 Cir. 1962); *N. L. R. B.* v. *Clearfield Cheese Co.*, 213 F. 2d 70 (3 Cir. 1954); *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289 (4 Cir. 1964); *N. L. R. B.* v. *Overnite Transportation*, 308 F. 2d 279 (4 Cir. 1962); *N. L. R. B.* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840 (4 Cir. 1950); *N. L. R. B.* v. *American Manufacturing Co. of Texas*, 351 F. 2d 74 (5 Cir. 1965); *N. L. R. B.* v. *Nelson Mfg. Co.*, 326 F. 2d 397 (6 Cir. 1964); *N. L. R. B.* v. *Larry Faul Oldsmobile Co.*, 316 F. 2d 595 (7 Cir. 1963); *Jas. H. Matthews & Co.* v. *N. L. R. B.*, 354 F. 2d 432 (8 Cir. 1965); *Retail Clerks Local 1179 (John P. Serpa)* v. *N. L. R. B.*, 376 F. 2d 186 (9 Cir. 1967); *Snow & Sons* v. *N. L. R. B.*, 308 F. 2d 687 (9 Cir. 1962); *N. L. R. B.* v. *George Groh & Sons*, 329 F. 2d 265 (10 Cir. 1964); *International Union of United Automobile Workers (Aero Corp.)* v. *N. L. R. B.*, 363 F. 2d 702 (D. C. Cir. 1966); *International Union of United Automobile Workers (Preston Products Co.)* v. *N. L. R. B.*, 392 F. 2d 801 (D. C. Cir. 1967).

the union so designated. *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289 (4 Cir. 1964); *N. L. R. B.* v. *Overnite Transportation*, 308 F. 2d 279 (4 Cir. 1962); *N. L. R. B.* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840 (4 Cir. 1950). And, since the Fourth Circuit's pronouncement in *Logan*, that authorization cards are inherently unreliable and that the presentation of such cards to an employer *ipso facto* creates a doubt as to the union's majority designation, no Court of Appeals has accepted and several Courts have overtly rejected the *Logan* doctrine.[19] Analysis of the bases upon which the Fourth Circuit predicated the *Logan* doctrine suggests why it has not received hospitable acceptance by other Circuits.

First, the Court stated that the Board "fully recognized" the unreliability of authorization cards as a method of designating the employees' collective bargaining represen-

19. The First, Fifth and Sixth Circuits appear to have repudiated the *Logan* rationale [*N. L. R. B.* v. *Sinclair Co.*, 397 F. 2d 157, 161-162 (1 Cir. 1968); *N. L. R. B.* v. *Goodyear Tire & Rubber Co.*, 394 F. 2d 711, 712-713 (5 Cir. 1968); *N. L. R. B.* v. *Atco-Surgical Supports*, 394 F. 2d 659, 660 (6 Cir. 1968)]; the Second Circuit has spurned it [*N. L. R. B.* v. *United Mineral & Chem. Corp.*, 391 F. 2d 829, 836 (2 Cir. 1968); *N. L. R. B.* v. *Big Ben Department Store, Inc.*, 396 F. 2d 78, 82 (2 Cir. 1968); *Bryant Chucking Grinder Co.* v. *N. L. R. B.*, 389 F. 2d 565, 568 (2 Cir. 1967), certiorari denied .... U. S. ...., 88 S. Ct. 2055 (1968)]; and the Third and Tenth Circuits, without reference to *Logan* or the Fourth Circuit, have failed to follow or apply it. *Steel City Transport* v. *N. L. R. B.*, ... F. 2d .... (3 Cir. 1968), 67 LRRM 2589; *N. L. R. B.* v. *Merrill*, 388 F. 2d 514, 519 (10 Cir. 1968); see also *N. L. R. B.* v. *Quality Meats*, 387 F. 2d 176, 178 (3 Cir. 1967), where the Court, quoting Board language in *Sunbeam Corp.*, 99 NLRB 546, 550-551, out of context (see *infra*, p. 15, fn. 22), accepted the principle, often enunciated by the Board, that employer's rejection of a union's demand for recognition supported by authorization cards signed by a majority of unit employees is violative of Section 8(a)(5), unless the employer "has a 'good faith' doubt that the union actually commands the purported majority." In finding such a violation based upon an authorization card majority the Court, in substance, held that such cards are not inherently unreliable as interpreted by the Fourth Circuit in *Gissel* and *Logan*.

tative, citing *Sunbeam Corp.*, 99 NLRB 546, 550-551 (1952); *Midwest Piping & Supply Co:*, 63 NLRB 1060 (1945); *Novak Logging Co.*, 119 NLRB 1573 (1958).[20] The Court made no mention of the fact that each of those cases involved the effect to be given to authorization cards where one of two competing unions was seeking recognition of the employer[21] where dangers of violations of Section 8(a)(2) are manifest.[22]

In addition, the Fourth Circuit's decision that authorization cards are inherently unreliable[23] is predicated upon

20. *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 565, fn. 8 (4 Cir. 1967).

21. See *Levi Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1338, 1342, fn. 10.

22. In two of the cases cited, *i.e. Sunbeam op. cit.* and *Novak Logging Co., op. cit.*, the Board found that the employer had illegally assisted one of the two competing unions in violation of Section 8(a)(2). In *Midwest Piping & Supply Co.*, 63 NLRB 1060, 1069-1071, 1075-1078, the Board held that the employer assisted a union in violation of Section 8(a)(1), *inter alia*, by entering into a union shop agreement with it at a time when the employer was apprised of another union's conflicting claim of representation and in the face of a representation proceeding then currently before the Board. Clearly, the Board in its experience and expertise is justified in differentiating between the use of authorization cards in (1) two-union situations and (2) situations where only one union is involved. *N. L. R. B.* v. *Universal Camera Corp.*, 340 U. S. 373 (1951).

23. In *Logan, op. cit.*, the Court had a basis for rejecting the authorization cards because of evidence of coercion. See concurring opinion: *N. L. R. B.* v. *Sehon Stevenson & Co.*, 386 F. 2d 551, 556 (4 Cir. 1967). In *N. L. R. B.* v. *Preiser Scientific Inc.*, 387 F. 2d 143, the possibility that the Fourth Circuit might limit its *Logan* doctrine to situations involving authorization cards impressed with coercion or misrepresentation loomed large, when it sustained the Board's Section 8(a)(5) order, stating at p. 144: "Particularly, the cards did not have the infirmities we found to render them unreliable under the principles we stated, and now reaffirm, in *Crawford Manufacturing Co., Inc.* v. *N. L. R. B.* (No. 11,040, 4 Cir. decided Oct. 27, 1967); *N. L. R. B.* v. *S. S. Logan Packing Company* (No. 10,355, 4 Cir., decided Oct. 27, 1967)." However, in the instant case and *N. L. R. B.* v. *Heck's, Inc.*, 398 F. 2d 337 (4 Cir. 1968), where there is no claim of misconduct in respect to the signing of

such authority as the "AFL-CIO Guidebook for Union Organizers",[24] a 1962 speech by Board Chairman McCullock[25] (sic) in which he set forth "data indicating some relationship" between the number of cards signed by employees and the number of Board elections won by unions,[26] a law student's conjecture on union authorization cards[27] and its own speculation as to what conceivably might occur in the solicitation of authorization cards.[28]

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any cards, it is clear that the Fourth Circuit has fashioned a rule of law to reject authorization cards, as an indicator of employees' union desires, irrespective of the absence of misrepresentation, coercion or taint of any kind.

24. *N. L. R. B.* v. *S. S. Logan Packing Co., op. cit.*, p. 565, fn. 9.

25. *Ibid.* p. 565 and fn. 10. In his concurring opinion in *N. L. R. B.* v. *Sehon Stevenson & Co., Inc.*, 386 F. 2d 551, 554-555 (4 Cir. 1967), Judge Sobeloff notes that "the only statistical study of cards, upon which the *Logan* opinion relies heavily, concludes: '[a]uthorization cards do have validity'."

26. No mathematical analysis can be relevant to the reliability of authorization cards. Experiences are all too frequent that Board election campaigns invite employer unfair labor practices, *General Shoe* interferences with fair election procedures [*General Shoe Corp.*, 77 NLRB 124, enforced, 192 F. 2d 504 (6 Cir. 1951), certiorari denied, 343 U. S. 904], long delays which chill the fervor of union adherents and multitudinous other factors which adversely affect the free choice of employees. Nor do the number of unfair labor practice charges or the number of objections to elections adequately illustrate the scope of employer interference with such employee free choice. Frequently unions fail to file such charges or objections because of futility arising from the inadequacy of Board remedies, the unlikelihood of success in re-run elections [See *e.g.*, Pollitt, NLRB Re-run Elections: A Study, 41 N. Car. L. Rev. 2091 (1963)], Board administrative problems, cost, internal union problems, further loss of prestige, etc.

27. *Union Authorization Cards,* 75 Yale L. J. 805 (1966).

28. Despite the intellectual erudition of the note writer and the Fourth Circuit, Congress has entrusted the Board, "whose findings within [the] field [of labor law] carry the authority of an expertness which courts do not possess and therefore must respect * * *", with the formulation of judgments on the basis of its "experience in dealing with a specialized field of knowledge", *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488, 71 S. Ct. 456, 465 (1950). Therefore, by the design of the Act, the exercise of the Board's expertise is paramount to scholarly conjecture or judicial speculation.

These factors seem an insufficient basis to digress from a long line of cases and well established legal principle.

2. This Court has accepted the principle that authorization cards are a valid basis by which a majority of employees may designate a union to represent them. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 76 S. Ct. 559, 564-565, 566 (1956); *International Ladies' Garment Workers Union (Bernhard-Altmann Co.)* v. *N. L. R. B.*, 366 U. S. 731, 739, 81 S. Ct. 1603, 1608 (1961); see *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 338-339, 60 S. Ct. 918, 928-939 (1940). In the *Arkansas Oak Flooring* case, *op. cit.*,[29] the Court held that a state court may not enjoin picketing by a union designated by a majority of eligible employees, the object of which was to obtain the employer's recognition, where the union had not filed affidavits and data then required under Section 9(f), (g) and (h) of the Act. The Court said [76 S. Ct. at 564-566]:

> Section 8(a)(5) declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions* of section 9(a)." * * * Section 9(a), [fn. 7 omitted] which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen [citations omitted]. It does not make it a condition that the representative * * * shall be certified by the Board, or even be eligible for such certification.[8] * * *
>
> 8. A Board election is not the only method by which an employer may satisfy itself as to the union's majority status [citations omitted].[30]

29. The basic issue in *Arkansas Oak Flooring* centered upon the rights of a labor organization which had failed to comply with Section 9(f), (g) and (h) of the Act and involved the problem of federal preemption.

30. The court cases cited by this Court in fn. 8 are all cases where authorization cards or other employee designations, such as signatures on a petition, were used as the predicate upon which majority representation was proved.

> Section 7 recognizes the right of the instant employees "to bargain collectively through representatives of their own choosing" and leaves open the manner of choosing such representatives when certification does not apply. The employees have exercised that right through the action of substantially more than a majority of them authorizing the instant union to represent them.
>
> Section 9(a) provides that representatives "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *.

The foregoing language of the Court explains its earlier statement that "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated Section 8(a)(5) of the Act" [76 S. Ct. at 563].[31] And "[t]hat fits this situation precisely" [76 S. Ct. 566].

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31. Courts of Appeals frequently have cited this Court's decision in *Arkansas Oak Flooring, op. cit.*, in support of their decisions to enforce NLRB bargaining orders based on union authorization cards. *N. L. R. B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179 (2 Cir. 1962); *N. L. R. B.* v. *Quality Markets Inc.*, 387 F. 2d 20, 23 (3 Cir. 1967); *Bilton Insulation Inc.* v. *N. L. R. B.*, 297 F. 2d 141, 144 (4 Cir. 1961); *Skyline Homes Inc.* v. *N. L. R. B.*, 323 F. 2d 642, 647 (5 Cir. 1963); *N. L. R. B.* v. *Universal Gear Service Corp.*, 394 F. 2d 396, 398 (6 Cir. 1968); *N. L. R. B.* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 755 (6 Cir. 1965); *Borden Cabinet Corp.* v. *N. L. R. B.*, 375 F. 2d 891, 893 (7 Cir. 1967); *Jas. F. Matthews & Co.* v. *N. L. R. B.*, 354 F. 2d 432, 436 (8 Cir. 1965); *N. L. R. B.* v. *Ralph Printing & Lithographing Co.*, 379 F. 2d 687, 693 (8 Cir. 1967); See also: *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 254 (2 Cir. 1963); *District 50, U. M. W.* v. *N. L. R. B. (Pittsburgh Valve Co.)*, 234 F. 2d 565 (4 Cir. 1956); *District 50, U. M. W.* v. *N. L. R. B. (Bowman Transportation, Inc.)*, 237 F. 2d 585 (D. C. Cir. 1956).

In another context this Court has accepted the right of an employer to recognize a union predicated upon a majority status proved by signed authorization cards. In *International Ladies' Garment Workers Union (Bernhard-Altmann)* v. *N. L. R. B.*, 366 U. S. 731, 81 S. Ct. 1603 (1961), the primary issue involved was the recognition by the employer of a union which had not been designated by a majority of the employees. There the Court said [81 S. Ct. at 1608]:

> If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate * * * he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so.

There is no distinction in principle between the obligations of an employer under Section 8(a)(2) to cross-check authorization cards and the obligation imposed upon him in this respect under Section 8(a)(5).[32] Indeed, to hold that an employer has a right to recognize a union's majority status by virtue of authorization cards to avoid a Board election where the employer prefers such union, and to reject the obligation to recognize a union which tenders a

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32. The Court in *Bernhard-Altmann, op. cit.*, also said [81 S. Ct. at 1608-1609]: "[a]ssuming that an employer in good faith accepts or rejects a union claim of majority status, the validity of his decision may be tested in an unfair labor practice proceeding [citing Section 8(a)(5) in fn. 13]. If he is found to have erred in extending or withholding recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act * * * no further penalty results. We believe the Board's remedial order is the proper one in such cases."

majority of valid, unambiguous authorization cards where the employer abhors the particular union, is to deny the employees the right to select the bargaining agent of their own choosing guaranteed in Section 7 of the Act.

3. Manifestly, the Fourth Circuit's rejection of authorization card Section 8(a)(5) violations is erroneous. Prior to *Logan*, every Court of Appeals, including the Fourth Circuit, recognized that the design of the Act left open to the employees the designation of the majority representative by means other than election and accepted as valid a designation by a majority of employees based upon signed authorization cards where neither coercion nor misrepresentation by the union in the obtaining of the cards was proved.[33] If Congress intended to change the results of such a long line of authority, it would have clearly demonstrated its intent to do so.[34]

But a reading of the legislative history of the 1947 amendments to the Act[35] reflects a contrary intention. The Bill passed by the House sought to amend Section 8(a)(5) to read as follows: "To refuse to bargain collectively with the representative of his employees currently recognized by the employer or certified as such under Section 9.", thus substituting the phrase "currently recognized by the employer or certified as such under Section 9" for the language "subject to the provisions of Section 9(a)." H. R. 3020, p. 21, I Legislative History of the Labor-Management Relations Act 1947, p. 178.

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33. See cases cited *supra*, p. 13, fn. 18, and *infra*, p. 22, fn. 39.

34. See *N. L. R. B.* v. *Gullett Gin Co.*, 340 U. S. 361, 365-366, 71 S. Ct. 337, 340-341 (1951); *N. L. R. B.* v. *Brooks*, 204 F. 2d 899 (9 Cir. 1953), affirmed, 348 U. S. 96, 75 S. Ct. 176 (1954).

35. The Fourth Circuit in *Logan* relied upon the Taft-Hartley amendments to Section 9(c) to conclude that the Board could not determine that a labor organization represented a majority of employees in a unit without the benefit of a Board-conducted secret ballot election.

The House Report on its version of the bill made it clear that certification under Section 9 would be the exclusive method of achieving recognition and that an employer would not violate Section 8(a)(5) by refusing to recognize a union designated by a majority of its employees, absent a Board certification. House Report No. 245 on H. R. 3020, p. 30, I Legislative History of the Labor-Management Relations Act 1947, p. 321.

The Senate bill retained the language of Section 8(a)(5) as written in the Wagner Act. S. 1126, p. 13, I Legislative History of the Labor-Management Relations Act 1947, p. 111; House Conference Report No. 510 on H. R. 3020, p. 7, I Legislative History of the Labor-Management Relations Act 1947, p. 511. In passing the Senate bill in preference to the altered House version, Congress rendered the refusal to bargain "subject to the provisions of Section 9(a)" and refused to foist upon Section 8(a)(5) the certification requirements of Section 9(c).[36] It is thereby difficult to see by what legerdemain changes wrought in Section 9(c) legitimately can be impressed by the Fourth Circuit on Section 8(a)(5) to divest the Act of a preexisting proscription against an employer's refusal to recognize where a union has been designated by a majority of eligible employees' execution of untainted authorization cards.

Section 9(c) under the Wagner Act provided that whenever a question concerning representation arose, the Board could investigate such controversy and certify a union representative after "a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." The phrase "or utilize any other suitable method" was deleted from Section 9(c) in the final passage of the Taft-Hartley amendments. This deletion has prohibited the NLRB from issuing without an election a certification

36. See *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62; 76 S. Ct. 559, 564-565, fn. 8.

based upon cards, petitions, strikes, statements signed by a majority of the employees, membership cards, membership applications, affidavits of membership signed by a majority of employees and various other methods of proof which had been accepted under the Wagner Act.[37] Clearly the deletion of the language "or utilize any other suitable method" goes no further than to prevent a *certification*[38] by the Board without an election. Since, as noted above, Congress rejected certification as a prerequisite to a refusal to recognize violation,[39] the elimination of the above phrase from

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37. See e.g.: *Delaware-New Jersey Ferry Co.*, 1 NLRB 85 (membership cards); *Atlantic Refining Co.*, 1 NLRB 359 (petition); *Rabkor Co., Inc.*, 1 NLRB 470 (strike participation); *Lykes Brothers Steamship Co., Inc.*, 2 NLRB 102 (sworn testimony); *Duplex Printing Press Co.*, 1 NLRB 82 (stipulation between parties); see also, NLRB, *First Annual Report*, pp. 103-104; NLRB, *Second Annual Report*, pp. 108-109.

38. With the inclusion of Section 8(b)(4) in the Act in 1947, *certification* by the Board took on an expanded significance as against *recognition* by an employer (Supp. App. *infra*, pp. 27, 29-30). See *General Box Co.*, 82 NLRB 678, 680-682; *Kennedy* v. *Warehouse & Distribution Workers Union, Local 688*, 37 LRRM 2496, 29 LC ¶ 69,736 (E. D. D. C. Mo. 1956); *Perry Norvell Co.*, 80 NLRB 225, 239.

39. It should be noted that despite the uniformity of decisions predicating Board bargaining orders on authorization card majorities between 1947 and 1959. *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), certiorari denied, 341 U. S. 914; *N. L. R. B.* v. *Ken Rose Motors Inc.*, 193 F. 2d 769 (1 Cir. 1952); *N. L. R. B.* v. *Marcus Brothers*, 272 F. 2d 253 (2 Cir. 1959); *N. L. R. B.* v. *Clearfield Cheese Co.*, 213 F. 2d 70 (3 Cir. 1954); *N. L. R. B.* v. *Harris-Woodson Co.*, 179 F. 2d 720 (4 Cir. 1950); *N. L. R. B.* v. *Lewis Motor Co., Inc.*, 180 F. 2d 254 (5 Cir. 1950); *N. L. R. B.* v. *Armco Drainage & Metal Products Inc.*, 220 F. 2d 573 (6 Cir. 1955); *N. L. R. B.* v. *Taitel*, 261 F. 2d 1 (7 Cir. 1958); *N. L. R. B.* v. *Wheeling Pipe Line Inc.*, 229 F. 2d 391 (8 Cir. 1956); *N. L. R. B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206 (9 Cir. 1954); *N. L. R. B.* v. *Hamilton*, 220 F. 2d 492 (10 Cir. 1955). Congress did not attempt in 1959 to amend Section 8(a)(5) or Section 9 to proscribe such action. See *N. L. R. B.* v. *Gullett Gin Co.*, 340 U. S. 361, 365-366, 71 S. Ct. 337, 340-341 (1951).

Section 9(c) could not affect the existing rights or obligations under Section 8(a)(5).[40]

4. The questions posed by the instant case involve a fundamental interpretation and application of the national labor law and are of far-reaching importance to industry and labor. The number of annual recognitions granted to unions based upon authorization card majorities has not been recorded. But there can be no doubt that the acceptance by the Board of union designations by such authorization card majorities has deterred employers in myriads of cases from refusing to recognize and bargain with unions

40. The only change in Section 9 of the Act wrought in 1947 which has relevance to a refusal to recognize violation of Section 8(a)(5) is the provision which accords the employer a right to file a petition for an election so that when he has a real doubt of the majority designation of the union no longer "* * * like Odysseus, [must] he stand * * * almost helpless as he makes the perilous passage between Scylla and Charybdis between a violation of Section 8(a)(2) if he recognizes and a violation of Section 8(a)(5) if he does not" [*N. L. R. B.* v. *Dan River Mills*, 274 F. 2d 381, 388-389 (5 Cir. 1960)]. In respect to the employer petition, Senator Taft said: "To determine whether this man really does represent his employees or not, the Bill gives him the right to go to the Board under those circumstances and say 'I want an election; I want to know who is the bargaining agent for my employee.'" 93 Congressional Record 3954, April 23, 1947, II Legislative History of the Labor-Management Relations Act 1947, p. 1013. The Fourth Circuit, prior to the enunciation of the *Logan* doctrine, had properly evaluated and applied the inclusion of subsection 9(c)(1)(B) in the Act where it held that "[i]f the company had any doubts [of the union's majority status] when it was approached by the union, it could have agreed to the private election suggested by the union or it could have itself petitioned the Board under Section 9(c)(1)(B) for a representation election. Refusing to pursue either course it acted at its peril" [*Flor[illegible] Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 292 (4 Cir. 1964)]. In *N. L. R. B.* v. *Overnite Transportation Company*, 308 F. 2d 279 (4 Cir. 1962), the Court suggested that the employer could have sustained a claim that it "sincerely doubted the union's majority status * * * by checking the union cards against the payroll or by requesting the Labor Board to hold a representation election as is its right under Section 9(c)(1)(B) of the Act * * *". No observable change in the law or Congressional intent has rendered the words of the Fourth Circuit prior to *Logan* less true today.

so designated and thereby has avoided industrial strife which otherwise would interfere with the normal flow of commerce.

The doctrine of the Fourth Circuit applied in the instant case excises the vitals of the long-standing refusal to recognize doctrine based upon authorization cards accepted by the Board and the Courts. Were this Court to accept the decision below, the Board would be transformed into an agency stamping its approval on a violation of the Act that it was designed to correct. Clearly, thereafter, employers would shrink from ascertaining information as to actual majority thereby to avoid the duty to recognize.[41]

In the meantime, the geographic area encompassed by the Fourth Circuit constitutes an oasis in which sophisticated employers can avoid the full scope of their obligations to recognize unions designated by majorities of their employees by means other than Board conducted elections. In view of the provisions of Section 10(f), the unusual doctrine of the Court below can be applied to organizing campaigns of unsuspecting unions beyond the ambit of the geographic area of the Fourth Circuit [42] (see Supp. App. *infra*, pp. 28-29).

All considerations of sound labor policy require that this Court review the decision below and put an end to the gross misinterpretation of the National Labor Relations Act which is adopted in that decision.

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41. It would be an act of supererogation to detail to this Court the practical difficulty, if not impossibility, of proving actual knowledge by the employer that a majority of its employees have selected a union to represent them without benefit of some authorization card-type proof and short of unequivocally successful strike action.

42. It should be noted that in *Crawford Manufacturing Co.* v. *N. L. R. B.*, 386 F. 2d 367 (4 Cir. 1967), certiorari denied, 390 U. S. 1028, the unfair labor practices were committed in Emporia, Kansas, and jurisdiction was obtained by the Fourth Circuit by virtue of the employer's principal office being located in Richmond, Virginia.

CONCLUSION.

For the foregoing reasons it is respectfully requested that this Court issue its writ of certiorari to review the decision below.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX.

Additional relevant provisions of the National Labor Relations Act, prior to the 1959 amendments (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Secs. 151, *et seq.*) are as follows:

Sec. 8—

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, * * *

(c) for the purpose of forcing or requiring any employer to recognize or bargain with a labor organization as the representative of his employees, unless such labor organization has been certified as the representative of such employees under the provisions of Section 9(a);

and of the Act, as amended in 1959, as follows:

Sec. 10—

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies

of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him; *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. • • •

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United

States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary re-

straining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D) * * *.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. _____

THE SINCLAIR COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the First Circuit.

The Sinclair Company, petitioner herein, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the First Circuit, entered in this case on July 3, 1968, granting enforcement of an order issued against Petitioner by the National Labor Relations Board.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. A, *infra*, pp. 33-40) is reported at 397 F. 2d 157. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 164 NLRB No. 49 (App. C, *infra*, pp. 41-78).

JURISDICTION.

The decision of the Court of Appeals was rendered on July 3, 1968 (App. A, *infra*, pp. 33-40); and its decree was entered on July 3, 1968 (App. B, *infra*, p. 41). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e).

QUESTIONS PRESENTED.

(1) Whether the National Labor Relations Board has authority under the provisions of the National Labor Relations Act to order petitioner to bargain with a labor organization that has lost a Board-conducted secret ballot election.

(2) In the alternative, if the Board has such authority under the Act, whether petitioner was lawfully entitled to refuse to recognize the Union and to insist upon an election upon the ground that authorization cards are unreliable, and without a requirement that petitioner conduct an investigation into the authenticity of such cards *or* be relegated to a mere check of the names appearing on the cards against the names on its payroll.

(3) Whether a combination of lawful statements made by petitioner to its employees can amount to unlawful threats and coercion as a "totality," and thereby lose their protection under the First Amendment to the Constitution and under Section 8(c) of the Act, and whether such findings by the Board can be sustained by reference to Board "expertise" and the test of substantial evidence under Section 10(e) of the Act.

STATUTES INVOLVED.

The National Labor Relations Act, as amended (61 Stat. 136; 72 Stat. 945; 73 Stat. 544; 29 U.S.C. § 141 *et seq.*), insofar as is here pertinent, provides:

Section 8(c):

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 9(c):

> "(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board
>
> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> "(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of repre-

sentation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Section 10(e):

"* * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

The First Amendment to the Constitution provides in pertinent part:

"Congress shall make no law * * * abridging the freedom of speech. * * *"

STATEMENT OF THE CASE.

I. THE FACTS.

A. The Union's Several and Different Recognition Demands and Unit Positions.

On July 3, 1965, the Wire Weavers Trade Division, International Brotherhood of Teamsters, commenced an organizing drive among petitioner's *Appleton* plant[1] employees (J.A. 13, 14, 176; R.A. 39b, 41b, 43b, G. C. Exs. 3, 6, 7).[2]

The Board, in its decision, and the Court of Appeals, relied upon a recognition demand made by the Union on September 20,[3] for a unit of Journeymen Wireweavers and Apprentices (R.A. 45b). Petitioner refused to recognize the Union by letter dated September 28 (R.A. 48b). This demand and petitioner's refusal was the basis for the Board's order issued herein, as though it was the only recognition demand involved. In fact, it was the *second* (2nd) recognition demand in a case which involved the receipt by petitioner of three (3) recognition demands, each for a different unit, and which involved *seven* (7) different positions on the part of the Union with respect to the unit of employees which it claimed to represent.

The *first* recognition demand and unit position was made on August 17 by a Cleveland Attorney upon another

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[1] Petitioner has plants on Appleton Street and on Park Street in Holyoke, Massachusetts.

[2] The Xerox copy of the transcript of testimony which was filed in the Court below will be referred to as J.A. ____. R.A. ____ refers to the printed Record Appendix To Respondent's Brief and B.A. ____ refers to the printed Record Appendix To Brief For Petitioner, both of which were filed in the Court below. Exhibits of the General Counsel are referred to as "G.C. Ex." and petitioner's Exhibits (Respondent in the proceedings below) are designated as "R. Ex."

[3] All dates refer to the year 1965 unless otherwise indicated.

Cleveland Attorney who, at that time, did not represent petitioner (R.A. 43b, 44b; G.C. Exs. 7, 8; J.A. 95, 98). The demand was for a unit of 87 Appleton Plant employees (R.A. 43b, 44b; G. C. Exs. 7, 8; J.A. 95, 98). At that time, eighty-seven (87) employees included everyone working for petitioner at both plants, except very top management (J.A. 94, 95, 98, 189). Petitioner rejected the recognition demand (R.A. 43b).

No further steps were taken by the Union to pursue this demand, and the Board made no attempt to establish that the Union had truthfully claimed to represent a majority of such employees.

The *second* demand and unit position, as set forth above, was for a unit of Journeymen Wireweavers *and apprentices*. For a period of thirteen (13) years prior to the demand, petitioner had employed no apprentices (J.A. 14, 15, 98, 99, 177, 190, 191, 224, 231). During this same thirteen year period, many of the skills formerly required by Journeymen Wireweavers had been eliminated (J.A. 195, 224, 225, 250). Having received two (2) consecutive claims from the Union for representation of non-existent employees, the petitioner also rejected the second demand (R.A. 48b, G.C. Ex. 11). The Union abandoned and withdrew this second demand and unit position by its third conflicting demand and unit position.

On October 11, the Union's *third* (3d) recognition demand and unit position was limited to the Appleton plant and to a unit described as weave shop, maintenance, machine shop, shipping room, finishing room, dandyroll, cylinder and water mark. In addition to the doubts engendered by a third conflicting recognition demand, petitioner believed that employees of its Park plant should also be included in the unit. It, therefore, refused this third demand (R.A. 51b; G.C. Ex. 13; J.A. 232).

The Union filed a representation petition with the Board on October 13, Case No. 1-RC-8664, for a unit consistent with its October 11 demand, except that it also requested inclusion of "part time production employees" (R. Ex. 1).

The *fourth* unit position by the Union was reflected in a Stipulation for Certification Upon Consent Election which was executed by the parties and by a Board Field Representative on November 2 (J.A. 105, 233, 234; R. Ex. 2). The bargaining unit was therein described as all "production and maintenance employees" at *both* the Appleton *and* Park plants (R. Ex. 2).

Despite this course of conduct by the Union, on November 8, six (6) days after the Stipulation was signed by the parties, over petitioner's objections, the Board's Regional Director granted the Union's telegraphic request that it be permitted to withdraw from the Stipulation without prejudice, so that it could petition for a "smaller unit" (R. Exs. 3, 5, 7). This *fifth* (5th) unit position failed in any way to define the unit. The Union made no further attempt to pursue its third demand and unit position or its fourth unit position.

The Union's *sixth* (6th) unit position was set forth in the representation petition filed on November 8 in Case No. 1-RC-8713, and was for a unit of "Apprentice and Journeymen Wire Weavers." It specifically requested the exclusion of all other Appleton and Park plant employees (G.C. Ex. 1(a)).

The Union's *seventh* and final position was set forth in a Stipulation for Certification Upon Consent Election for a unit limited to Journeymen Wire Weavers *only*. No demand for recognition was ever made by the Union for this unit.

B. Petitioner's Communications With Its Employees.

As set forth above, the Union's organizing drive commenced on July 3 by a letter to the Appleton plant employees (R.A. 39b). Shortly thereafter, employees offered Petitioner's President, David H. Sinclair, copies of the Union's communication, and he accepted one copy (J.A. 96, 175, 176).

Within a few days, President Sinclair talked to employees of the Machine Shop, Roll, Cylinder and Weaving Departments at the Appleton plant (J.A. 100, 101, 114, 218, 250, 251, 257). Only his talk to about twenty-six (26) employees of the Weaving Department (J.A. 15, 178) is involved here.[4] President Sinclair had no written speech or notes, and he talked for ten (10) to twelve (12) minutes (B.A. 8).

In his talk, President Sinclair referred to historical facts relating to petitioner's past experience with the American Wire Weavers Protective Association (AWWPA) which had now merged with the Teamsters Union (J.A. 104, 180, 192, 193).

In 1952, AWWPA called a strike of Wire Weavers which closed petitioner's plant for twelve (12) or thirteen (13) weeks. Petitioner was unable to meet the unreasonable and excessive demands of AWWPA (J.A. 179-181, 226; B.A. 6). Petitioner's plant reopened in September, 1952, on the basis of petitioner's last offer to the AWWPA (J.A. 102, 181, 223, 252, 253). Some, but not all of the Wire Weavers, returned to work (J.A. 253).

Following the 1952 strike and continuing until 1965, petitioner's financial position was precarious. In July, 1964, President Sinclair was forced to sell the business (J.A. 222, 225, 226). The Lindsay Wire Weaving Com-

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[4] Journeyman Wire Weavers constituted only fourteen (14) of the twenty-six (26) employees of that department.

pany acquired 100% of petitioner's stock, and David H. Sinclair continued as President. However, Lindsay officers made it clear that they were looking for a profit and not for a "hole to pour money down" (J.A. 103, 168, 226).[5]

In his talk, Mr. Sinclair reviewed the 1952 strike and petitioner's financial problems subsequent to that date which resulted in its sale in 1964. He discussed Lindsay's relationship with petitioner; Lindsay's insistence that petitioner make money; that he did not want to find himself in the same situation as in 1952, where a Union would make unreasonable demands that petitioner could not meet; that strikes could be caused by a Company's inability to accede to Union demands; that a strike could lead to closing the plant; that petitioner could not accede to unreasonable demands; and that the last thing he wanted was a plant that was closed down because "this was my life, too" (J.A. 141).

Following this July talk, the Union apparently believed that it was successful in its organizing attempts. It made the several claims of majority representation in August, September and October, which are set forth above. Petitioner did not communicate with its employees regarding the Union's organizing attempt during the four (4) month period from early July until November.[6] Commencing on November 2, petitioner sent eight (8) written

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[5] Subsequent to the Board's order herein, The Lindsay Wire Weaving Company sold the shares of petitioner and since that time has not had any interest in petitioner.

[6] On October 21, petitioner posted a notice to employees commenting on the Union's representation petition, then pending before the Board (R.A. 25b). During the period from July to December 9, President Sinclair asked ten of the Weavers, individually, whether they had any questions concerning the Company's position (J.A. 161, 162, 186, 187). The specific content of the discussions with some of the ten who asked questions was not litigated (B.A. 17), and the Board found it unnecessary to consider or pass on them (B.A. 19).

communications to its employees (R.A. 18b-38b; G.C. Exs. 14-19, 21); and on December 8, President Sinclair talked to the Weavers (R.A. 56b-59b; R. Ex. 20).[7]

The November 2 letter (R.A. 18b-21b) answered a number of questions concerning voting procedure, union shop and discussed job security. It stated that petitioner *would bargain in good faith*, if the Union won an election, but because of its precarious financial condition, it did not "make sense for us *to meet* unreasonable Union demands *which will result in further losses* and eventually the necessity of closing the plant."

The second letter was dated November 5 (R.A. 22b-24b). Petitioner reviewed its history, the 1952 strike and its relationship with Lindsay. President Sinclair stated that "a long strike" would be bad for him because he wanted to continue to live in Holyoke, had pride in the Sinclair name and "would like to see the plant modernized, expanded and prosper." He also stated, "No one has a right to threaten you, or coerce you to make you vote their way."

An undated handbill was distributed between the 18th and 25th of November. The 1952 strike was discussed in the handbill, together with Teamster strike policy, as evidenced by a statement by Teamster President Hoffa. Also discussed were the employees' rights in voting in the Board election and their rights in the event of a strike (R.A. 36b-38b).

A fourth letter, dated November 22, merely stated that a copy of Senator Robert Kennedy's book entitled

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[7] At the hearing it was established that authorization cards from Wire Weavers had been signed by them as follows: one (1) on July 6 (G. C. Ex. 2); three (3) on July 7 (G. C. Exs. 28, 31, 32); five (5) on July 8 (G. C. Exs. 23, 24, 26, 27, 29); and two (2) on July 9 (G. C. Exs. 25, 30; B.A. 24). It thus affirmatively appears that the authorization cards were signed following President Sinclair's July talk.

"The Enemy Within" was enclosed and suggested that employees read it (R.A. 25b).

On November 30, a fifth letter (R.A. 26b-28b) was sent. It discussed strikes and Lindsay's connection with petitioner. Among other things, it stated:

> "This Company is *not anti-union.* We *would not close the plant in retaliation for employees voting for a Union.* But this Company must show a profit, *regardless* of whether or not you select the Teamsters Union as your spokesman."

The seventh letter of December 7 (R.A. 31b-35b) discussed plants that had been closed in the Holyoke area, and pointed out that Unions had done nothing to promote sound industrial growth in the area.

The December 8 handbill severely criticized the Teamsters for using Union funds to defend James Hoffa in criminal proceedings and pointed out advantages of a vote against the Union (R.A. 35b-36b).

President Sinclair talked to the Wire Weavers on December 8. His talk was a brief recapitulation of what had already been stated in prior communications. However, he repeated that the decision was up to the employees alone and that "no one (could) threaten or coerce" them; that there were a lot more important things than who would represent them; that he would do his "level best *to keep Sinclair Co. in business and growing*"; "I'm not concerned with beating a union—I'm concerned with our future."

The election was held on December 9, and the employees voted against the Teamsters by a vote of 7 to 6. Objections to the election and charges of unfair labor practices were subsequently filed, and a Complaint was later issued.

II. THE BOARD'S DECISION AND ORDER.

The Board adopted the findings, conclusions and recommendations of the Trial Examiner, except for two modifications in the breadth of the Order. Although it had found that a question of representation existed and had conducted an election, it now ruled that the election should never have been held and ordered petitioner to bargain with the Union. Notwithstanding the First Amendment to the Constitution and Section 8(c) of the Act, it used petitioner's communications with its employees as the basis for the bargaining order. Although it found no threats, it ordered petitioner to cease and desist from threatening its employees with possible plant closure, transfer of weaving production with attendant loss of employment or with other economic reprisals if they *selected* the Union as their bargaining representative.

(A) With respect to petitioner's communications with its employees, the Board made two (2) inconsistent findings. The first, that petitioner's communications:

> "taken together and considered as a whole, reasonably tended to convey to the employees the belief or impression that *selection of the Union* in the forthcoming election *could* lead Respondent to close its plant, or to the transfer of the weaving production, with resultant loss of jobs to the wire weavers." (App. C, p. 58.)

The foregoing finding relates to a "possibility" of disadvantageous consequences as a result of selection of the Union. In its second (2d) finding, the Board piled inference upon inference in an attempt to convert the "possibility" into a "certainty," as follows:

> "But the message which the foregoing preelection campaign * * * reasonably tended to convey to the employees was that if they *selected this Union* as their bargaining representative, a strike would be inevi-

table because the Union *would* make excessive demands which Respondent *would* refuse to meet, that a strike *could* lead to the closing of the plant or the transfer of the weaving production to Lindsay's other facilities, and that the wire weavers *would* then lose their jobs and find it difficult to get other jobs because of their age and limited craft skills." (App. C, pp. 58-59.)

(B) The Board in no way explicated the basis for its findings, contenting itself with basing them upon the alleged "totality" of petitioner's communications. The findings made by the Board largely consist of statements which must be conceded, even by the Board, to be protected under the First Amendment to the Constitution. Such findings include, in their "totality," the finding that on November 22 petitioner furnished each of its employees with a copy of Senator Robert Kennedy's book, "The Enemy Within" (App. C, p. 51).

On June 16, 1967, more than a month after it issued its decision herein (App. C, p. 77), the Board, without any request by Respondent or any other party, voluntarily issued its Order Supplementing Decision and Order, which added a footnote disclaiming any reliance upon petitioner's distribution of "The Enemy Within" as "part of the totality of * * * conduct in violation of Section 8(a)(1) of the Act" (App. C, p. 78).[8]

(C) With respect to the allegations of refusal to bargain, the Board ignored all demands for recognition except the *second* demand of September 20 and ignored the proceedings in connection with the representation petition filed in October. It ruled upon the matter as though the

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[8] The Board did not rule upon petitioner's contention that its communications with its employees were protected by the First Amendment to the Constitution.

September 20 demand and the representation petition of November 8 were the only facts in the case.

The Board found that the Union's loss of support "must be found attributable to the Respondent's unfair labor practices" (App. C, p. 66) and that:

> "Respondent's refusal to bargain on and after September 20, 1965, was not motivated by any good faith doubt as to the Union's majority status in an appropriate bargaining unit but was instead motivated by a desire to gain time within which to dissipate that majority status." (App. C, p. 69.)

(D) The Board did not rule upon petitioner's contention that by reason of the changes made in Section 9(c) of the Act by the Taft-Hartley Amendments (61 Stat. 143), among other things, deleting the Board's authority to "utilize any other suitable method" to determine a bargaining representative, that the Board did not have statutory authority to order bargaining based upon a card check, after it had resolved the question of representation by means of a secret ballot election.

III. THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals enforced the Board's order. It stated that the Board's order was based upon findings that petitioner threatened its employees "that unionization *would* cause them to lose their jobs" (App. A, p. 33) and that there was a refusal to bargain in violation of the Act.[9] It held that the "basic question" was whether these findings were supported by substantial evidence on the record as a whole.

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[9] The Board made no finding that petitioner threatened that unionization *"would"* cause employees to lose their jobs.

THE COURT'S DECISION WITH RESPECT TO PETITIONER'S COMMUNICATIONS.

With respect to Petitioner's communications, the Court relied upon findings which are substantially curtailed in scope from those relied upon by the Board. The Court impliedly sustained petitioner's contentions that it made no untrue statements and that its statements, considered separately, were lawful.

Although the Court mentioned the tests set forth in Section 8(c) of the Act relating to promises of benefits or threats of force or reprisal, it made no findings under those standards. Instead it turned to the language of Section 8(a)(1), which prohibits conduct by an employer:

"to interfere with, restrain *or coerce* employees * * *."

The Court held that the test in considering "coercive effect" was the "totality of the circumstances." It held that:

> "Whether an employer has used language that is *coercive in its effect* is a question essentially for the specialized experience of the Board.
>
> * * * * *
>
> "On the record before us we think there is *substantial evidence* to support these findings." (App. A, p. 38.)

The Court, therefore, as did the Board, applied the tests pertaining to a violation of Section 8(a)(1) of the Act and not the tests set forth in Section 8(c) thereof. Further, the Court, likewise, did not rule upon petitioner's contention that its communications were protected by the First Amendment to the Constitution, nor did the Court review the factual findings for the Board's order, as required with respect to an order restraining freedom of speech.

With respect to the refusal to bargain issue, the Court found that the Board's finding of a violation of Section 8(a)(5) and (1) of the Act was supported by substantial evidence. It ruled that a good faith doubt was not established by assertion and that it must have some reasonable or rational basis in fact.

> "Here the company made no attempt to discover what the card situation was when the union requested recognition for the wire workers unit. We therefore conclude that *the company* made no real showing of good faith doubt either as to the union's majority status or as to the appropriateness of the bargaining unit." (App. A, p. 39.)

The Court found that instead of recognizing the Union on the basis of its "admitted" card majority, that petitioner sought to gain time to dissipate the Union's majority. The Court gave no recognition to the fact that such majority was not known to petitioner until the hearing on October 4 and 5, 1966. It gave no consideration to the Union's false claim of majority representation in August and it did not consider the abandonment by the Union of its September claim by the October demand and petition, and by the execution, in November, of a Stipulation for an Election in an entirely different bargaining unit.

The Court ruled that it had rejected the proposition, in the First Circuit, that authorization cards were so unreliable that an employer has a right to reject a request for recognition based upon them; and that it was reasonable to conclude that the Union's majority had been dissipated by petitioner's unlawful interference. The Court did not discuss the effect of the Union's frequent changes of position nor did it rule upon petitioner's contention that the change made in Section 9(c) of the Act by the Taft-Hartley Amendments (61 Stat. 143) prohibited the issuance of the Board's bargaining order.

REASONS FOR GRANTING THE WRIT.

Recurring litigation has arisen under the National Labor Relations Act with respect to the exercise by employers of their rights of freedom of speech under Section 8(c) of the Act and under the First Amendment to the Constitution. Much litigation has reached the Courts of Appeals in recent years with respect to the authority of the National Labor Relations Board to issue bargaining orders following the defeat of a Union in proceedings conducted under Section 9(c) of the Act. The decisions of the Courts of Appeals are in conflict, and a decision by this Court on such questions is important in the administration of the National Labor Relations Act.

I. THE DECISION BELOW IS IN CONFLICT WITH A DECISION OF THE FOURTH CIRCUIT WITH REGARD TO THE AUTHORITY OF THE BOARD.

In *NLRB v. Logan Packing Co.*, 386 F. 2d 562 (CA-4, 1967), the Court of Appeals for the Fourth Circuit rejected the procedure followed by the Board here. The Court pointed out that "card checks" or "card counts" were utilized by the Board under the Wagner Act, which permitted the Board to use "any other suitable method" for determining a collective bargaining representative. The Court held that the present Act "provides for a secret election under Board supervision as the *exclusive method* of resolving a question of representation" (386 F. 2d at 569). It held that a bargaining order remedy was an extraordinary one and that such an order might be permissible in exceptional cases where the employer's conduct was particularly outrageous and pervasive, but found none in the case before it.

Here there was no finding, nor is there any basis for a finding of outrageous and pervasive conduct on the part

of petitioner. The evidence is to the contrary.[10] Two (2) representation petitions were filed by the Union alleging that a question of representation had arisen, and the Union twice stipulated that:

> "a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c)." (R. Ex. 2; G. C. Ex. 1(b).)

The conflict between the Fourth Circuit and the First Circuit on this issue should be resolved by this Court.

II. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE FOURTH, FIFTH, AND SIXTH CIRCUITS WITH REGARD TO AN EMPLOYER'S DUTY TO ACCEPT AUTHORIZATION CARDS.

The Court below concluded that petitioner had not made a showing of good faith doubt concerning the Union's majority status because:

> "Here the company made no attempt to discover what the actual card situation was when the Union requested recognition for the wire workers unit." (App. A, p. 39.)

In direct conflict with this holding, Courts of Appeals in other Circuits have held that an employer carries no such burden. In *NLRB v. Sehon Stevenson & Co.*, 386 F. 2d 551 (CA-4, 1967), the Court held:

> "Because of their unreliability (authorization cards) should not be accepted as proof of the union's claim of majority status, and an employer is entitled to doubt the union's claim as long as it is so unreliably founded." (386 F. 2d, at 553.)

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[10] The Board found no *conduct* by petitioner, other than speech, in violation of the Act. The only violation found by the Board was based upon petitioner's communications.

The Fifth Circuit in *NLRB v. Dan River Mills*, 274 F. 2d 381 (CA-5, 1960), held that an employer was not required, at his peril, to engage in an investigation concerning the validity of authorization cards:

> "* * * But like Odysseus, he stands almost helpless as he makes the passage between Scylla and Charybdis. If he makes a simple inquiry to each employee and accepts the simple answer, the very pressures apprehended may well bring about the employee's confirmation as well. If he probes deeper, the inquiry unavoidably becomes an investigation and soon it is inescapable that there will be insinuations in terms of relative evaluation of union or nonunion conditions. At that point, undefined or undefinable, the inquisitor trespasses either on forbidden ground or flounders in the Serbonian bog surrounding it so that what started out to be a means of compliance with law is turned into an affirmative charge of an unfair labor practice." (274 F. 2d at 388.)

The Sixth Circuit has also ruled contrary to the decision made by the Court below. Its decision in *NLRB v. Fashion Fair, Inc.*, ____ F. 2d ____, 68 LRRM 2964 (CA-6, 1968), states specifically:

> "An employer is not obligated to submit to a card check by a neutral third party in order to preserve his claim of good faith doubt." (68 LRRM at 2967.)

And in *Lane Drug Co. v. NLRB*, 391 F. 2d 812 (CA-6, 1968), the Sixth Circuit held that:

> "The offer of a check of authorization cards does not impose a duty upon the Company to submit to the check or suffer the consequences of a refusal to bargain charge." (391 F. 2d at 820.)

The conflict between the First Circuit and the Fourth, Fifth, and Sixth Circuits on this issue should be resolved by this Court.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS IN THE SECOND, FOURTH, AND SIXTH CIRCUITS WITH RESPECT TO THE RELIABILITY OF AUTHORIZATION CARDS.

The Court below held that petitioner was contending "that signed authorization cards are so unreliable that it has a right to reject a request for recognition based on them and insist upon an election. We have already rejected this proposition in this circuit." (App. A, p. 40.)

In *NLRB v. Logan Packing Co.*, 386 F. 2d 562 (CA-4, 1967), the Court stated that: "it would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands." The Court discussed the reasons for the unreliability of authorization cards in great detail and then concluded:

> "For such reasons, a card check is not a reliable indication of employees' wishes." (386 F. 2d at 566.)

And in *NLRB v. Fashion Fair, Inc.*, ____ F. 2d ____, 68 LRRM 2964 (CA-6, 1968), that Court held:

> "As both the Courts and the Board recognize, the use of authorization cards is a 'notoriously unreliable method of determining the majority status of a union'." (68 LRRM at 2966.)

In *NLRB v. River Togs, Inc.*, 382 F. 2d 198 (CA-2, 1967), the following appears in Footnote 10 to the decision:

> "* * * The Board itself has characterized authorization cards as a notoriously unreliable method of determining majority status of a union. Sunbeam Corp., 99 NLRB 546, 550-51, 30 LRRM 1094 (1952). Some indication of the degree of unreliability is afforded by the statistics in Chairman McCulloch's oft-cited address, A Tale of Two Cities; or Law in Action, printed in Proceedings, Section of Labor Relations Law,

American Bar Ass'n., pp. 14, 17-18 (1962)." (382 F. 2d at 206.)

The conflict between the First Circuit and the Second, Fourth and Sixth Circuits on this issue should be resolved by this Court.

IV. THE DECISION BELOW CONFLICTS WITH DECISIONS IN THE SECOND AND SIXTH CIRCUITS ON THE ISSUE OF THE BURDEN OF PROOF.

The Court below stated that petitioner had made no attempt to discover what the actual card situation was when the Union made its offer of a card check:

> "We therefore conclude that *the company made no real showing* of good faith doubt either as to the union's majority status or as to the appropriateness of the bargaining unit." (App. A, p. 39.)

The Court below improperly placed the burden of proof upon petitioner. In this regard the Sixth Circuit held in *NLRB v. Fashion Fair, Inc.*, ____ F. 2d ____, 68 LRRM 2964 (CA-6, 1968), that:

> "The burden is on the Board's General Counsel to prove that respondents did not possess a good faith doubt in refusing to bargain * * * The question to be decided is whether at the time of the refusal to recognize, the employer actually possessed a good faith doubt, the burden being on the General Counsel to prove the negative." (68 LRRM at 2966-2967.)

The Second Circuit in *NLRB v. River Togs, Inc.*, 382 F. 2d 198 (CA-2, 1967), held the following in that case:

> "* * * The Board's conclusion that respondent's refusal to bargain was not motivated by a good faith doubt—an issue on which the General Counsel has the burden of proof * * *—is not supported by substantial evidence on the record considered as a whole." (382 F. 2d at 206.)

The decision of the Court below on this issue goes beyond the decision of the Board itself. Footnote 16 to the Board's decision states:

> "* * * While the burden is on the General Counsel to establish affirmatively that a good faith doubt of majority was not the reason for respondent's refusal to bargain, there is no requirement that the complaint must contain such an allegation. John P. Serpa, Inc., 155 NLRB No. 12 (p. 2); H & W Construction Company, Inc., 161 NLRB No. 77 (pp. 6-7) * * *." (App. C, p. 70.)

The conflict between the First Circuit and the Second and Sixth Circuits on this issue should be resolved by this Court.

V. THE DECISION HEREIN IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND WITH DECISIONS OF THIS COURT WITH RESPECT TO PETITIONER'S EXERCISE OF ITS CONSTITUTIONAL RIGHT OF FREEDOM OF SPEECH.

A. Petitioner's Statements to Its Employees Were Truthful, Did Not Include Any Threat of Reprisal and Were Protected by the First Amendment to the Constitution.

The Court below defined the issue as whether petitioner had "*interfered* with the organization rights of its employees by *threatening* that unionization would cause them to lose their jobs" (App. A, p. 33). The Board made two conflicting findings. The first related to the possibility that "selection of the union" in the election "could" lead to closing the plant. The second related to the alleged "certainty" that if employees "selected the Union" there "would" be a strike because of excessive demands and to the *possibility* that such demands in turn "could" lead to closing of the plant.

Neither the Board nor the Court applied the tests of Section 8(c) of the Act which provides that speech or other communications shall not constitute or be evidence of an unfair labor practice:

> "* * * if such expression contains no threat of reprisal or force * * *."[11]

There is no contention that petitioner even threatened force against its employees. Neither the Court nor the Board made any finding that petitioner threatened a *reprisal* on its part, i.e., that petitioner threatened that it (the petitioner) would take any action in retaliation against its employees if they selected the Union in the election.

Obviously, there was no basis for a finding, and the Board made none, that *petitioner* had threatened to inflict any reprisal or retaliation upon its employees.[12] Nevertheless, the Board proceeded in its Concluded Findings with respect to petitioner's communications (App. C, pp. 58, 59) to find that petitioner "interfered with, restrained and coerced" its employees in violation of Section 8(a)(1) of the Act.

The Board, therefore, applied the tests of Section 8(a)(1) of the Act in testing the legality of petitioner's communications. It failed to even consider the tests set forth in Section 8(c) and it completely ignored petitioner's contentions with respect to the applicability of the First Amendment to the Constitution.

The Board did not even attempt to challenge the truthfulness of any statement made by petitioner. No

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[11] The finding of unlawful refusal to bargain is based in its entirety upon the Board's findings with respect to petitioner's communications.

[12] Petitioner promised its employees in writing: "We would *not* close the plant in retaliation for employees voting for a Union" (R.A. 27b).

single statement was found to be unlawful or to constitute a threat of force or reprisal. The Board relied upon the so-called "totality" doctrine to sustain its *ipse dixit* pronouncements.

The Court below impliedly agreed that all of petitioner's communications, considered separately, were lawful. It did not dispute the contention that petitioner informed its employees of the facts and made no untrue statements. With respect to the contention that the combination of lawful statements could not result in illegal conduct, the Court below merely held that "The problem is not as simple as that" and held that the proper test was the "totality of the circumstances" (App. A, p. 37).

The Board and the Court, however, failed to consider the totality which included, among other things, the facts that the employees involved (1) had participated in union affairs in the past; (2) had participated in a strike caused by unreasonable demands; and (3) that petitioner's financial position was continuously precarious following that strike and even after petitioner was sold in 1964.

This Court held in *Thornhill v. Alabama*, 310 U. S. 88 (1940), that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution" (310 U. S. at 102). More recently, in *Linn v. United Plant Guard Workers*, 383 U. S. 53 (1966) this Court stated:

> "We acknowledge that the enactment of Sec. 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management. And as we stated in another context, cases involving speech are to be considered 'against the background of a profound * * * commitment to the principle that debate * * * should be uninhibited, robust and wide

open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks'." (383 U. S. at 62, 63.)

B. The Decision Below Is in Conflict With Decisions of the Fifth, Second, Fourth, Sixth and Eighth Circuits and With Decisions by the Board Itself.

In *Siegel Co. v. NLRB*, 328 F. 2d 35 (CA-2, 1964), the Court approved a decision by the Board finding no violation of the Act when the Employer's Vice President expressed the "honest belief" that the union's organizational drive, "would if succesful, result in a reduction of the work force." (328 F. 2d at 26.)

NLRB v. W. T. Grant Co., 208 F. 2d 710 (CA-4, 1953), involved a statement by the store manager "that in the event of a strike, Grant would probably close the store and, if it continued too long, move out * * *." The Court found no violation of the Act.

The Fifth Circuit found no violation in *NLRB v. Transport Clearings, Inc.*, 311 F. 2d 519 (CA-5, 1962), in the General Manager's statement that it "might be forced out of business if the motor carriers had to pay the company the same amount to operate as it would cost them" as a result of unionization. The Court stated that this was an example:

> "* * * of a prophecy by an employer of dire results for employees that may flow solely from a union's policy or practices rather than from employer action, and is privileged under the free speech section of the Act." (311 F. 2d at 524.)

An applicable decision is *Texas Industries, Inc. v. NLRB*, 336 F. 2d 128 (CA-5, 1965). There the Company stated to employees:

> "There is only one way that a union representative can enforce his demands upon the Company. This is by calling a strike. When you strike, you will lose your wages and possibly your jobs." (336 F. 2d at 130.)

The Court there set aside the Board's finding that Section 8(a)(1) had been violated.

The Sixth Circuit in *Union Carbide Corp. v. NLRB*, 310 F. 2d 844 (CA-6, 1962), reversed the Board and found lawful a statement by the Employer there that it would no longer be the sole source of supply for certain customers if the employees became unionized. The Court stated:

> "We think the utterances of either side in an election campaign ought not to receive a narrow or strained construction." (310 F. 2d at 845.)

The decision in *NLRB v. Wilson Lumber Co.*, 355 F. 2d 426 (CA-8, 1966), involved statements as follows:

> "An economic strike could cause us to lose business. This might cause us to have to shut down the plant. If so, you would be without a job."
>
> * * * * *
>
> "In dealing with the Union I'll deal hard with it—I'll deal cold with it—I'll deal at arm's length with it." (355 F. 2d at 429.)

The Court held that the above statements were protected by the First Amendment to the Constitution and were authorized by Section 8(c) of the Act.

The conflict between the First Circuit and the Second, Fourth, Fifth, Sixth and Eighth Circuits on this issue should be resolved by this Court.

C. Board Decisions on Free Speech Issues Are Most Inconsistent. Guidance From This Court Is Therefore Required.

A leading decision by the Board with respect to free speech issues in a representation campaign is *American Greetings Corporation*, 146 NLRB 1440 (1964). Among statements which the Board found to be lawful were the following: "We strongly believe it (a Union) would do serious harm"; "We would have the right to reject any Union demands which we felt were out of line"; that the Union had called a strike because the "Union Bosses wanted to save face"; and "Do you want to *lose your job* through being replaced in one of (the Union organizer's) stupid strikes?"

On facts substantially identical with those here the Board found no violation of the Act in *Jacob Brenner Company, Inc.*, 160 NLRB 131 (1966). There the Employer stated:

> "* * * This is the same Union that ran us out of business at our Third Street plant. They called a strike that eventually resulted in *our locking the doors* and all the men *lost their jobs*, * * *. We want to stay in this business * * * and not have to *lock the doors again* because of union troubles and strikes." (160 NLRB at 136.)

The foregoing statement had greater potential of having a coercive effect than any statement made by petitioner since it related to an actual closing of the plant in the past. Still, the Board found the foregoing statement to be lawful and protected, but inconsistently, found a violation herein. This Court should establish guidelines for the guidance of counsel, the Board and the Courts of Appeals in ruling in this delicate area concerning freedom of speech.

D. A Combination of Lawful Statements Cannot Be Added Up to an Unlawful Totality.

The instant case serves as a prime example of unbridled administrative fiat where the Board wrongfully seeks, under the color of "expertise," to declare in a most general way that a "series" of communications by petitioner were unlawful, without ever explicating, by objective fact finding, the rational basis for its decision.

No statement made by petitioner was found to be unlawful. No statement made by petitioner was found to be untruthful. Still, the Board found a violation of Section 8(a)(1) of the Act based upon the alleged "totality" of such communications as supposedly having a certain effect upon employees.

In this respect the Board's pronouncements constitute a subterfuge to remove all restrictions upon "expertise" and to macerate the concept that the burden of proof must be borne by the General Counsel.

In *NLRB v. Virginia Electric & Power Co.*, 314 U. S. 469 (1941) this Court approved consideration of the totality of the Company's activities, i.e., its speeches to employees and its other conduct. However, in *NLRB v. Exchange Parts Co.*, 375 U. S. 405 (1964) this Court disclaimed any reliance upon "words of the respondent dissociated from its conduct" because of the provisions of Section 8(c) of the Act, which was added to the Act *subsequent* to this Court's decision in *Virginia Electric & Power, supra.*

Here, however, petitioner engaged in no other conduct which was found to violate the Act. The violation found by the Board and by the Court below consists solely of petitioner's "words" which the Board found, without explanation, to violate the Act in their "totality."

This Court should review this finding of the Board to provide proper guidance to the Courts below and to the Board to prevent infringement of the exercise by employers of their right of freedom of speech.

E. Free Speech Questions May Not Properly Be Left to Board "Expertise" Nor Does the "Substantial Evidence" Test Control.

The Court below held that the proper test for determining the legality of petitioner's communications was the "totality of the circumstances" (App. A, p. 37). The Court then deferred to the Board's "expertise" and held that the Board's findings were supported by "substantial evidence." [13]

Application of these standards by the Court below does not conform with decisions of this Court with respect to issues involving freedom of speech.

In *Wood v. Georgia*, 370 U.S. 375 (1962), this Court stated:

> "But state courts may not preclude us from our responsibility to examine 'the evidence to see whether it furnishes a rational basis for the characterizations put on it' * * * by the enunciation of a constitutionally acceptable standard in describing the effect of the conduct. The ultimate responsibility to define the limits of state power regarding freedom of speech and expression rests with this Court * * * and

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[13] Petitioner's counter-statement of questions involved to the Court below, included the following: "Were Respondent's communications to its employees lawful and protected by Section 8(c) of the Act and by the First Amendment to the Constitution, and could they be properly found by the Board as being violative of Section 8(a)(1) of the Act, and could they properly be used by the Board for the further purpose of showing a lack of good faith doubt of the Union's claimed majority and also as evidence that Respondent allegedly sought time to dissipate such majority?"

> when it is claimed that such liberties have been abridged, we cannot allow a presumption of validity of the exercise of state power to interfere with our close examination of the substantive claim presented." (370 U.S. at 386.)

As here, in that case the Court below did not indicate in any manner how the conclusions arrived at were supported by the evidence in the record.

In *Speiser v. Randall*, 357 U.S. 513 (1958), this Court pointed out the danger that legitimate utterances would be penalized by the generality of standards applied. This Court pointed out that the deterrence of speech which the Constitution makes free cannot be accomplished:

> "* * * indirectly by the creation of a statutory presumption any more than * * * by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." (357 U.S. at 526.)

And in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court dealt with that problem in still another context and again held that the power to create presumptions was not a means of escaping constitutional limitations (376 U.S. at 284). This Court further held that its duty was not limited to the elaboration of constitutional principles, but included the duty of reviewing the evidence to make certain that such principles had been constitutionally applied:

> "We must 'make an independent examination of the whole record' * * * so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (376 U.S. at 285.)

Here the Court of Appeals completely failed in its duty to make an independent examination of the whole

record. It based its decree enforcing the Board's order upon its finding that there was "substantial evidence" to support the Board's findings and upon the Board's "expertise." In this regard, it improperly gave effect to a legislative presumption which cannot be a means of escape from constitutional limitations. Also, the decision of the Court below is in conflict with decisions of other circuits in this regard.

The Sixth Circuit held in *NLRB v. Hobart Bros. Co.*, 372 F. 2d 203 (CA-6, 1967):

> "Further, the construction of a writing is *not* the special expertise of the Board. Rather, it is for the Courts which have more experience and competence in construing and interpreting written instruments. * * * Our holding simply is that the Board's construction of a writing is not sacrosanct and that we have the right, if not the duty, to correct an impermissible and unfounded inference drawn therefrom." (372 F. 2d at 206.)

The Eighth Circuit did not defer to the Board's expertise in *NLRB v. Wilson Lumber Co.*, 355 F. 2d 426 (CA-8, 1966). It found the employer's statements there to be protected by Section 8(c) and by the First Amendment to the Constitution and stated that they:

> "were improperly interpreted by * * * the Board as a basis for authorizing an unfavorable inference." (355 F. 2d at 432.)

In *NLRB v. TRW—Semiconductors, Inc.*, 385 F. 2d 753 (CA-9, 1967), the Court freely reviewed and denied enforcement of the findings of the Board with respect to the alleged coercive effect of the employer's communications.

The exercise of Constitutional rights cannot be made dependent upon Board "expertise," nor can the exercise

of such rights be made dependent upon the substantiality of evidence under Section 10(e) of the Act.

This Court should establish the constitutional principles that are applicable to free speech issues which are litigated before the Board and should resolve the conflict between the First Circuit and the Sixth, Eighth and Ninth Circuits on this issue.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

(July 3, 1968.)

McENTEE, *Circuit Judge*. This is a petition for enforcement of a Labor Board order issued against the respondent, The Sinclair Company. The order is based on findings that the company interfered with the organizational rights of its employees by threatening that unionization would cause them to lose their jobs and also that the company refused to bargain with the union as the representative of its employees in violation of § 8(a) (1) and (5) of the National Labor Relations Act.[1] The basic question is whether on the record as a whole these findings are supported by substantial evidence. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951).

The respondent company, whose main plant is in Holyoke, Massachusetts, was founded in 1925. It was acquired by Lindsay Wire Weaving Company of Cleveland, Ohio, in 1964 and is now a division of Lindsay. David Sinclair, son of the founder and the central figure in this litigation, continued as president under the new regime.

Briefly, the company's labor relations background is as follows. From 1933 to 1952 its journeymen and apprentice wire weavers were represented by a union known as the American Wire Weavers Protective Association. (A.W.W.P.A.) This relationship terminated in 1952 after A.W.W.P.A. called a strike that lasted some thirteen weeks. From 1952 to 1965 the employees were not represented by any union.

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[1] Accordingly, the Board ordered the company to cease and desist from its unfair labor practices, to bargain upon request, with the union as the authorized representative of its wire weavers, and to post appropriate notices.

Early in July 1965[2] the Teamsters Union began organizing the employees.[3] By letter dated September 20, Teamsters Local 404 notified the company that it represented a majority of its journeymen wire weavers and apprentices; requested that the company bargain with it and made the usual offer to submit the signed authorization cards for authentication.[4] The company refused to recognize the union. Local 404 filed a representation petition. The parties stipulated to a Board conducted election among the wire weavers and said election was held on December 9. With a total of thirteen ballots cast the union lost by a vote of seven to six. Thereupon it petitioned the Board to set aside the election and filed the unfair labor practice charges here involved. Adopting the findings of the trial examiner, the Board set aside the election and entered an unfair labor practice order. The issue revolves around the pre-election conduct of the company's president.

In July when Sinclair learned of the union's efforts he immediately addressed the employees in separate groups, with the view to dissuading them from joining the union.[5]

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[2] All dates hereinafter mentioned, unless otherwise indicated, to the year 1965.

[3] Sometime between 1952 and 1965 A.W.W.P.A. merged or affiliated with the Teamsters Union.

[4] At that time the union had authorization cards from eleven of the company's fourteen journeymen wire weavers. There were no apprentices.

[5] He reminded them, particularly the wire weavers, that the last union had a long strike that almost put the company out of business, and that the company has been on "thin ice" ever since. Sinclair also told them that "A strike could lead to the closing of the plant." Continuing in this vein he indicated that wire weaving offered only limited job opportunities and in view of their age and lack of education, new jobs would be hard to get. He then proceeded to down-grade the Teamsters Union and concluded by saying that in merging with Lindsay the company had been given a second chance but that Lindsay didn't need the company's wire cloth production and in the event of a strike could satisfy its needs elsewhere.

On November 2, and again on November 5, he sent them letters vigorously opposing the union.[6]

We now come to the period directly involved in the Board's findings.[7] Two or three weeks before the scheduled election, Sinclair embarked upon an intensive campaign to induce the wire weavers to reject the union. His first message consisted of a letter or pamphlet illustrated with drawings and entitled "Who Would Buy The Groceries * * * While You Walk The Teamsters Picket Line?" Its dominant theme was "Do You Want Another 13-Week Strike?"[8] Among other things, the pamphlet emphasized that the union has but one weapon—a strike; that the Teamsters Union is a "strike happy outfit"; that it can again close the wire weaving department and the entire plant by a strike and that only the striking employees and the company, not the union organizers, would be hurt. On November 30 he followed up with a similar letter to the wire weavers reminding them again of the

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[6] In the first of these letters Sinclair indicated that employees who signed cards could still vote against the union. He also told them that nothing the Teamsters or any other union could offer would increase their job security and ended with the warning that the company was still on "thin ice" and that it didn't make sense for the company to meet unreasonable union demands which could result in further losses "and eventually the closing of the plant."

The November 5 letter reviewed the poor earnings history of the company; stated that the new ownership was interested in "profits and not pressure"; that the Teamsters Union can only deliver pressure—the threat of a strike; that the new management had no ties in Holyoke or Massachusetts and he "did not believe the threat of a strike will cause the new owners any loss of sleep" but "a long strike would be bad for me because I would like to continue to live in Holyoke."

[7] While the Board took into account the company's prior conduct as background, its findings were based on the company's activities during the period from November 8, when the instant representation petition was filed, and December 9, the date the election was held.

[8] A majority of the wire weavers had participated in the 1952 strike.

disastrous effects of the long 1952 strike on both the company and the employees. He also stated that "a strike can still close the Holyoke plant." The very next day (December 1) Sinclair sent the wire weavers a third communication containing more of the same, listing the misdeeds of several top Teamsters officials, denouncing the union and its tactics and urging the wire weavers to vote "No" in the election.

Next came a four page leaflet dated December 7, entitled "Let's Look At The Record" and illustrated with a cartoon. This leaflet purported to be an obituary of the companies in the Holyoke-Springfield area that allegedly had fallen victim to union demands and had gone out of business, eliminating some 3500 jobs in the area. The leaflet concluded by suggesting that the wire weavers drive past these plants before making their decision to vote for the union. The day before the election another handbill entitled "Vote Right—Avoid Strikes" was passed out by the company. In graphic form it set out several supposedly beneficial effects of voting "No" in the election and ended with a scathing attack on high Teamsters officials and the union itself. That same afternoon the president personally addressed the wire weavers in a final appeal to reject the union. Again he mentioned union corruption and reminded his hearers of the company's precarious financial condition. In his closing plea, Sinclair again told the wire weavers of the unlikelihood of their obtaining other employment because of their age and limited education. It also appears that Sinclair talked personally to about ten of the fourteen wire weavers between July and December 9 in an effort to persuade them not to vote for the union.

An employer violates § 8(a) (1) of the Act if in communicating with his employees during a union organiza-

tional campaign preceding an election he makes promises of benefits, threats of loss, or reprisal for their vote. *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (7th Cir. 1967). The respondent defends on the ground that in making the pre-election statements above mentioned it was merely informing its employees of the facts; that it made no untrue statements; that these statements considered separately are lawful and this being so, the combination of them could not result in illegal conduct. The problem is not as simple as that. Conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact, unless, which is most improbable, the eventuality of closing is capable of proof. The employer's prediction must be in terms of demonstrable "economic consequences." *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 761 (6th Cir. 1965). Moreover, in considering coercive effect the test is the totality of the circumstances. *N.L.R.B. v. Kolmar Laboratories, Inc.*, 387 F.2d 833, 837 (7th Cir. 1967). *Daniel Construction Co. v. N.L.R.B.*, 341 F.2d 805 (4th Cir.), *cert. denied*, 382 U.S. 831 (1965); *N.L.R.B. v. Wagner Iron Works*, 220 F.2d 126, 139 (7th Cir. 1955), *cert. denied*, 350 U.S. 981 (1956).

As stated in *N.L.R.B. v. Kropp Forge Co.*, 178 F.2d 822, 828-29 (7th Cir. 1949), *cert. denied*, 340 U.S. 810 (1950):

> "A statement * * * might seem * * * perfectly innocent * * *, including neither a threat nor a promise. But, when the same statement is made by an employer to his employees, and we consider the relation of the parties, the surrounding circumstances, related statements and events and the background of the employer's actions, we may find that the statement is a part of a general pattern which discloses action by the employer so coercive as to entirely destroy his

> employees' freedom of choice and action. * * * If, when so considered, such statements form a part of a general pattern or course of conduct which constitutes coercion and deprives the employees of their free choice guaranteed by Section 7, such statements must still be considered as a basis for a finding of unfair labor practice."

It is evident that Sinclair's communications were designed to impress upon the wire weavers (1) that the 1952 strike had left the company in a state of continuing financial difficulty; (2) that the union's only weapon is a strike and the Teamsters Union is a "strike happy outfit"; (3) that another strike could, and in his opinion would, close the plant and (4) that it would be difficult for the wire weavers because of their age and limited education to secure other employment. Whether an employer has used language that is coercive in its effect is a question essentially for the specialized experience of the Board. *Daniel Construction Co. v. N.L.R.B., supra.* The Board found

> "that the series of letters, pamphlets, leaflets, and speeches from and by President Sinclair, hereinabove described, taken together and considered as a whole, reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead Respondent to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers."

The Board also found that the aforesaid conduct interfered with the employees' exercise of a free and untrammeled choice in the election.[9]

On the record before us we think there is substantial evidence to support these findings. Also, it is clear that under the circumstances the company must take the re-

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[9] See n. 7.

sponsibility for the pre-election conduct of its president. *Daniel Construction Co. v. N.L.R.B., supra.* In *N.L.R.B. v. Freeport Marble & Tile Co.*, 367 F. 2d 371 (1st Cir. 1966), we held that respondent having made threats of economic consequences to its business in case of unionization has the burden of proving justification. The company has not met its burden here.

Also, we think the Board's finding that in refusing to bargain with the union the respondent violated § 8(a)(5) and (1) of the Act is supported by substantial evidence. The company contends that it refused to recognize and bargain with the union for the following reasons: (1) that it had a good faith doubt that Teamsters Local 404 represented an uncoerced majority of the weaving department employees; (2) that authorization cards are an unreliable means for determining the union's majority status, and (3) that it expected there would be questions concerning the appropriate bargaining unit which should be determined by the Board. In its consent to the election respondent agreed that the wire weavers group constituted an appropriate unit. Furthermore, the company does not dispute that on September 20 when Local 404 requested recognition for this group it had valid authorization cards for at least ten of the fourteen wire weavers. A good faith doubt is not established merely by assertion but must have some reasonable or rational basis in fact. *N.L.R.B. v. Superior Sales, Inc.*, 366 F. 2d 229, 237 (8th Cir. 1966). Here the company made no attempt to discover what the actual card situation was when the union requested recognition for the wire workers unit. We therefore conclude that the company made no real showing of good faith doubt either as to the union's majority status or as to the appropriateness of the bargaining unit. Instead of recognizing the union on the basis of its admitted card majority

the company insisted on an election—as the Board found, in order to gain time in which to dissipate the union's majority. In view of the company's unlawful interference with the employees' rights during the pre-election campaign, we think the Board acted within its discretion in setting aside the election and in ordering the company to bargain. *N.L.R. B. v. Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851 (1st Cir. 1967).

Actually what the company is contending here is that signed authorization cards are so unreliable that it has a right to reject a request for recognition based on them and insist upon an election. We have already rejected this proposition in this circuit. *N.L.R.B. v. Whitelight Products*, 298 F. 2d 12 (1st Cir.), *cert. denied*, 369 U. S. 887 (1962). See *N.L.R.B. v. Southbridge Sheet Metal Works, Inc., supra.* The representation status of a union may be shown by means other than an election. *Mine Workers v. Arkansas Flooring Co.*, 351 U. S. 62, 71-72 (1956).

In the instant case there is undisputed evidence of the union's majority status long prior to the election. It is reasonable to conclude that this status was dissipated by the company's unlawful interference with the employees' Section 7 rights, thus tainting the December 9 election. In these circumstances we think the Board was warranted in entering a bargaining order rather than ordering a new election. *Wausau Steel Corp. v. N.L.R.B., supra.*

Finally, we see no merit in the company's contention that the Board's order is invalid in that it fails to specify the conduct it purports to proscribe.

The order will be enforced.

APPENDIX B.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

(July 3, 1968.)

This cause came on to be heard upon Petition for Enforcement of an Order of the National Labor Relations Board, and was argued by Counsel.

Upon consideration whereof, it is now here ordered, adjudged, and decreed as follows: The Order of the National Labor Relations Board of May 2, 1967, is hereby affirmed and enforced.

APPENDIX C.

TRIAL EXAMINER'S DECISION.

STATEMENT OF THE CASE.

This proceeding, involving consolidated cases, was heard before Trial Examiner Louis Libbin at Springfield, Massachusetts, on October 4 and 5, 1966, pursuant to due notice. The complaint in Case No. 1-CA-5266, issued on July 22, 1966, pursuant to charges filed by the Union, named in the caption, on December 14, 1965, alleges, in substance, that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act, (1) by refusing at all time after September 20, 1965, upon request, to bargain collectively with the Union which was the exclusive bargaining representative of the employees in a designated appropriate unit, and (2) by engaging in various specified acts of interference, restraint, and coercion. Respondent's duly filed answers denies the unfair labor practice allegations and asserts certain affirmative defenses. Case No.

1-RC-8713 arises out of a representation election conducted by the Board on December 9, 1965, timely objections to the election filed by the Union on December 14, 1965, and timely exceptions filed by the Union on February 2, 1966, to the Regional Director's Report on Objections. The Board, on March 8, 1966, ordered that a hearing be held to resolve the issues raised by the Union's objections and exceptions.

For the reasons hereinafter indicated, I find that Respondent violated Section 8(a)(1) and (5) of the Act, that there is merit to some of the Union's objections, and that the election should be set aside. Upon the entire record[1] in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT.

I. THE BUSINESS OF THE RESPONDENT.

Respondent, The Sinclair Company, is a Massachusetts corporation with its principal place of business in Holyoke, Massachusetts, where it is engaged in the manufacture, sale and distribution of paper mill rolls, wires, and related products. Respondent receives materials, annually

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[1] I hereby note and correct the following obvious errors in the typewritten transcript of testimony:

Page	*Line*	*Change*	*To*
78	21	66	65
95	11	to	the
102	15	or	of
102	16	wekk	well
105	11	we	were
108	5	along	a long
111	15	buy	but
112	7	copies	companies
113	14	into	in to
116	7	this	thin
162	6	out	our
168	18	whole	hole
170	6	lon	long

valued in excess of $50,000, at its Holyoke plant directly from points outside the Commonwealth of Massachusetts; it also ships products, having an annual value in excess of $50,000, from its Holyoke plant to points outside the Commonwealth of Massachusetts.

Upon the above admitted facts, I find, as Respondent admits in its answer, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED.

The complaint alleges, the answer admits, the record shows, and I find, that General Teamsters, Chauffeurs, Warehousemen & Helpers, Building Materials, Heavy & Highway Construction Employees, Local No. 404, an affiliate of International Brotherhood of Teamsters, the Charging Party herein called the Union or Local 404, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES AND OBJECTION TO ELECTION.

A. Introduction; the Issues.

The Union began organizing Respondent's employees in July 1965.[2] By letter dated September 20, the Union informed Respondent that it represented a majority of Respondent's journeyman wire weavers and apprentices, and requested recognition and a meeting to negotiate a collective-bargaining agreement. At that time, the Union had signed authorization cards from 11 of Respondent's 14 journeymen wire weavers. The Respondent employed no

[2] Unless otherwise indicated, all dates hereinafter mentioned are in the year 1965.

apprentices. By reply letter dated September 28, Respondent refused the Union's request for recognition on the asserted grounds that it doubted the Union's claimed majority status, the appropriateness of the unit, and the reliability of authorization cards to prove majority status. Upon the filing of a representation petition by the Union on November 8, the Board, pursuant to a consent election agreement, conducted an election among Respondent's journeymen wire weavers on December 9; of the 13 ballots cast among the 14 eligible voters, the Union was defeated by a vote of 7 to 6. Meanwhile, during the period from July up to and including the day before the election, Respondent's President Sinclair addressed the employees through a series of speeches, letters, pamphlets, and individual talks, to induce them to reject the Union as their collective-bargaining representative.

The principal issues in this case are (1) whether the speeches, letters, pamphlets, and individual talks of President Sinclair, either separately, or in their totality, constituted interference, restraint and coercion violative of Section 8(a)(1) of the Act;[3] (2) whether, by so much of the foregoing conduct which occurred after the filing of the representation petition, the Respondent interfered with the employees' exercise of a free choice in the election of December 9 so as to warrant setting aside the election; and (3) whether Respondent's refusal to bargain with the Union was motivated by a good-faith doubt with respect to the requested unit and the Union's majority status therein.

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[3] Also in issue is whether Respondent violated Section 8(a)(1) of the Act by the conduct of Superintendent William Seavey, an admitted supervisor, in allegedly attempting to cause the South Hadley American Legion Post to deny the use of its meeting hall to Respondent's employees for a union organizational meeting.

B. BACKGROUND.

The Sinclair Company was founded by President David H. Sinclair's father in 1925. From 1933 until 1952, the American Wire Weavers Protective Association, herein sometimes called the AWWPA, represented Respondent's journeymen wire weavers and apprentices and had contracts covering this unit on a national basis. President David Sinclair began working for Respondent on a full time basis in 1947, and, until 1952, was Respondent's representative in the contract negotiations with AWWPA for the journeymen and apprentice wire weavers, which negotiations were held on an industry-wide basis in Cleveland and New York. In 1952, Respondent's plant was closed for about 12 or 13 weeks as a result of a strike called by AWWPA. The strike terminated in September 1952, when the plant was reopened without a union contract on the basis of Respondent's last offer to the AWWPA. Respondent had no further dealings with AWWPA which thereafter "faded out" and no longer represented any of Respondent's employees. From the termination of the strike in 1952 until the Union began its organizational efforts in July 1965, Respondent's employees were not represented by any union.

In 1963, Respondent opened a weaving plant in Florence, Mississippi, which was known as the Sinclair Wire Works. Gary Brunault, a member of the Union's employee organizing committee in July 1965 but no longer employed by Respondent at the time of the instant hearing, testified that sometime in the summer of 1963 he went to President David Sinclair's office and asked for a raise, that Sinclair stated that the Company could not afford one, that Brunault stated that the good thing about a union is that you could negotiate for a raise with power, and that Sinclair replied that there would not be a union at Re-

spondent's plant so long as he was president and that if Brunault did not like the conditions he knew where the door was. President Sinclair remembered an occasion about that time when Brunault asked for a raise; he testified that he told Brunault that there was nothing he could do about it at that time, and specifically denied having made the other statements attributed to him by Brunault. Although Brunault testified that the conversation lasted about 20 minutes, he could not remember anything else that was said. President Sinclair impressed me as a forthright and candid witness. I was not favorably impressed by Brunault. Under all the circumstances, I do not credit Brunault's disputed testimony and credit Sinclair's denials.

In 1964, the Lindsay Wire Weaving Company of Cleveland, Ohio, herein sometimes called Lindsay, acquired 100 percent of the stock of Respondent, which then became a Division of Lindsay. Respondent's Florence, Mississippi, plant at that time also became part of the Lindsay operation which, in addition, consisted of plants in Cleveland and Mentor, Ohio. However, David Sinclair continued as, and still is, president of Respondent.

C. Interference, Restraint, and Coercion.

President Sinclair first learned of the Union's organizational campaign in the early part of July when he was informed by some employees, and was given a copy, of the leaflet and attached authorization card mailed to the homes of employees. From that time until the day of the election, President Sinclair, through a series of speeches, letters, pamphlets, and talks with individual employees, engaged in a campaign to induce the employees to reject the Union as their collective-bargaining representative.

1. The facts.[4]

(a) *The July speech.*

Early in July President Sinclair talked to all the employees in separate groups concerning the Union's organizational drive. He had no written speech and used no notes. His speech to the wire weaving group, which lasted about 10 to 12 minutes, is the only one concerning which Sinclair testified as follows:

When he talked to the weaving department, which included the wire weavers, he told them that he was "going to be blunt" with them because he knew that the union organizing campaign started in their department. He told them that "I was disappointed" that they were considering getting a union into the plant "because they had union experience, that the last union [with which] we had had dealings in our wire weaving group had a strike of a good many weeks duration and that most of the people there could well remember that had almost put our company out of business at that point and that I was disappointed to see that some of what I considered to be lessons of the past weren't living with them any more." He spoke of the Company's financial condition, indicating that ever since the last strike the shop has been running on "thin ice"; pointed out that "strikes were initiated by unions" and not "by any act of the Company"; emphasized that if the Company could not agree to the Union's demands, "the union's only weapon is a strike"; and pointed out that, while he did not intend to close, a strike "could lead to the closing of the plant." Sinclair also told the group that the wire weavers craft was a small one, that it would be difficult for

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[4] Unless otherwise indicated, the factual findings in this section are based on evidence which is either admitted or undisputed.

them to find other jobs because it was not like finding a job as a machinist, that many of them did not have the education, which would make it difficult for them to find another job, and that many of them were getting too old to go out and find new jobs.

He further told the men that he did not have a great deal of respect for the Teamsters, that he had read a great deal about their leadership, and that this was not the kind of an organization that he would like to deal with. He also stated that "there were inequities in our method of compensating or paying the weaving shop," that he had been concerned with this for a long time, that "if I was involved with negotiations I would certainly correct this," and that "by correcting these it would mean that I would negotiate down in the instance where these things would correct themselves in that direction as well as up in other directions."

He told the group that "we had basically been given a second chance in the chance to grow through our merger with Lindsay," that "we had to earn our own way," and that he "hoped that we would be able to reach a point where we would put in new and more modern equipment than we had to make everyone's job better, but that certainly the Lindsay Company was not going to pour money into this if we were not making a profit." He also told them that "we had a very sad experience with a union before, which they knew of, and that he did not want to get into the position" where the Union would strike the Company when it could not meet the Union's demands, with the resultant possibility of the plant closing, adding that the last thing he wanted was a closed plant.

Sinclair further told the group that he did not feel that Lindsay needed the production equipment in Respondent's weaving department to meet the total needs for wire

cloth of the entire organization, that he did not think "the Lindsay organization was going to be concerned" if "through contract negotiations with a union our people went on strike," that a strike could close Respondent's plant and nothing would prevent Lindsay from having Respondent's weaving work done at Lindsay's plant in Ohio or Mississippi. He also stated that Respondent was subject to foreign competition and that it was conceivable that if the plant was closed, under any circumstances, that some of the work would go to foreign companies and that Respondent had handled foreign wires in the past. He pointed out that all they had to do was to look around Holyoke if they thought a strike could not close Respondent's plant.[5]

(b) *The November 2 letter*

On November 2, President Sinclair mailed to all employees a letter bearing that date and addressed "To All Employees." The letter informed the employees that the pending Labor Board election "raises a number of ques-

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[5] The above findings are based on the credited testimony of President Sinclair. Richard Bougie, the only other witness who testified to the content of Sinclair's speech, testified as a witness for the General Counsel that Sinclair also stated during the course of his talk that "if we attempted to bring in a union at this time that Lindsay was sure to close," and that "if he was instructed to negotiate a contract he would negotiate down and not up." Sinclair denied having made these statements. With respect to the first statement, Bougie testified that he was "reasonably sure" that Sinclair said it; he then added that it was "probably not in those words." He either did not know or could not "recall" what Sinclair said on most of the other subjects. Although the General Counsel called as witnesses 10 of the weavers who were employed at the time of Sinclair's speech, he adduced no testimony from them or from any other witness in corroboration of Bougie in this respect. Under all the circumstances, I am convinced that Bougie's testimony merely reflects his impression of what Sinclair said; I do not credit Bougie's testimony that Sinclair in fact made the above statements attributed to him, and credit Sinclair's denials in this respect.

tions which should be answered." Then, in answer to hypothetical questions raised by Sinclair, the letter states, among other things, that "there is nothing that the Teamsters or any other Union can offer you which will in any way increase your job security under the circumstances existing at this plant" (page 2), "We are still on 'thin ice,'" and that "it just doesn't make sense for us to meet unreasonable Union demands which will result in further losses and eventually the necessity of closing the plant" (page 3).

(c) *The November 5 letter*

This letter from President Sinclair is dated November 5 and is also addressed "To All Employees." President Sinclair testified that this letter was mailed to all employees on that date or a few days thereafter. In this letter Sinclair reviewed the Company's "poor earnings history," and emphasized that the "new ownership is interested in profits and not pressure. They have no ties with Holyoke or Massachusetts. If a dollar invested here can't earn as much as a dollar invested in Mississippi or Ohio, or somewhere else, you can be sure that their dollars are going to go where they can earn the most pennies" (page 2). Contrasting what the Union would do, he stated that "the Teamsters Union promises you a lot, but what can they deliver except pressure—the threat of a strike?" He then stated that "I do not believe the threat of a strike will cause the new owners any loss of sleep. However, a long strike would be bad for me because I would like to remain in Holyoke. I have pride in the Sinclair family and would like to see the plant modernized, expanded and prosper" (page 2).

(d) *The November 22 letter and book entitled, "The Enemy Within"*

By a covering letter dated November 22 and addressed "To All Employees," Sinclair enclosed "a copy of the book written by Senator Bob Kennedy entitled, 'The Enemy Within' "; informed the employees that "this book is the experience of Senator Kennedy when he was Attorney General of the United States and investigating racketeering aspects of the labor movement in the United States"; and urged them to "take the time to read it."

(e) *The undated November pamphlet*

It was stipulated that this pamphlet was sent by President Sinclair, as it is addressed, "To ALL WIRE WEAVERS" about 2 to 3 weeks before the December 9 election.

Page one shows a Teamster picket in front of the Respondent's plant with the question "Who would buy the Groceries * * * while you walk the Teamsters picket line?" A heading in bold red letters on page two asks, "Do you want another 13-week strike?" Another paragraph on page two has the underscored heading *"No changes at this time,"* and states:

> During a union organizing campaign an employer is prohibited by law from making any changes in wages or other benefits which could induce any employee to change his mind on how he will vote. Because of this rule, we are unable to discuss wages with other groups of our employees whom the Union does not wish to represent at this time.

Other paragraphs on page two point out that "the Union has only one weapon with which it can try to make good its big campaign promises to the Wire Weavers. That weapon is a strike. We had a 13-week strike in the Wire Weaving Department in the early 1950's. The Wire Weav-

ing Department was closed * * * We have no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike. We have no hopes that the Teamsters Union Bosses will not call a strike * * * The Teamsters Union is a strike happy outfit * * * Unions sometimes call strikes as a 'face-saving' gesture."

On page three there appear the statements that "you have an equal right to refuse to strike and to come through the Union's picket line. This might be very rough for a while. The Teamsters Union is notorious for its picket line violence." Following these remarks is a cartoon showing Respondent's plant closed down with a "Sinclair" flag flying at half mast and the statement in red letters next to the cartoon, "The 'Closedest' Closed Shop In Town."

Towards the end of page three, the Respondent states that the Teamsters Union Organizers "obviously" cannot make good on their promises, and asks, "how long a strike can you afford?" This appears near a cartoon of a "closed shop worker" with his empty pocket labeled "IBT Was Here."

The entire last page contains the admonition, in bold red and black letters, to "VOTE RIGHT AVOID STRIKES," followed by an X in a square with the word "No" over the square.

(f) *The November 30 letter*

In this letter, addressed to "ALL WIRE WEAVERS," President Sinclair again reminds the employees of the long strike 15 years ago when Respondent was "virtually out of business" and the plant was "reopened on a non-union basis." He then warns that "a strike can still close the Holyoke plant, but other plants can pick up the work," and that the new ownership "is interested in profits and not pressure." He then points out that the "Teamster Union"

cannot do anything "to improve our profit position," but can only make "big" demands "which the Company cannot meet" and then "call you out on strike" because "a strike is a Union's only weapon" to enforce its "big" demands. He then asks, "can you afford a long strike" "when you know the Holyoke plant has been given a second chance to stay in business and furnish jobs for all of us?"

(g) *The December 1 letter*

In the December 1 letter, addressed "To ALL WIRE WEAVERS," Sinclair devotes three pages to informing the employees that the Teamsters Union is involved with "serious crimes," "racketeering," "hoodlum domination," "shocking misdeeds," "goon squads," "threats to run down children," and "unlawful acts." He then warns that "if the Teamsters Union wins this election, it will be very difficult for you to get another election to vote it out." He then concludes with the admonition that "A *'No'* vote is a vote *against* surrendering your rights to the Bosses of the 'Hoodlum saturated' Teamsters Union" while "A 'yes' vote is a vote to become a part of them."

(h) *The December 7 letter*

This is a four page letter or handbill, dated December 1, from President Sinclair "To ALL WIRE WEAVERS," and entitled "LET'S LOOK AT THE RECORD." The first page contains a large cartoon, showing that certain named companies lie buried in a graveyard with the Teamster Union about to bury the Sinclair Company. The letter opens with the statement that "the Holyoke-Springfield industrial graveyard is filled with Companies which died under union pressure," and warns that before deciding how to vote in the December 9 election "every WIRE WEAVER in this plant

would find it profitable to visit a few of the sites of once prosperous companies in the Holyoke area." Page two lists the names of companies which closed down, with number of jobs lost, and points out that "these companies needed higher production and better quality to meet stiffer competition. The 'union doctor' gave them bloodletting strikes, restricted production and higher labor costs. The result, as you can see as you look around you, was the death of these companies." Sinclair then states in part, that "whatever your feelings about unions may be, these facts exist! Factories are gone! Jobs are gone!" (Page 2). He asks, "what facts do you have which would lead you to believe that a hoodlum dominated union, like the Teamsters, can give you real job opportunity at the Sinclair Company?" (Page 2). He then warns that "against a background such as ours, your dreams of 'union miracles' can be dangerous to your real job security," and urges that "before making your decision, drive past a few of the vacant plants where business died," assuring that "it will not be a pleasant drive but it could be a very informative one for you" (page 3). At the bottom of page 3, in bold black letters, appears the slogan, "VOTE RIGHT, AVOID STRIKES," with an X in a square and the word "no" over the square.

Page four contains the names and pictures of five plants which closed down, with statements such as: "Remember When These Plants FURNISHED Jobs To Area People?" * * * "Unions Furnished No Job Security Here!" * * * "Death Along The River" * * * "So Quiet Today."

Sinclair admitted at the instant hearing that he had no objective basis for stating that a union had anything to do with the closing of these plants.

(i) *The December 8 leaflet*

The parties stipulated that this leaflet was handed out to the unit employees (wire weavers) on December 8 by President Sinclair at a company meeting. One side of this leaflet refers to the convictions of Teamsters International officials and to the "Hoodlum" and "Racketeer" domination of the Union. The other side repeats the slogan to "VOTE RIGHT, AVOID STRIKES" and enumerates what a "No" vote will do, such as "never called a strike" and "never cost you a single day's pay" or "a cent of your paycheck." It concludes with the indication that a "No" vote will "protect yourself" and "protect your family."

(j) *The December 8 speech*

President Sinclair delivered a speech to the unit employees (wire weavers) at 1:30 p.m. on December 8, in the presence of the weave shop foreman. This time he talked from notes which he had before him. Many of the things he said were admittedly a repetition of what he had previously stated in his July speech. He opened his speech by referring to the corruption in the Teamsters and the conviction of some of its officials. Among the statements admittedly made by Sinclair were, in substance, the following:

The Lindsay Company has made it clear that they want to make a profit in Holyoke at Sinclair and will not sink a bundle of money in Sinclair "for the fun of it"; if the Sinclair Company does not make a profit on its own, there was nothing to prevent Lindsay from having the work done at its facilities in Mississippi or Ohio; we have been operating on "thin ice"; the Teamsters Union can only demand higher wages and expensive welfare and pension plans which could lead to even larger losses, and can call you out on strike; we could not accede to unrea-

sonable demands; the Union's only weapon is a strike; a strike could lead to the closing of the plant; the weaving production at Sinclair was not a necessity to the success of the total operation of the Lindsay organization because Lindsay had other facilities where the material could be woven; he did not think the Lindsay organization was going to be concerned about the threat of a strike; we were still subject to foreign competition and it was perfectly conceivable, if under any circumstances the plant should close, that some of this work could go to the foreign wire companies; we had to handle foreign wires in the past; the Teamsters cannot guarantee you another job if the plant should close because of a strike; it made no difference to the Teamsters whether or not Sinclair stayed in business; the Teamsters might feel that other companies with whom they had contracts would pick up our lost business; "they don't care which sheep they shear so long as they get the wool"; "it makes a lot of difference to me who is working"; I "want my job and I suppose that you want your job"; the wire weavers had a skilled trade which had limited use; "we are all Jack Benny's," with no one admitting that he is getting older; some of the wire weavers were over 60 years old, which is a difficult time in life to start over again; "most companies probably have a large number of applicants who are younger and better experienced," with "a lot better insurance rating," who "could be hired for less money"; "I am giving you the facts today and by my mailings previously"; "I am not concerned with beating a union," but "I am concerned with our future."

At the end of his talk, he asked if any of the employees would like to ask questions. No questions were asked.[6]

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[6] The findings concerning the December 8 speech are based entirely on Sinclair's testimony and Respondent's Exhibit No. 20.

(k) *Individual employee talks*

President Sinclair admitted that during the period from July to the date of the election on December 9, he talked to about 10 of the 14 wire weavers in the unit, individually, in the weave shop where they worked. He admitted that on these occasions he told the individual employee that he would like to talk to him about the Union, asked if the employee had any questions concerning President Sinclair's position and the Company's feeling about the matter, and stated that he would answer any such questions if he could. Some of the employees asked questions which he attempted to answer. These questions "included some of the matters that were in my talk to the group in July."

The record contains the specific content of only one of these conversations. In the latter part of September or the first part of October, after Sinclair had been informed by the Union in a letter dated September 24 that Richard Bougie, a wire weaver, was appointed a member of the Union organizing committee, President Sinclair came to Bougie's work place and asked what Bougie expected to get out of the Union, adding that "I realize that you are sold on this idea and I am here to try to unsell you." Bougie replied that he would like to see job security, seniority rights, and possibly a pension plan. Sinclair mentioned the things he liked such as a health and accident plan, stated how much these things would cost, and explained that he could not afford them.[7]

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[7] The findings as to this conversation are based on the credited testimony of Bougie. Sinclair did not deny Bougie's testimony in this regard.

2. Concluding Findings.

I am convinced and find that the series of letters, pamphlets, leaflets, and speeches from and by President Sinclair, hereinabove described, taken together and considered as a whole, reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead Respondent to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers. I reach the same conclusion and make the same finding based only on the totality of so much of the foregoing as occurred after November 8, the date on which the Union filed its representation petition, particularly when considered in the light of the letters and speech which preceded that date as background.[8] By the foregoing conduct, Respondent in each case interfered with, restrained, and coerced the employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.[9]

Sinclair admitted that his company had made a small profit in 1965, that the Charging Union in this case, Local No. 404, had never made any demands at all upon Respondent, and that he had no basis for concluding that this Local or its leaders were in any way connected with racketeering or hoodlums or picket line violence. But the message which the foregoing preelection campaign, even after November 8, reasonably tended to convey to the employees was that if they selected this Union as their

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[8] Cf. *Dee's of New Jersey, Inc.*, 161 NLRB No. 18.

[9] See, e.g. *Miller-Charles & Co.*, 146 NLRB 405, affd. 341 F. 2d 870 (C.A. 2); *Harvey Aluminum*, 156 NLRB No. 115; *Suprenant Mfg. Co.*, 144 NLRB 507, 510-511, enfd. 341 F. 2d 756, 761 (C.A. 6); *Ideal Baking Company*, 143 NLRB 546; and *Kolmar Laboratories, Inc.*, 159 NLRB No. 74, and cases cited in footnote 3.

bargaining representative, a strike would be inevitable because the Union would make excessive demands which Respondent would refuse to meet, that a strike could lead to the closing of the plant or the transfer of the weaving production to Lindsay's other facilities, and that the wire weavers would then lose their jobs and find it difficult to get other jobs because of their age and limited craft skills.

The General Counsel further contends in his brief that certain specific statements in the July speech and subsequent letters and the individual talks with the 10 unit employees, each independently constituted a violation of Section 8(a)(1) of the Act. In view of my previous findings concerning Respondent's violation of Section 8(a)(1), I deem it unnecessary to consider and to pass upon these contentions.

D. The Allegation Concerning the Rental of the American Legion Hall

Paragraph 14(c) of the complaint alleges: "Respondent, by its supervisor and agent, William Seavey, during the month of November 1965 or the first part of December 1965, in the Holyoke or South Hadley, Massachusetts area, attempted to cause the officers and/or managing agents of the American Legion Post organization not to allow its employees to use the American Legion Post facilities located at South Hadley, Massachusetts for the purpose of holding a union organizational meeting, and said Legion Post has officers and members who are employees of the Respondent, in order to interfere with, restrain and coerce the employees in the exercise of their rights guaranteed in Section 7 of the Act."

William Seavey is employed by Respondent as superintendent of the Machine Division and is admitted to be a supervisor and agent of Respondent. During the past 10

years, Seavey has been a member of the American Legion Post 260, headquartered in a building owned by the Legion Post and located about one-half to three quarters of a mile from Respondent's plant. At one time or another, Seavey has held every position with the Legion Post; in November 1965, he was the Chaplain, a member of the Board of Directors, and the President of the Board of Trustees.

Seavey has been a member of the Board of Directors since the time when he was the moving force in the purchases of the Legion Post building in 1959 or 1960. During his stewardship and because of his efforts, the membership of the Post had risen to 176 but had fallen to 140 or 150 in November 1965. Seven of the members were employed by Respondent, including Post Commander Nadeau and President Sinclair.

The top floor of the Legion building is rented from time to time to other organizations, and was regularly rented for the monthly meetings of labor organizations which represented employees at two area companies. Although this hall was never rented by Respondent, a going away party for two of Respondent's employees was held there in 1963, attended by Seavey and President Sinclair, and a retirement party for one of Respondent's employees was held there in 1965, attended by President Seavey. Respondent has an Employee Association which takes care of this type of function.

During the time material herein, the manager of the building was Harold Geisler, who was also on the Board of Directors but was not an employee of Respondent. The steward was Richard Meta, who was also employed there as the bartender. The Board of Directors consisted of 14 members. There are two Trustees who have the authority with respect to the upkeep and maintenance of the building. When a question arises regarding the use of the

building, the Board of Trustees will meet and pass upon it. Either a member will leave a note for the Manager regarding a proposed rental or the Manager can arrange the rental. The Board of Trustees acts officially in rental matters only when a problem arises, and this does not occur in more than one case out of a hundred.

In November 1965, Post Commander Nadeau, who was employed by Respondent as a truckdriver, asked Seavey if he knew that Respondent's employees were attempting to rent the Legion Hall for a union organizing meeting. It was Nadeau's practice to request Seavey's opinion on all matters pertaining to American Legion business. Seavey replied that he had heard about it but had not heard anything official. Nadeau asked Seavey what he thought about it. Seavey replied that he "didn't like it," stating that President Sinclair and five other employees of Sinclair were members of the Post and that he "didn't think it was right."

A few weeks later, Seavey was approached by two members of the Legion Post's Board of Directors, Geissler and Petri, concerning the hall rental for the proposed union meeting. Geissler was also the manager of the Legion Post. Seavey stated that he would rather not discuss the matter at the bar, and they moved to an adjoining room. The bartender or steward informed them that "one of the boys" gave him a $10 down payment for the use of the hall. All three expressed surprise, and this was the first time Seavey obtained any real information about the matter. Geissler and Petri asked Seavey how he felt about it. Seavey replied that he didn't like it, that there would be conflict with members that were in the shop, that the Legion had worked hard for members, that he had tried to build the Post up and that he had brought seven members in from Sinclair, that he didn't want to

use the Legion Hall as grounds for an argument, and that he would prefer that the meeting be held somewhere else, on neutral grounds.

No meeting of the Board of Directors or of the Trustees was held; nor did Seavey request such a meeting, although he was a member of both Boards. Seavey gave no instructions to the Steward or to the Manager concerning this matter; nor did he mention it to President Sinclair or any other agent or supervisor of Respondent. However, as a result of this matter involving the rental of the hall to Respondent's employees for union organizational meetings, Seavey resigned as president of the Board of Trustees before his term had expired.

Upon consideration of all the foregoing, I find that Respondent did not violate Section 8(a)(1) of the Act by the above-described conduct of Superintendent Seavey.

E. Objections to Election.

An election was conducted by the Board in a unit of Respondent's journeymen wire weavers on December 9, 1965. As previously noted, the Union lost the election by a vote of 7 to 6. Thereafter, timely objections and exceptions were filed by the Union, and the hearings ordered by the Board was for the purpose of resolving the issues raised thereby. The hearing was consolidated with the hearing in the unfair labor practice case.

It is well settled that the Board will consider only conduct which occurred after the date of the filing of the petition as a basis for objections to an election.[10] In this case, the petition was filed on November 8, 1965. As I have previously found, the series of letters, pamphlets, and leaflets, and the December 8 speech, from and by

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[10] *Goodyear Tire & Rubber Co.*, 138 NLRB 453.

President Sinclair after November 8, taken together and considered as a whole, particularly in the light of his letters and speech which preceded that date as background, violated Section 8(a)(1) of the Act because they reasonably tended to convey to the wire weavers the belief or impression that selection of the Union in the forthcoming election could lead Respondent to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers. I further find that the aforementioned conduct also interfered with the exercise of a free and untrammeled choice in the election involved here. See *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782, 1786-1787. Accordingly, I find that the Respondent's conduct deprived the employees of their right to express a free choice in the election. I therefore find merit in, and sustain the, objections numbered 1, 2, and duplicate 2, and recommend that the election of December 9, 1965, be set aside.

Moreover, assuming, *arguendo*, that Respondent's above-described conduct is not found to be violative of Section 8(a)(1) of the Act, I nevertheless recommend setting the election aside. It is clear that Respondent's entire pre-election campaign after November 8 generated an atmosphere of fear of economic loss which completely polluted the free atmosphere which is indispensable to a valid election and tended to foreclose the possibility that the election issues will be decided on the basis of the employees' judgment as to whether the Union will be able to represent them effectively in light of existing economic conditions.[11]

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[11] See e.g., *Ideal Baking Company*, 143 NLRB 546, 553; *General Industries Electronics Co.*, NLRB 428; and *Brunswick Corp.*, 147 NLRB 1139.

F. The Refusal to Bargain.

1. The appropriate unit and the Union's majority status therein.

The complaint alleges, the answer admits, and I find, that all journeymen wire weavers of Respondent employed at its Holyoke, Massachusetts, plant, exclusive of all other employees, all production and maintenance employees, service employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The parties stipulated to the names of the employees in the appropriate unit at all material times herein, which consisted of a total of 14 employees; they further stipulated that the same 14 named employees were the only ones employed in the unit by Respondent during the period from July 6 through December 9, 1965. The General Counsel introduced into evidence Union authorization cards signed in July 1965, by 11 of the 14 employees in the appropriate unit. At the hearing, but no longer mentioned in his brief, counsel for Respondent objected to the cards signed by Gary Brunault, Victor Goulet, and William Dean. He affirmatively stated that he had no objections to the cards signed by the other eight employees, thus conceding that in July, 1965, the Union had valid authorization cards signed by a majority of the employees in the appropriate unit.

The objection to the card signed by *Brunault* was on the alleged ground that the date was not properly authenticated. His cards bears the date of 7-20-65. Brunault credibly testified that he received the Union card at his home by mail about July 6 or 7, 1965, that he filled it out and signed it at home but did not date it, that he then put it in his shirt pocket and later mailed it when he

got to a mailbox. He further credibly testified that to the best of his recollection it was July 8 when he filled it out and signed it. The card bears a United States postal stamp of July 9. Brunault explained that someone must have put the date on the card after it was received by the Union. I find that Brunault signed the card between July 6 and 9, 1965, and that this is a valid authorization card for the purpose of determining the Union's representative status.

The objection to the card signed by *Goulet* was on the alleged ground that Goulet could not testify positively concerning the facts in connection with the card. Goulet credibly testified that he signed the card on July 7, and that he filled it out himself, including the date. I find no merit in Respondent's objection, and find this to be a valid authorization card for the purpose of determining the Union's representative status.

The objection to the card signed by *Dean* was on the ground that he allegedly did not voluntarily mail the card or deliver it to the Union. Dean credibly testified that he received the card in the mail, that he signed it at home, that he had read it before signing it, that he then placed it on his bureau because he wanted to think it over for "a little while," and that the next day his wife told him that she had his son mail it. He further credibly testified that, although he had not authorized his wife to mail it, he did nothing thereafter to try to get his card back or to revoke his authorization. I find this card to be a valid authorization card for the purpose of determining the Union's representative status.

It thus appears that a clear majority of the employees in an appropriate unit had validly designated the Union as their bargaining representative when the Union made its demand on September 20, 1965, for recognition and bargaining. While a Board election is normally the best

method of determining whether or not employees desire to be represented by a bargaining agent, where, as here, an employer engages in unfair labor practices which make impossible the holding of a free election, there is no alternative but to look to the signed authorization cards as the only available proof of the choice employees would have absent the employer's unfair labor practices.[12] To the extent that the election revealed a loss of Union support, such loss must be found attributable to the Respondent's unfair labor practices. I find that at all times on and after September 20, 1965, the Union has represented a majority of the employees within the appropriate unit and has been, and still is, the exclusive representative of all the employees within said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

2. The request and refusal.

By letter dated September 20, 1965, from Union President Carmin Napoli and addressed to Respondent's President Sinclair, the Union advised that "the majority of your journeymen-wireweavers and apprentices at your Holyoke, Massachusetts, location have designated this Local Union, an affiliate of the International Brotherhood of Teamsters, as their collective bargaining representative"; requested "recognition as the exclusive bargaining representative of the aforementioned Employees" and a "meeting, as soon as possible, for the purpose of negotiating a collective bargaining agreement covering wages, hours and other conditions of employment"; and offered "to submit signed authorization cards of your Employees to a neutral party, mutually agreed upon, and to allow the

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[12] *Bryant Chucking Grinder Company*, 160 NLRB No. 125 (pp. 5-6).

third party to compare these cards with your present payroll" if "you have any doubt as to our representing a majority of your employees in the above described bargaining unit." The letter concluded with the statement that "we would appreciate hearing from you on this matter at your earliest convenience." President Sinclair admitted receiving this letter and replying by a letter dated September 28, 1965. The reply letter acknowledged receipt of the above-described letter of the Union; stated that "your request for recognition is denied (a) because the Company has a good-faith doubt that Local 404 of the International Brotherhood of Teamsters represents an uncoerced majority of its weaving department employees, (b) because as stated by NLRB Chairman McCullough, authorization cards are unreliable as a means for determining a Union's majority status, and (c) because the Company expects that there will be questions concerning the appropriate bargaining unit which should be determined by the Board"; and suggested "that Local 404 follow the election procedures established by the Board." The Union admitted receiving this letter.

3. Respondent's contentions and concluding findings.

Sinclair testified that "I was not at all sure that they represented a majority of the employees because I didn't actually know exactly what they were talking about as far as bargaining unit is concerned." He further testified that he was questioning the appropriateness of the requested bargaining unit of journeymen wire weavers and apprentices because "we had no apprentices at that time" and "I did not know what was meant by an apprentice." I find this argument to be specious. Sinclair very well knew what an apprentice wire weaver was. He admitted that Respondent had in the past employed wire weaver appren-

tices, that it had not been unusual for a wire weaving department to employ both journeymen and wire weaver apprentices, that the only union which ever represented any of Respondent's employees represented the journeymen wire weavers and apprentices, and that many of the journeymen wire weavers employed by Respondent during the period from July through December had started as apprentices and had served their apprentice years with Respondent. He further admitted that the helpers employed in the weaving department "to assist the weavers in the various operations of setting up and removing cloth" are not apprentices. Sinclair admittedly made no effort to ascertain to whom the Union was referring by the category of apprentices. He knew that he had no apprentices in his employ at that time and that there were only 14 journeymen wire weavers employed. In the latter part of November, Respondent entered into a stipulation that its journeymen wire weavers constituted an appropriate unit. I find that Respondent did not have any good-faith doubt as to the composition of the bargaining unit which the Union claimed to represent[13] or that such unit was appropriate for collective bargaining purposes even if Respondent at that time employed no apprentices. Moreover, a good-faith, but erroneous, belief that a unit is inappropriate is no defense to a refusal to bargain.[14]

As previously noted, the Union's bargaining request of September 20 and the representation petition which it filed on November 8, covered a unit of journeyman wire weavers and apprentices. However, as Respondent em-

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[13] See, e.g., *Ivy Hill Lithograph Co.*, 121 NLRB 831, 835.

[14] *Tom Thumb Stores, Inc.*, 123 NLRB No. 833; *United Butchers Abattoir, Inc.*, 123 NLRB 946, 957; *Southern Paint Co., Inc.*, 156 NLRB No. 2 and cases there cited; and *Owego Street Supermarkets, Inc.*, 159 NLRB No. 139.

ployed no apprentices, the stipulation which the parties executed in the latter part of November and the instant complaint covers a unit only of journeyman wire weavers as an appropriate unit. Counsel for Respondent contends in his brief that there was no bargaining request in a unit confined solely to journeyman wire weavers and that there is a fatal variance between the unit requested and the unit for which it is alleged Respondent unlawfully refused to bargain. I find no merit in this contention. I find that there is no substantial variance in the units and that the Union's bargaining request was a valid request for bargaining in the unit to which the parties subsequently stipulated and herein found appropriate.[15]

Nor do I find any merit in Respondent's contention that it had a good-faith doubt of the Union's majority representation claim. Sinclair testified that this doubt was based on his "personal feeling." As previously found, after the Union's bargaining request, Respondent engaged in a coercive course of conduct designed to induce the employees to abandon their support for the Union and which dissipated the Union's majority status and prevented a free choice in the subsequent election. Such conduct gives rise to the inference, which I herein make, that Respondent's refusal to bargain on and after September 20, 1965, was not motivated by any good-faith doubt as to the Union's majority status in an appropriate bargaining unit but was instead motivated by a desire to gain time within which to dissipate that majority status. *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732, 737, 741 (C.A.D.C.), cert.

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[15] See e.g. *Edwards Fields, Inc.*, 141 NLRB 1182, 1195; *Mid-West Towel & Linen Service, Inc.*, 143 NLRB 744, 752; *Sabin Vending Co., Inc.*, 147 NLRB 1010, 1011; *Hamilton Plastic Molding Co.*, 135 NLRB 371, 373; *Galloway Mfg. Corp.*, 136 NLRB 405; *Gotham Shoe Mfg. Co.*, 149 NLRB 862, 873; and *Fleming & Sons of Colorado, Inc.*, 147 NLRB 1271, 1273.

denied 341 U.S. 914. By such refusal, Respondent violated Section 8(a)(5) and (1) of the Act.[16]

IV: THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE.

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW.

1. All journeymen wire weavers of Respondent employed at its Holyoke, Massachusetts, plant, exclusive of all other employees, all production and maintenance employees, service employees, office clerical employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times on and after September 20, 1965, the Union has been, and still is, the exclusive representative of all the employees within said appropriate unit for the

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[16] I find no merit in the procedural contention of counsel for Respondent that the 8(a)(5) allegation in the complaint is defective because it fails to contain an affirmative allegation that Respondent did not have a good-faith doubt of the Union's majority status when it refused its request for recognition and bargaining. While the burden is on the General Counsel to establish affirmatively that a good-faith doubt of majority was not the reason for Respondent's refusal to bargain, there is no requirement that the complaint must contain such an allegation. *John P. Serpa, Inc.*, 155 NLRB No. 12 (p. 2); *H. & W. Construction Company, Inc.*, 161 NLRB No. 77 (pp. 6-7). As found in the text, the General Counsel has satisfied his burden in this case.

purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment, within the meaning of Section 9(a) of the Act.

3. By refusing to recognize and bargain with General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees, Local No. 404, an affiliate of International Brotherhood of Teamsters, as the exclusive representative of the employees in the above-described appropriate unit, the Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

4. By the foregoing conduct and by threatening employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment for the wire weavers, if they were to select the above-named labor organization as their collective bargaining representative, in the manner described in section C, *supra*, the Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, and thereby has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY.

Having found that Respondent engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action which will effectuate the policies of the Act.

Having found that Respondent refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, I will recommend that, upon request, Respondent recognize and bargain collectively with the Union as the exclusive representative of all its employees in the appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. Moreover, I would recommend the same bargaining order even if the record had warranted the conclusion, contended for by Respondent, that it relied on a *bona fide* doubt of the Union's majority in refusing to bargain with the Union. As previously found, the Union represented a clear majority of the journeymen wire weavers when Respondent began its unlawful campaign directed at destroying that majority. To the extent that the election revealed a loss of union support thereafter, such loss must be found attributable to the Respondent's unfair labor practices. Therefore, effectuation of the policies of the Act would still require such a bargaining order in order properly to remedy Respondent's other unfair labor practices herein found.[17]

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER.

Respondent, The Sinclair Company, Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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[17] *Bryant Chucking Grinder Company*, 160 NLRB No. 125 (pp. 5-6).

(a) Refusing to recognize and bargain collectively with General Teamsters, Chauffeurs, Warehousemen and Helpers, Building Materials, Heavy & Highway Construction Employees, Local No. 404, an affiliate of International Brotherhood of Teamsters, as the exclusive representative of its employees in the following appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

> All journeymen wire weavers of The Sinclair Company employed at its Holyoke, Massachusetts, plant, exclusive of all other employees, all production and maintenance employees, service employees, guards and all supervisors as defined in Section 2(11) of the Act.

(b) Threatening the employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, if they were to select the above-named, or any other, labor organization as their collective-bargaining representative.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively with the above-named labor organization as the exclusive representative of the employees in the above-described unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at its plant in Holyoke, Massachusetts, copies of the notice attached hereto and marked Appen-

dix A.[18] Copies of said notice to be furnished by the Regional Director for the First Region, shall upon being duly signed by Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other materials.

(c) Notify the said Regional Director in writing, within 20 days from the date of this Decision and Recommended Order, what steps the Respondent has taken to comply herewith.[19]

I also recommend that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

I further recommend that the election in Case No. 1-RC-8713, held on December 9, 1965, be set aside.

Dated at Washington, D. C., January 12, 1967.

(s) LOUIS LIBBIN
LOUIS LIBBIN
Trial Examiner

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[18] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

[19] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the First Region, in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX A

NOTICE TO ALL EMPLOYEES
PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT threaten our employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, if they were to select GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, BUILDING MATERIALS, HEAVY & HIGHWAY CONSTRUCTION EMPLOYEES, LOCAL NO. 404, AN AFFILIATE OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL, upon request, recognize and bargain collectively with the above-named Union as the exclusive representative of all employees in the following appropriate unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and embody in a signed agreement any understanding reached. The bargaining unit is:

All journeymen wire weavers employed at our Holyoke, Massachusetts, plant, exclusive of all other employees, all production and maintenance

employees, service employees, guards and all supervisors as defined in Section 2(11) of the Act.

THE SINCLAIR COMPANY
(*Employer*)

Dated _____ By _____
(*Representative*) (*Title*)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 20th Floor, John F. Kennedy Federal Building, Cambridge and New Sudbury Sts., Boston, Mass. (Tel. No. 223-3353).

DECISION AND ORDER.

On January 12, 1967, Trial Examiner Louis Libbin issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of these allegations. Thereafter, the Respondent filed exceptions, with a supporting brief, and the General Counsel filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error

was committed. The rulings are hereby affirmed. The Board has considered the Decision, the exceptions, the briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the modification set out below.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and orders that the Respondent, The Sinclair Company, Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Delete the word "other" from paragraph 1(c) of the Trial Examiner's Recommended Order, and substitute therefor the words "like or related. * * *".

2. Delete the word "other" from the paragraph beginning "WE WILL NOT in any other manner" in Appendix A attached to the Trial Examiner's Decision, and substitute therefor the words "like or related. * * *"

IT IS FURTHER ORDERED that the petition for certification of representative filed in Case No. 1-RC-8713 be, and it hereby is, dismissed, and that all prior proceedings held thereunder be, and they hereby are, vacated.

Dated, Washington, D. C., May 2, 1967.

FRANK W. MCCULLOCH, *Chairman*
GERALD A. BROWN, *Member*
HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD

[SEAL]

ORDER SUPPLEMENTING DECISION AND ORDER.

On May 2, 1967, the Board issued a Decision and Order[1] in the above-entitled proceeding.

IT IS HEREBY ORDERED that the said Decision and Order be, and it hereby is, supplemented as follows:

(1) By adding footnote reference 1 following the word "findings" on the fifth line of the third paragraph of page 1.

(2) By adding the following footnote at the bottom of page 1:

> [1] Contrary to the assertion made by the Respondent, we do not read the Trial Examiner's decision as relying on the distribution of the book "The Enemy Within" as a part of the totality of the Respondent's conduct in violation of Section 8(a)(1) of the Act. In any event, we would not find the distribution unlawful in itself or in context, either as a violation of Section 8(a)(1) or as grounds for setting aside the election.

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby supplemented.

Dated, Washington, D. C., June 16, 1967.

By direction of the Board:

OGDEN W. FIELDS,
Executive Secretary.

---

[1] 164 NLRB No. 49.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. Early in July 1965, the International Brotherhood of Teamsters Local Union No. 404 began an organizing campaign among the employees at the Company's Holyoke, Massachusetts plant. By letter dated September 20, the Union notified the Company that it represented a majority of its journeymen wire weavers and apprentices, requested that the Company bargain with it, and offered to submit the signed authorization cards for authentication (Pet. App. 43,

66-67). At that time, no apprentices were employed and the Union had obtained signed cards from 11 of the 14 journeymen wire weavers authorizing the Union to represent them (Pet. App. 43-44, 64). President Sinclair, by letter, denied the Union's request because the Company had a "good-faith doubt that Local 404 * * * represents an uncoerced majority of its weaving department employees," "authorization cards are unreliable as a means for determining a Union's majority status," and "the Company expects that there will be questions concerning the appropriate bargaining unit which should be determined by the Board" (Pet. App. 67). On November 8, the Union filed a petition for a Board election, and the parties stipulated that the appropriate unit was "all journeymen wire weavers employed at [the] Holyoke plant, excluding all other employees" (G.C. Exh. 1(b); Pet. App. 64).

From this point forward until the election on December 9, President Sinclair endeavored to undermine the Union. His efforts consisted principally of reminders of a 13-week strike in 1952 which had led to the demise of another union and put the Company in an allegedly precarious financial position, and of aspersions on the Teamsters' honesty and strike tactics. Thus, two or three weeks before the election he sent the wire weavers a pamphlet which emphasized, *inter alia*, that the Teamsters Union was a "strike happy outfit," which could again close the wire weaving department and the plant (Pet. App. 35, 51-52). On November 30, Sinclair sent a letter to the wire weavers further reminding them of the disastrous effects

of the 1952 strike, and adding that "a strike can still close the Holyoke plant" (Pet. App. 52-53); he stressed, as he had in previous letters (Pet. App. 49-50), that the company which recently had purchased the plant was "interested in profits and not pressure." On December 1, he sent them another letter, warning that the Union was involved with "serious crimes," "racketeering," and "threats to run down children," and that, if it won the Board election, it would be difficult to get another election to vote it out (Pet. App. 53).

On December 7, Sinclair sent the wire weavers a four-page leaflet which purported to be an obituary of the companies in the Holyoke-Springfield area that had fallen victim to union demands and had gone out of business,[1] eliminating some 3500 jobs in the area. The leaflet concluded by suggesting that the employees drive past these plants before deciding to vote for the Union. (Pet. App. 53-54.) On December 8, the day before the Board election, Sinclair passed out another handbill in the same vein (Pet. App. 55). That same afternoon, he personally addressed the wire weavers in the plant. He again reminded the employees of the Company's precarious financial position; that the new parent corporation could afford to and would close the Company in the event of a strike; and that it was unlikely that they could obtain other employment, because of their age and limited education (Pet. App.

---

[1] Sinclair admitted at the hearing that he had no objective basis for linking union demands to the demise of these companies (Pet. App. 54).

55-56). The Union lost the next day's election by one vote, 7 to 6.

2. The Board found that the above-described letters, pamphlets, and speeches by President Sinclair, considered as a whole and in the light of his earlier letters and speeches, "reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers." Accordingly, the Board concluded that, by the foregoing conduct, the Company violated Section 8(a)(1) of the Act. (Pet. App. 58.) The Board further found that the Union had valid authorization cards from a majority of the employees when it requested recognition on September 20; that the Company declined recognition, not because of a good faith doubt as to the Union's majority status, but in order to gain time to dissipate that status;[2] and that the Company thus violated Section 8(a)(5) and (1) (Pet. App. 67-70). The Board set the election aside (Pet. App. 62-64) and ordered the Company to cease and desist from the unfair labor practices found and to bargain, upon request, with the Union (Pet. App. 72-74).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 33-40).

---

[2] The Board found that the Company was under no doubt as to the unit in which recognition was sought, in view of its subsequent stipulation in the representation proceeding (p. 2, *supra;* Pet. App. 68-69).

3. The third question presented (Pet. 2)—whether the Board and the court below properly concluded that President Sinclair's speeches and other statements constituted restraint and coercion prohibited by Section 8(a)(1) of the Act—does not warrant review. The determination whether an employer's remarks on unionization constitute an expression of views and opinion protected by Section 8(a)(1) turns primarily on the facts of the particular case. As the court of appeals correctly stated, "[w]hether an employer has used language that is coercive in its effect is a question essentially for the specialized experience of the Board," and "in considering coercive effect the test is the totality of the circumstances." (Pet. App. 38, 37, and cases there cited.)[3]

The remaining issue (Pet. 2, questions 1 and 2) is whether an employer must always be deemed to have had a good faith doubt in refusing to recognize a union that based a claim for representative status solely upon its possession of authorization cards signed by a majority of the employees, irrespective of the unfair labor practices he may have committed in opposing the union after receiving its demand. This question is basically the same as that presented by the Board's petition in No. 573, *National Labor Relations Board* v. *Gissel Packing Co., et al.* (see *e.g.* the petition in No. 573 at p. 16), where the Court of

---

[3] *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405, 409, n. 3, is not to the contrary. Since the statement in the letter of March 4 was not alleged as an independent violation of Section 8(a)(1) of the Act, the Court had no occasion to consider that issue. Cf. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 477.

Appeals for the Fourth Circuit answered in the affirmative. Accordingly, the Court may desire to defer ruling on the present petition until disposition of *Gissel*. The Board believes, however, that the court below correctly answered this question in the negative, in accordance with the principle ordinarily applied in the courts of appeals, and that it properly enforced the order to bargain based on the Board's finding that the Company's refusal to bargain with the Union had not been motivated by good faith doubt of the Union's majority status and thus violated Section 8(a)(5) of the Act.

Respectfully submitted.

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OCTOBER 1968.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC. ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC. ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC.

BRIEF OF GENERAL STEEL PRODUCTS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The "Question Presented" as stated in the Petition for Certiorari does not fairly embody the position of the Court of Appeals for the Fourth Circuit.

These cases in which Writ of Certiorari is sought are all Per Curiam decisions. (App. A, p. 1a; App. D, p. 77a; App. G, p. 163a) The rationale of the Court of Appeals for the Fourth Circuit can only be discovered by turning to the antecedent decisions on which these cases are based. They are: *NLRB v. S. S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562; *Crawford Mfg. Co. v. NLRB*, 4 Cir., 386 F. 2d 387, cert. denied 36 LW 3404, ... U. S. ..... ; *NLRB v. Sehon*

Stevenson Co. Inc., 4 Cir., 386 F. 2d 551. This Court denied certiorari in the *Crawford* case; no Petition for Certiorari was filed in the *Logan* case; and the Court of Appeals for the Fourth Circuit enforced the Board's order to bargain in *Sehon Stevenson.*

The question posed by the Petition for Certiorari implies that the Court of Appeals has held that an employer can *never* be required to bargain with a union unless it has won an election, "irrespective" of unfair labor practices of the employer. This is not so. The Court of Appeals has properly held in these antecedent cases that an election is the preferred method selected by Congress for determining questions of representation; but that Court has further said that recognition and bargaining can be required without an election: (1) where no bona fide question of majority representation exists (*Sehon Stevenson* case) or (2) where the employer's misconduct is so extensive and pervasive as to prevent the conduct of a valid secret election. (See *Logan* case and the present decisions.)

THE PRESENT CASES — RATIONALE

In the present cases what the Court of Appeals has held is that on this evidence a question of representation exists, which the parties are entitled to have resolved by election, as required by Sec. 9 (c) of the Act, and not by a dubious card count, and further held that employer misconduct found by the Board is not so pervasive as to prevent the conduct of a valid election.

It may be noted that the Board has made no finding, and is not now contending that valid secret ballot elections could not be held in these cases. What the Board's position really amounts to is that the Board "prefers" a card count over an election in cases where it finds any employer unfair

labor practices. This was not the preference of Congress as expressed in Sec. 9 (c) and reemphasized when the power of the Board to determine representation by other "suitable means" was eliminated from this section by the Taft-Hartley Act (NLRB Sec. 9 c, 29 U.S.C. Sec. 159 c). The Board acknowledged that its authority had been so curtailed in its Annual Report for 1948:

> "Section 9 (c) of the Act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed - but rarely exercised - to utilize other "suitable means" of ascertaining representatives."

Notwithstanding this change, the Board has increasingly sought to require recognition and bargaining without an election, or after the union had lost an election (as in the *General Steel* case), based upon some finding that the employer lacked a "good faith doubt" of the union's majority. This rule has been generally ascribed by the Board as growing out of language of this Court in *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62, 69, 100 L. Ed 941, 947, 76 S. Ct. 559:

> ". . . In the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated Sec. 8 (a) (5) of the Act."

This case does not support, and we submit was never meant to support, the structure which the Board has sought to erect upon it. In *Arkansas Oak Flooring* there had been no election; the union possessed cards from 174 of 225 employees *stipulated* to be validly signed by the employees involved.

There was indeed no question about representation. It was a "preemption" case. The holding of the Supreme Court (which is off-point as far as the present case is concerned) was that the dispute fell within the National Labor Relations Act notwithstanding failure of the union to file non-communist affidavits, since there was no need for an election; and therefore that a state court could not intervene by an injunction against peaceful picketing.

The Act speaks in terms of "a question of representation," and this Court in the *Arkansas Oak Flooring* case spoke of bona fide dispute "*as to the existence of the required majority.*" The Board, however, in building upon the case, has changed the nature of the inquiry and now exhibits little interest in whether there is an *actual question* concerning the adherence of the *employees* to the union. Instead, it is interested in the general attitude and conduct of the *employer,* and if it finds unfair labor practices on his part, *however unrelated logically to the union's standing among the employees, or to the employer's knowledge of it*; the Board concludes, and concluded in the *General Steel* case, that the employer was acting generally in bad faith and therefore must have "known" (non sequiter) that the union had a majority all along. This is the holding which the Court of Appeals refused to sustain. The present Petition for Certiorari acknowledges that this is precisely the Board's approach (Petition p. 10):

> "In each case the Board based its conclusion that the Company did not have a good faith doubt as to the Union's majority status on the fact that the Company had committed substantial unfair labor practices during its anti-union campaign."

Surely this is nonsense, for an employer who is convinced that a union has not achieved majority may be just as in-

terested in dissuading his employees, as one who is convinced that the union has full support. *NLRB v. River Togs, Inc.*, 2 Cir., 382 F. 2d 198, 65 LRRM 2987; *NLRB v. James Thompson & Co.*, 2 Cir., per Judge L. Hand, 208 F. 2d 743 at 746, 33 LRRM 2205; *Montgomery Ward & Co. v. NLRB*, 6 Cir., 377 F. 2d 452, 65 LRRM 2285; *NLRB v. Ben Duthler, Inc.*, 6 Cir., ... F. 2d ....., 68 LRRM 2325; *NLRB v. S. S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562, 62 LRRM 2596.

Noteworthy too, along with failure of the Board to conduct an election or to make any finding that a valid election could not be conducted, is the Board's further failure to resort to an injunction proceeding as authorized by Congress in Section 10 (j) of the Act. If indeed there were unfair labor practices such as to frustrate a fair election, Congress has provided a remedy for controlling such situations, for restoring a proper atmosphere under which an election could be held. Again the Board prefers not to use the procedure laid down by Congress.

The Court of Appeals has held in its decision in *Sehon Stevenson*, 4 Cir., 386 F. 2d 551, that where the union's majority support is undisputed, the employer must recognize it without an election. This is in accord with the decision of the Supreme Court in *Arkansas Oak Flooring* and not at variance with it. Where there is a genuine dispute, however, and the union's claim rests only on cards solicited by it, we submit the *employees* are entitled to an opportunity for a secret vote, and the *employer* is likewise entitled to the results of such a ballot. *NLRB v. River Togs, Inc.*, 2 Cir., 382 F. 2d 198, 65 LRRM 2987; *NLRB v. Flomatic Corp.*, 2 Cir., 347 F. 2d 74, 59 LRRM 2535; *NLRB v. S. S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562, 62 LRRM 2596; *NLRB v. Ben Duthler, Inc.*, 6 Cir., ... F. 2d ....., 68 LRRM

2324; *Montgomery Ward & Co. v. NLRB*, 6 Cir., 377 F. 2d 452, 65 LRRM 2285.

THE GENERAL STEEL CASE

REASONS FOR DENYING CERTIORARI

In *General Steel* the union lost a secret ballot election by a vote of 94 to 85 (App. I, p. 172a). The election was set aside, but no new election has ever been held or called for.

In this case no one was discriminatorily discharged; there was no violation of Sec. 8 (a) (3) charged against the Company. Solely on the basis of alleged coercion of employees, the Board rests its conclusion that this employer should now be compelled to recognize the union, contrary to the election result.

The union had demanded recognition by *General Steel* at the time it filed its petition for election, claiming support of a majority of employees, but it never at any time offered an examination of its cards by the employer or by an impartial third person. Indeed the union had assured the employees that their cards would be kept *secret*, except for submitting them to the Labor Board to secure an election. The union wrote a letter to the employees repeatedly assuring them of the secrecy of the cards (General Steel Joint Appendix p. 76, Trial Examiners Exhibit 2):

> "Your Petition for a Secret Ballot Election has been filed. Your secret cards have been turned over to the Federal Government . . . "
>
> * * *
>
> "During the next few weeks while you are awaiting your secret vote election, . . . "
>
> * * *
>
> "Your signed, secret card and your "X" Yes

on a Government Secret Ballot is your democratic way . . . "

* * *

"An overwhelming majority has already signed Secret Authorization Cards."

It is strange that this letter, admitted as a Trial Examiner's Exhibit (Joint Appendix pp. 76, 112), was never dealt with in the Decision of the Trial Examiner or the Board.

In this veil of secrecy, and faced with the union's demand for recognition, *General Steel* endeavored to learn the truth about the union's claim by making inquiry among the employees (General Steel Joint App. p. 429 et seq.). The Trial Examiner agreed that the employer had the right to do this. (General Steel Joint Appendix p. 434). See *NLRB v. Lorben Corp.*, 2 Cir., 345 F. 2d 346, 59 LRRM 2184; *NLRB v. Trumbull Asphalt Co.*, 8 Cir., 327 F. 2d 841, 55 LRRM 2435; *Kay Allen Classics, Inc.*, 152 NLRB No. 134, 59 LRRM 1308; *Sagamore Shirt Co.*, 153 NLRB No. 27, 59 LRRM 1474.

The result of this inquiry was that the Company concluded that only about 30 percent of employees favored the union at that time. (General Steel Joint App. p. 431) and that there was no majority for the union. The outcome of the secret ballot election vindicated the Company. But all of this was swept aside by the Labor Board under the general cloud of the employer's supposed "bad faith," and the Board issued its order to bargain notwithstanding the expressed desires of the employees in a secret ballot election.

Certiorari should be denied in *General Steel* regardless of the rationale under which it was decided by the Court of Appeals. We submit that this Board decision could not have been sustained in any Circuit. Even if one assumes the valid-

ity of the "card check" approach, the Board here counted as "votes" for the union a majority of the cards which should have been rejected under numerous decisions. The Trial Examiner's Decision, as adopted by the Board, accepts 97 out of a total of 120 cards counted for the union upon the following basis. (App. I, pp. 193a-194a):

> "Accordingly, I reject Respondent's contention 'that if a man is told that his card will be secret, or will be shown only to the Labor Board for the purpose of obtaining election, that *this* is the *absolute equivalent* of telling him that it will be used "only" for purposes of obtaining an election.' "
>
> * * *
>
> "With respect to the 97 employees named in the attached Appendix B, Respondent in its brief contends, in substance, that their cards should be rejected because each of these employees was told one or more of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. *For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face.*" (Emphasis added)

Thus the Trial Examiner ruled that even though a man was told *all* of these things: that his card would be used to obtain an election, that it would otherwise remain secret and be shown to nobody but the Labor Board in connection with obtaining an election, and that notwithstanding signing the

card he would remain uncommitted and free to vote either way - that still such cards may be counted as votes for the union. A majority of the cards in this case were counted under this ruling. We think this was clear error under any rational approach. See *Bauer Welding & Metal Fabricators v. NLRB*, 8 Cir., 358 F. 2d 766, 62 LRRM 2022; *Phelps-Dodge Corp. v. NLRB*, 7 Cir., 354 F. 2d 591, 60 LRRM 2550; *NLRB v. Koehler*, 7 Cir., 328 F. 2d 770, 55 LRRM 2570; *NLRB v. Winn-Dixie Stores, Inc.*, 6 Cir., 341 F. 2d 750, 58 LRRM 2475; *NLRB v. Lake Butler Apparel Co.*, 5 Cir., 392 F. 2d 76, 67 LRRM 2882; *NLRB c. Southland Paint Co.*, 5 Cir., ... F. 2d ....., 68 LRRM 2169; *Englewood Lumber Co.*, 130 NLRB 394, 47 LRRM 1304; *Morris and Associates*, 138 NLRB No. 126, 51 LRRM 1183.

We submit that *General Steel* is not a proper vehicle for testing the question which the Labor Board is now propounding for decision by this Court.

We further submit that these decisions of the Court of Appeals for the Fourth Circuit are correct and that the Labor Board's *Bernel Foam* doctrine (146 NLRB 1277, 56 LRRM 1039) is wrong as applied in cases such as *General Steel*; that this doctrine springs not from the desire of the Board to dispose of cases where no question concerning representation exists, but from its eagerness to resolve doubtful questions of representation in favor of a union regardless of the desires of the employees involved. We suggest that this is an intrusion into the broad field of labor policy which is beyond the proper function of the Board. *American Shipbuilding Co. v. NLRB*, 380 U. S. 300, 318-19, 13 L. Ed. 2d 855, 867, 85 S. Ct. 955.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA,

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IN THE

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THE SINCLAIR COMPANY, *Petitioner,*

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as amicus curiae in support of the Petitioner.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers is a nonprofit voluntary business organization composed of manufacturing concerns, including corporations, partnerships, sole proprietorships, and other forms of business enterprises located throughout the United States and its territories. Most of its members engage in interstate commerce and are therefore subject to the provisions of the National Labor Relations Act.

The Association has an interest in the proper resolution of the issues presented in this case because of the substantial effect, both immediate and potential, on the labor relations of its members.

This case is typical of many in which the National Labor Relations Board has ordered an employer to bargain with a union, although it was rejected by employees in a secret ballot election conducted by the Board, on the ground that the union had already been designated as majority representative before the election because it had obtained authorization cards from a majority of employees. In many other cases the Board has bypassed the election procedure and ordered the employer to bargain with a union holding such cards without an election.

This case is also typical of many in which the Board has based such bargaining orders at least in part on its conclusion that the employer coerced and restrained the employees by his communications designed to inform them of certain economic facts of life regarding business operations, and to give them truthful information about the union seeking to represent them.

Because the Board's card doctrine is frequently applied to compel employers to bargain with unions that

have failed or avoided the test of the secret ballot election provided by Congress, and because the Board's rulings on employer communications severely restrict the freedom of speech of employers and the right of employees to hear both sides, the issues in the present case are of major concern and importance to industry generally, including the members of this Association.

Since the facts of the case are set forth in detail in the Statement Of The Case in Petitioner's brief, they will not be repeated here.

SUMMARY OF ARGUMENT

1. Determination of the question whether a majority of employees in an appropriate bargaining unit want a labor organization to represent them under the National Labor Relations Act is an extremely important matter because the majority rules and the will of the majority is imposed on an unwilling minority of employees in the unit.

In the NLRA as originally enacted in 1935, Congress gave the National Labor Relations Board authority to determine the majority question by secret ballot of employees or "any other suitable method," and also authorized it to make that determination either in an unfair labor practice proceeding "or otherwise." When Congress adopted the Taft-Hartley Act in 1947, however, it was dissatisfied with the Board's use of authorization cards and other means in lieu of the secret ballot election to determine majority questions. Therefore it repealed the provisions that had authorized the Board to use such other methods and to make such determinations in unfair labor practice proceedings. In lieu of the former procedure, Congress provided for the filing of election petitions and made it

mandatory that when there is a question of representation the Board "shall direct an election by secret ballot and shall certify the results thereof." Again in 1959 in the Landrum-Griffin Act, Congress showed its repugnance for other means of determining majority status when it outlawed picketing for recognition and made special provisions for an expedited election to determine the majority question in such situations.

The Board largely observed this congressional intent during the 1950's, but in the 1960's it has adopted a practice of determining majority status on the basis of union authorization cards and giving unions bargaining rights based thereon. This amounts to an indirect certification of a union as majority representative on the basis of cards, thus accomplishing indirectly what Congress has forbidden the Board to do directly. In doing so, the Board has also resumed its former practice of determining majority status in unfair labor practice proceedings, although its authority to do so was revoked by Congress in the Taft-Hartley Act. The Board's practice thus exceeds its authority and is contrary to the statute and should be held invalid.

2. The Board's practice is also unsound, improper and contrary to policies of the Act in other respects. It is basically unsound because authorization cards are wholly unreliable as evidence of union majority status, a fact that is recognized by everybody, including the Board itself. Even if the authenticity of signatures on cards is established, there still remains the fact that they are frequently signed under pressures or because of misrepresentations and do not reflect the true wishes of employees. Moreover their traditional purpose has been merely to show that enough employees are interested to justify the Board in holding an election, and

the Board has had to give such cards a strained and false meaning not intended by the parties, when it uses them to determine majority status.

The Board's doctrine that an employer must recognize a union on the basis of cards if he does not have good faith doubt of its majority status practically assures bargaining rights to a union if it can acquire a majority of cards by any means. If the employer does not investigate their validity the Board concludes he did not have good faith doubt. If he does investigate he must interrogate employees and almost inevitably commit at least minor or technical unfair labor practices on the basis of which the Board is able to find he did not have good faith doubt.

The Board's practice also contravenes the Act's provision that extent of organization shall not be controlling in determining appropriate bargain units, because unions always demand bargaining on the basis of a unit in which they have obtained a majority of cards. The extent of organization is the controlling factor in determining the unit in such cases.

3. The Board's ruling in this case, as in many others, impairs the right of free speech protected by the Constitution and the statute. Here the employer communicated with his employees before the election through a series of speeches and letters and distribution of a book to inform them on economic facts of life and on documented facts about the Teamsters Union and certain of its officials. The Board found no threat or promise, but it ruled that the "totality" coerced the employees.

The Court of Appeals accepted the Board's totality finding on the theory that it should defer to the Board's

expertise and on the theory that it must accept the Board's finding if supported by "substantial evidence."

Thus a constitutional right—the highest and most inviolate form of right under our law—is restricted and impaired through a vague and meaningless "totality" finding that is upheld by a Court of Appeals out of deference to the expertise of a Board that has no special expertise in determining the meaning of words, and on the basis of mere substantial evidence that may be contrary to the overwhelming preponderance of evidence in the record. Constitutional rights should not be thus eroded.

ARGUMENT

1. The National Labor Relations Board Does Not Have Authority to Determine Majority Representation on the Basis of Authorization Cards and to Order Bargaining Based Thereon

Employees are guaranteed the right under Section 7 of the National Labor Relations Act to bargain collectively through representatives of their own choosing if they so desire, or to refrain from doing so if they prefer. The choice is made by a majority of employees in an appropriate bargaining unit, and if a majority do choose a representative it becomes the exclusive representative of all employees in the unit under the provisions of Section 9(a) of the Act.

Accordingly, the determination whether a majority want a representative is an extremely important matter, not only because it aids in effectuating the will of the majority but also because it imposes that will on an unwilling minority.

Under the National Labor Relations Act, as first enacted, known as the Wagner Act, the National Labor

Relations Board was authorized to make that determination by secret ballot, authorization cards or other means, under Section 9(c) which then provided:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

It will be noted that this section in its original form not only authorized the Board to determine majority representation by secret ballot or "any other suitable method," but also permitted it to make that determination either in conjunction with an unfair labor practice proceeding under section 10 or in any other kind of proceeding. Thus the Board was given broad authority to determine majority representation by any "suitable method" and in any kind of proceeding.

In reviewing the labor law and its administration in 1947, the Congress was highly dissatisfied with the methods the Board had used to determine majority choice. The Labor Committees of both the Senate and the House reported bills deleting the language of section 9(c) in its entirety and substituting a new procedure for determining representation questions by secret ballot election. The provisions of the Senate and House bills were substantially alike, and both provided for the filing of representation petitions by employees or by labor organizations or by employers. The

amendment to section 9(c) as finally adopted in the Taft-Hartley Act in 1947 provided that when a representation petition has been filed:

> "... the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

In explanation of this amendment, the House Committee Report (H. Rept. No. 245, 80th Cong., 1st Sess. (1947)) stated at page 7:

> "Important among the provisions of the bill are those that really assure to workers freedom in their organizing and bargaining activities. The old act purported to do this, but in the Board's hands it often had the opposite effect.
>
> "The bill prescribes rules for the new Board to follow in setting up units for collective bargaining and in holding elections to determine whether or not employees wish labor unions to bargain for them. These rules do away with practices of the old Board by which it has subjected literally millions of workers to control by labor unions notwithstanding that the employees did not wish the unions to represent them and voted against the unions in the Board's elections."

Again at page 35, the House Report explained that the new language of section 9(c):

> "... sets forth the procedure by which employers, employees, and representatives may ob-

> tain elections in which employees may determine whether or not they wish a representative to act as their exclusive representative, and, if so, which one."

In connection with the House bills's provision permitting the parties to waive hearing before the Board, which was adopted as section 9(c)(4) of the Act, this House Report made clear at page 39 that even in cases of waiver the Board must hold a secret election and cannot rely on cards:

> "The bill permits parties to waive hearings before the Board (providing no other interested person intervenes and objects), but when the parties waive a hearing, the Administrator must conduct a secret ballot, not check membership cards as the Board sometimes has done in the past."

Thus the Congress clearly indicated its intent that questions of majority representation should be determined by the traditional American method of secret ballot elections. The Board recognized this in its contemporary interpretation of the Taft-Hartley Act. Thus in discussing changes made by the new Act in its Annual Report for 1948, the Board recognized that:

> "Section 9(c) of the act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed (but rarely exercised) to utilize other 'suitable means' of ascertaining representatives." 13 *NLRB Annual Report* 32 (1948).

At the same time, in connection with the Taft-Hartley provisions which precluded the Board from certifying a union as representative if it had not complied

with the financial and non-communist filing requirements of then sections 9 (f), (g) and (h) of the Act, the Board recognized:

> "... that an order to bargain is often tantamount in practice to a certification of the union as bargaining representative and that, just as the Board may not issue a certification to a noncomplying union, so it should not issue an order requiring an employer to bargain with such a union." Id. at 49.

In fact, an order to bargain is not only tantamount to a certification of a union, it even goes a step further. In case of a certification, an order to bargain would not be entered unless and until the employer has refused to bargain and unfair labor practice proceedings have been conducted before the Board. Thus the order to bargain is one step farther along toward judicial enforcement than certification of a union after a secret ballot election.

The Board's present practice of ordering bargaining on the basis of authorization cards in a large number of cases accomplishes indirectly what the Congress prohibited it from doing directly—determining majority on the basis of cards. It has been labeled an "indirect certification" and is so recognized and utilized by unions. In a Handbook for Union Organizers, titled *Organizing and the Law* (BNA, Washington, 1967), by Stephen I. Schlossberg, General Council of the United Automobile Workers Union, the author points out:

> "The legislative history of Taft-Hartley makes it clear that this change *was intended to preclude Board certification on cards.* As this chapter will demonstrate, however, an 'indirect certification' on cards is possible through Board bargaining orders." (p. 82).

The author then demonstrates how this is accomplished. First, the union demands recognition on cards before going to a Board election. Second, after losing the election, it files charges of unlawful refusal to bargain based on the employer's preelection refusal of recognition. Third, "If the-refusal-to-bargain charge is successful, the Board order has the same effect as a certification, for it directs the employer to bargain with the union as the representative of the employees." (Id. at 87).

While the Congress in 1947 precluded the Board from determining majority status on the basis of authorization cards, it did not prohibit uncertified unions from seeking to force their recognition demands on employers by strikes and picketing unless another union was already certified. As this Court pointed out in *UMW* v. *Arkansas Oak Flooring Company*, 351 U.S. 62 (1956), unions could still strike to force recognition upon an employer without an election and certification. But Congress outlawed that method of obtaining recognition when it added section 8(b)(7) to the National Labor Relations Act in 1959. It made recognition picketing an unfair labor practice when continued beyond "a reasonable period of time not to exceed thirty days" without a representation petition being filed. It also provided an expedited election procedure for promptly resolving representation questions under such circumstances.

Thus again the Congress expressed its disapproval of forced recognition on the basis of authorization cards and clearly indicated its intent that questions of majority status should be resolved by a secret ballot election.

The Congress has left only one means of obtaining bargaining rights on the basis of authorization cards, namely voluntary recognition by an employer if he is willing to take the risks of granting such recognition. As this Court ruled in *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961), the employer's good faith is immaterial in such situations and if he grants recognition to a union that does not in fact represent a majority he is guilty of an unfair labor practice. The proper remedy, as the Court stated there, is an order preventing further recognition and directing an election to determine the majority question. We submit that that is also the only proper remedy where an employer declines to take upon himself the responsibility of determining majority status and refuses to grant voluntary recognition upon the basis of authorization cards.

As we will show later, for an employer to undertake an adequate investigation to determine the authenticity and validity of authorization cards is an extremely risky undertaking which almost of necessity involves detailed questioning of employees about the circumstances under which they signed authorization cards and almost inevitably results in unfair labor practice findings against him. The Board should be limited to the secret ballot election procedure provided by Congress and should not be permitted to place employers in the position of having to determine majority questions at their peril.

2. Even If Held Not Precluded by the Election Provisions of the Act, the Board's Present Authorization Card Doctrine Is Unsound, Unrealistic, and Contrary to Other Policies of the Act

The Board's practice of ordering bargaining on authorization cards began as a special and unusual remedy, or perhaps even a penalty, against employers in cases where the Board thought they had committed multiple and flagrant unfair labor practices and prevented free employee choice. It was at least tentatively accepted by a number of Courts of Appeals as an extraordinary remedy possibly justified on the basis of the Board's expertise. It was applied sparingly in only a few cases in the 1950's and accordingly any injustices involved in its application were limited to a relatively few instances.

In the 1960's, however, the Board began applying this procedure on a more widespread basis and has used it to give bargaining rights in hundreds of cases to unions, many of which had lost Board elections. It has now become a common method of obtaining indirect certification. As stated in Schlossberg's Handbook for Union Organizers cited above, "Because of the new, more liberal attitude of the NLRB toward card majorities, many unions have based their recognition demands on card majorities," (p. 87). The current practice was recently described by the Court of Appeals for the Sixth Circuit as follows:

> "No election was held; neither did the union seek one. It followed a now popular procedure of filing unfair labor practice charges against the company, having its claim of a bare majority sustained, and thus obtaining bargaining rights without an election." *NLRB* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609, 619 (1967).

As the Court of Appeals have come to realize that the Board has changed this from an extraordinary remedy to a common method for granting bargaining rights, they have become more critical and have refused to enforce the Board's bargaining orders in an increasing number of cases. They have noted that the practice assumes that authorization cards are a reliable indication of employee wishes, and that this is a wholly false and unwarranted assumption. Perhaps the most comprehensive statement of the unreliability of authorization cards is contained in the opinion of the Court of Appeals for the Fourth Circuit in *NLRB* v. *S. S. Logan Packing Company,* 386 F. 2d 562, 565, 566 (1967). That Court stated:

> "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. This, the Board has fully recognized. So has the AFL-CIO. . . .
>
> "The unsupervised solicitation of authorization cards by unions is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying 'No.' This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance.
>
> "That is not the most of it, however. Though the card be an unequivocal authorization of repre-

> sentation, its unsupervised solicitation may be accompanied by all sorts of representations. 'We need these cards to get an election. You believe in the democratic process, don't you? Do you want to deny people the right to vote? Isn't it our American way to resolve questions at the polls? Do you want to deprive us of that right? Are you a Hitler or something?'
>
> "As the affidavits tendered by the employer in this case indicate, unsupervised solicitation of cards may also be accompanied by threats which the union has the apparent power to execute. . . ."

After discussing some of the threats commonly used by organizers and their effect of compelling employees to sign cards, the Court continued:

> "The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be non-conformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. . . .
>
> "For such reasons, a card check is not a reliable indication of the employees' wishes."

The traditional purpose of cards ever since the adoption of the National Labor Relations Act has been to make a showing of interest to get an NLRB election, i.e., to demonstrate to the Board that enough employees are interested to justify it in holding an election (see 15 *NLRB Annual Report* 31 (1950)).

To support its new card doctrine, however, the Board has had to ignore the traditional purpose of such cards

and give then an entirely different meaning and significance. The Board has indulged in the fiction that such cards constitute a formal, legal, binding, written contract between the parties, at least to the exent of invoking the legalistic parol evidence rule of formal contract law which presupposes the existence of a contract between parties dealing at arm's length. Applying the parol evidence rule, if the wording of the card designates a union as representative, absent proof of fraud as gross misrepresentation the Board will not permit employees to testify that they did not intend the card to make the union their representative. In the Board's words, "subjective evidence as to the intent of the signers is irrelevant," *Bauer Welding & Metal Fabricators, Inc.*, 154 NLRB 954, n. 1 (1965), and to give consideration to such testimony of card signers is "but to ignore the proven wisdom of the parol evidence rule," *Dan Howard Mfg. Co.*, 158 NLRB 805, 807, n. 5 (1966).

Moreover, the Board will not let employees revoke their cards by any means less than formal written notice to the union. It has even refused to recognize revocation by written notice sent to the Board itself, even though employees were following advice of the Board's Hearing Officer in addressing their notice to the Board's office. *Arkansas Grain Corp.*, 163 NLRB No. 92 (1967). By requiring the employee to send written notice to the union, the Board forces him to expose himself to the very importunings and pressures by union organizers which he sought to avoid in the first place by signing the card.

Thus by treating the card as a formal contract the Board uses it to frustrate and pervert the prime purpose of the Act to determine the genuine free choice of

employees whether they want a union to represent them. It would hardly be possible to devise a practice more directly contrary to the purposes of the Act and more inconsistent with their effectuation.

Although an employer cannot help but have good faith doubt of a union's majority claim based on cards, the Board's doctrine places him in an impossible dilemma. If he does not investigate the validity of the cards, the Board considers his failure to do so an indication that he did not have good faith doubt. If he does investigate, on the other hand, he is treading the dangerous ground of questioning employees about organizing matters and it is virtually impossible for him to avoid doing something that the Board will find an unfair labor practice.

If the Board does find any unfair labor practice in such investigation, even of the most technical or minor nature, it then frequently holds that such unfair labor practice is evidence of the employer's bad faith. An excellent illustration is provided in *Dixie Cup Division of American Can Company,* 157 NLRB 167 (1966) where a union with authorization cards from 182 of the 304 employees in the unit lost a Board election by a vote of 81 to 200. The union then alleged that the company's communications had interferred with the election and it filed unfair practice charges and requested an order to bargain on the basis of cards. In investigating the validity of the cards and preparing its defense, the company's attorneys interviewed the 304 employees to find out whether they had voluntarily signed cards and whether any misrepresentations were made. This investigation disclosed, and the Board's Trial Examiner later found, that at least 4 cards were forged, 22 were signed by persons unknown, and 45

cards were obtained by threats or misrepresentation. When these cards were eliminated, the union did not have a majority and the Board could not order the company to bargain. However, it did find an unfair labor practice because "on at least three occasions employees in the course of interviews with Respondent's attorneys were questioned as to the identity of the persons from whom they received union authorization cards." Although these were obviously isolated instances which would inadvertently occur in practically any interrogation of a substantial number of employees, the Board found them sufficient to justify an unfair labor practice ruling against the company.

The Board's doctrine also collides with other policies of the Act relating to the determination of proper bargaining units. Union representation and collective bargaining can occur only in relation to an appropriate bargaining unit, and the determination of the appropriate unit is inseparable from the determination of majority status in that unit. When a union demands bargaining on the basis of cards, an employer frequently has doubts about the unit demanded by the union as occurred in the case here before the Court. Here the union made several different bargaining unit demands, varying all the way from the smallest unit of 14 wire weavers to a comprehensive unit of 87 production employees. Its final demand was the smallest unit of 14 wire weavers in which it had a majority of cards and in which it lost a Board election. The Trial Examiner and the Board found that the employer's doubts about the appropriateness of the union's various unit requests could not justify a refusal to bargain. In the words of the Trial Examiner whose decision was adopted by the Board, ". . . a good faith, but erroneous,

belief that a unit is inappropriate is no defense to a refusal to bargain."

It is obvious that the union in the present case, as in other card cases, demanded a unit based solely on its extent of organization—the unit in which it had a majority of cards and thought it could win an election. Thus the Board's card doctrine is custom-made to give unions bargaining rights in units determined solely on the extent of the union's organization. The practice of giving bargaining rights in such units flies directly in the face of the provision of section 9(c)(5) of the Act that "In determining whether a unit is appropriate for the purposes specified in section (b), the extent to which the employees have organized shall not be controlling."

The Board's card rulings usually contain, as in the present case, a pro forma recital that the employer's refusal to recognize the union was not based on good faith doubt but instead was motivated by a desire "to gain time in which to dissipate the union's majority." The majority referred to, of course, is that fleeting and evanescent majority of cards of questionable validity signed under unknown circumstances and for unknown purposes and reasons. The desire to gain time to dissipate that majority refers, of course, to the employer's desire to have a Board election in which employees will have an opportunity to hear both sides and to express their informed choice in the secrecy of the voting booth free from coercion or restraint from any source.

The Board's card orders also commonly contain a recital that the employer has made a fair election impossible. Usually, as in the present case, this recital is unsupported by any evidence or rationale. To arrive

at this point, the Board takes a curiously different view of employees from that which it uses to support the reliability of cards as evidence of majority status. In treating cards as reliable evidence, it regards employees as shrewd, sophisticated, fully informed in the intricacies of labor law, and unafraid of union coercion. To support its recital that an employer has made a fair election impossible, it views employees as naive, gullible, ignorant, and so timid that they are frightened by the mildest expression from their employer. Both extremes are wrong. It is unnecessary to view employees as anything other than what they are—normal, average citizens who vote in public elections and elect the President, Vice President and Congress of the United States and state and local public officials, and are accustomed to election campaigns and capable of evaluating campaign propaganda. When they are regarded as what they actually are, it is apparent that the secret ballot election provided by Congress is the only appropriate method of determining majority status in representation matters.

Although the Board normally makes the foregoing recitals, they are not essential to its doctrine of ordering bargaining on cards, accordingly, they are largely window dressing. Under the Board's doctrine, nothing more is needed than a Board finding that the employer refused to recognize a union having a majority of cards and that he did not have good faith doubt of the majority. In *H. & W. Construction Company, Inc.*, 161 NLRB 852 (1966), the Board was confronted with a case involving nothing more than a bare demand by the union for recognition on cards and a refusal by the employer. In the Board's words, "The charge did not allege that the Respondent had committed any other

unfair labor practices," and the Board found none. Nevertheless it ordered the company to bargain with the union on the basis of cards. One Board member dissented from this ruling that "a union with a demonstrated majority of cards *must* be recognized". 161 NLRB at 859.

The Board's authorization card doctrine has been the subject of wide controversy and there is extensive literature on the subject, much of it directed to side issues such as the recitals mentioned above which appear in the Board's decisions but are not really essential to its doctrine. One must agree with the comment of the United States Court of Appeals for the District of Columbia in its recent decision in *NLRB* v. *Henry I. Siegel Co., Inc.* (Docket No. 21,131, decided January 9, 1969) where a union obtained cards from 113 of the 182 employees and petitioned for a Board election in which it received only 48 votes out of 172 cast. In denying enforcement of the Board's order to bargain on cards, the Court of Appeals stated:

> "We regard as peripheral many of the propositions posed and debated so vehemently in the papers before us and in the extensive literature key-numbered under this heading. Such off-target inquiries include: Did the employer say this or did he say that to the employees? Did the Union organizers say definitely that an election would be held, or did they only clearly intimate it? Should these three votes be counted or should they not? Did pulpit expressions of the village priest really intimidate his parishioners or obstruct their freedom of action in a purely economic matter? If so, is the action of the priest to be ascribed to the company-employer? Did 51 per cent of the employees sign the cards or only 48½ per cent of them? Did the Union organizer *tell* the employees

> the purpose of the cards was to get an election, or did he only *intimate* that purpose? Did he say an election was *a* purpose, or *the* purpose, or the *sole* purpose? Did the president of the company say the plant *would* be abandoned, or did he say it *might* be abandoned? Were these three specified ballots valid or invalid? Who was afraid of what?"

It is submitted that the best answer and the only appropriate answer under the policies adopted by Congress is the secret ballot election for determining questions of majority status.

3. The Board's Ruling That the Company's Election Campaign Statements Coerced and Restrained the Employees Impairs the Freedom of Speech Guaranteed by the First Amendment of the Constitution and by Section 8(c) of the Act

During the campaign preceding the NLRB consent election, the company communicated with its employees through a series of letters and speeches designed to inform them on certain economic facts of life and on the character of the Teamsters Union which sought to represent them. The thrust of its statements may be summarized as follows:

1. It briefly recounted the history of the Sinclair Company, noting that it had formerly been a family-owned business, that it had been hurt financially by a 13-week strike some 15 years ago, that the business had not been highly prosperous and the family had been forced to sell control to Lindsay Wire Weaving Company of Cleveland, Ohio, and that like any other business it could not stay in business unless it made a profit.
2. That the character of the Teamsters Union reflects the character of its top officials, that a number of

top officers of the Teamsters Union have acted in their own private interest in handling union funds and in their conduct of collective bargaining and strikes, and the last two presidents of the union had been convicted of serious crimes in connection with their handling of union matters.

3. That if the employees voted in the Teamsters Union they could hardly hope to control its decisions and actions, and it might strike for unreasonable demands that could make the company's costs excessive and drive it out of business.

It would hardly be possible to make a more restrained statement of economic facts of life and of established facts about the union. They are the same kind of statements of which the Court of Appeals for the Second Circuit has said:

> "... statements as to the economic effect of unionization are the kind of speech protected by § 8(c). Rather than being threats of reprisals to be imposed because of the employer's anti-union bias, these remarks were a prediction as to the likely economic consequences of unionization. . . . Although the Board apparently thinks workers should be shielded from such disconcerting information, an employer is free to tell his employees what he reasonably believes will be the likely economic consequences of unionization that are outside his control, as distinguished from threats of economic reprisal to be taken solely on his own volition. Cf. Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. L. Rev. 38, 77-82 (1964). If § 8(c) does not permit an employer to counter promises of pie in the sky with reasonable warnings that the pie may be a mirage,

> it would indeed keep Congress' word of promise to the ear but break it to the hope." *NLRB* v. *River Togs, Inc.*, 382 F.2d 198, 201, 202 (1967).

The Board could not point to any threat in any of the employer's communications, but it ruled that the "totality" of his communications restrained and coerced the employees.

The Board's "totality" is a meaningless term in this connection. No one knows what it means. It would seem that if it means anything it must mean all of the employer's communications added together. And yet the Board did not mean all of the communications. The totality of the employer's communications included distribution of copies of Senator Robert F. Kennedy's book, *The Enemy Within,* in which the author reported on certain union abuses and criminal conduct of certain union officials disclosed in hearings of the Senate Select Committee on Improper Activities in the Labor or Management Field, also known as the McClellan Committee, of which the author had been Chief Counsel. After that fact was noted and commented on in the public press, the Board issued a Supplemental Decision adding a footnote explanation that it did not mean to include "distribution of the book 'The Enemy Within' as a part of the totality of the Respondent's conduct in violation of Section 8(a)(1) of the Act." (A. 204)

The only difference between the separate communications of the employer and their totality in this case is mere repetition, because the employer restated the same economic facts and facts about the union a number of times. We submit that speech does not lose its constitutional protection because of emphasis by repetition.

The employer's communications here did not even approach the limits of protected free speech as those limits were recently stated by this court:

> ". . . cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'" *Linn* v. *United Plant Guard Workers,* 383 US 53, 62 (1966).

And yet the Board selected a sufficient number of isolated statements out of the employer's communications to constitute "substantial evidence," gave them its own meaning under its "expertise," and ruled that the "totality" coerced employees and was an unfair labor practice. The Court of Appeals accepted the Board's ruling on the theory that the question was whether the Board's findings "are supported by substantial evidence" and its theory that interpretation of the employer's statements "is a question essentially for the specialized experience of the Board."

We submit that the Board should not be permitted to abridge constitutional freedom of speech on the basis of findings based merely on "substantial evidence" which may be contrary to the overwhelming preponderance of the evidence in the record, and interpretations of the meaning of an employer's statements made in the exercise of so-called expertise by a Board whose members are not even required to have legal training and often do not. The Board has no special expertise in determining the meaning of language, and the courts with their training and experience are far more capable in this area than the Board.

We submit that, at a minimum, constitutional freedom of speech should not be limited on the basis of any-

thing less than a preponderance of the evidence and a full review of the meaning of an employer's statements by qualified judges unhampered by any "substantial evidence" rule or by any requirement of deference to findings made by the Board.

If freedom of speech is not given at least this minimum protection, it will continue to be abridged by action of an administrative agency under a law made by Congress, through a process which this Court has described:

> "... unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines* v. *United States*, 371 US 156, 167 (1962).

The constitutional right of free speech should not be subjected to this kind of rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be reversed and an order should be entered setting aside the order of the Board.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 573.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GISSEL PACKING CO., INC., ET AL.

No. 691.

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner,

vs.

GISSEL PACKING CO., INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO.

OPINIONS BELOW.

The opinion of the Court of Appeals (A. 316-318) is reported at 398 F. 2d 336 (4 Cir. 1968). The decision and order of the National Labor Relations Board (A. 314-315; 250-309) are reported at 157 NLRB 1065.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 28, 1968 (A. 316). On September 17, 1968, Mr. Justice Black extended the time for filing the Union's petition for writ of certiorari to and including October 26, 1967. On September 26, and October 26, 1968, the Board (No. 573) and the Union (No. 691) respectively filed petitions. On December 16, 1968, both petitions were granted and consolidated for hearing (A. 321). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and Section 10(e) of the National Labor Relations Act, 29 U. S. C. 160(e).

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, *et seq.*) are set forth in the Supplemental Appendix, *supra*, pp. 1-13.

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Act, as amended, imposes the duty to recognize a union upon an employer only under circumstances: (1) where the union has been certified by the National Labor Relations Board after a Board conducted election or (2) where it can be proved that an employer has actual knowledge (by means other than authorization cards) that a union represents a majority of its employees in an appropriate unit.

2. Whether unambiguous authorization cards signed by a majority of employees unequivocally designating a union to represent them in respect to wages, hours and conditions of employment, are so inherently unreliable that an employer may refuse to recognize a union so designated without violating Section 8(a)(5) of the National Labor Relations Act, as amended.

3. Whether the Court of Appeals erroneously construed Section 8(a)(5) of the National Labor Relations Act, as amended, in concluding that, irrespective of his other unfair labor practices, an employer is justified in refusing to recognize a union that bases its claim to representative status on the possession of unambiguous authorization cards signed by a majority of the employees obtained without misrepresentation, coercion or taint of any kind.

STATEMENT.

A. The Board's Finding of Fact.

In 1960, Gissel Packing Company, Inc., hereinafter referred to as the Company or Employer, reacted to a Union organizing campaign by engaging in threats to refuse to bargain with the Union, to close its plant located in Huntington, West Virginia, or greatly to curtail its operations, and to discriminate against employees who joined the Union; the Company also implied that the employees would be given the benefit of group insurance if they rejected the Union.[1] In 1963, shortly after employee Mount was hired, Company Vice President Charles Gissel told him that the shop was non-union and that any employee

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1. After a hearing, a Trial Examiner found the above actions of the Company to be unfair labor practices violative of Section 8(a)(1) of the Act (Case No. 9-CA-2068). (Supp. A. 14-33.) No exceptions were filed to the Trial Examiner's Intermediate Report (A. 255).

"caught" talking to a Union representative would be discharged (A. 60).

In September 1964, aware of the Union's activities at two other Huntington plants,[2] Vice President Charles Gissel individually interrogated employees Frye and Mount as to whether they had engaged in conversations concerning the Union and threatened them with discharge if either was caught talking to a suspected Union agent (A. 265; 61, 93-94).

The Union resumed its organizing efforts in January 1965,[3] and between January 13 and 22, thirty-one of the forty-four to forty-seven unit employees signed unambiguous union cards[4] authorizing the Union to represent them in collective bargaining.

In January, employee Adkins heard Vice President Gissel tell a group of employees that "[i]f the Union got in,

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2. Unfair labor practice hearings involving *S. S. Logan Packing Co.*, 152 NLRB 421, modified 386 F. 2d 562 (4 Cir. 1967), and *Sehon Stevenson & Co., Inc.*, 150 NLRB 675, enforced 386 F. 2d 551 (4 Cir. 1967), had been held in Huntington, West Virginia in the summer and September of 1964, respectively.

3. All dates hereafter shall refer to the year 1965, unless otherwise specified.

4. The cards read (A. 264; 241):

APPLICATION

FOOD STORE EMPLOYEES UNION, LOCAL # 347

P. O. Box 2751 Charleston, W. Va.

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours and working conditions.

.....	.....
Employer's Name	Your Name
.....	.....
Employer's Address	Your Street Address
.....	.....
Date	City and State
	.....
	Your Telephone Number

he'd just take his money and let the Union run the place the way they wanted to" (A. 270; 134).

On January 22, Union representative Spencer advised Vice President Gissel that the Union represented a majority of employees and requested recognition and bargaining; Gissel refused "to talk about the Union" and referred Spencer to the Company's attorneys (A. 256; 12, 17-18). The same day, Spencer confirmed his telephone request for recognition in a letter to Gissel in which he offered to submit signed authorization cards to the Company, "so that there will be no possible doubt as to our majority status".[5]

On January 26, the Company rejected the Union's request in a letter which: (1) stated that the Union had lost an earlier NLRB election[6] and that the Company did "not believe that there has been any change in circumstance or opinion of our employees since that time"; (2) alleged that the Company was "advised" that the Union's organizing technique involved the obtaining of "signatures on so-called authorization cards by a variety of means and representations which are not compatible with a free exercise of an employee's choice", including information "of instances of direct misrepresentation in obtaining employees' signatures"; (3) denied that truck drivers were "a part of any appropriate bargaining unit"; and (4) invited the Union to file for a Board election (A. 257-258; 233). At no time did the Company avail itself of the opportunity under Section 9(c)(1)(B) of the Act to petition for an election (A. 288).

In the early part of February, Vice President Gissel (1) interrogated one employee as to whether he had heard any-

5. Spencer's letter noted that truck drivers were to be included in the requested unit (A. 257; 232).

6. The election referred to was held within thirty days after January 27, 1961, in a unit of production and maintenance employees "including truck drivers [and] truck driver salesmen * * *" (Supp. A. 34-38).

thing about the Union and if any Union man had been around to sign him up, (2) asked employee Moore whether employee Don Kidd was the leader of the Union, stating that Kidd would be immediately discharged if Gissel discovered him to be such a leader,[7] (3) requested Moore to report to Gissel all he could learn about the Union, including the names of the employees who had signed cards, (4) asked employee Frye (a) if he knew anything about the Union, (b) what the Union had offered him and (c) stated that he could offer Frye more than the Union could,[8] (5) asked an employee if he would join in a "walk-out",[9] (6) told a group of employees "[t]he hell with the Union * * * I'm going to leave [the plant] and turn it over to them,"[10] (7) later in February said to a group of employees that he did not want "to hear any more about this Union stuff"—to "get out" if they could not do their work and (8) to another employee, Gissel threatened that the Union would

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7. Much of the conduct in the instant case found by the Board to have violated Section 8(a)(1) is similar to the unfair labor practices committed by this Company in 1960 (NLRB Case No. 9-CA-2068). In that case the Board found *inter alia* that Herbert Gissel unlawfully had told employees that only those who did not sign Union cards would retain their jobs (Supp. A. 22-23).

8. In 1960 Company President Paula Gissel in a captive audience speech to all employees promised the benefit of group insurance if they rejected the Union (Supp. A. 20).

9. In the earlier case, Paula Gissel told employees that those who wanted to walk out could do so, that the plant could still operate with a smaller work force (Supp. A. 17).

10. During the previous union organization campaign at Gissel in 1960, Paula Gissel told employees that rather than accept the Union she would close the plant or greatly curtail its operations. This threat was confirmed by Herbert Gissel and Edward Gissel who on separate occasions told different groups of employees that their mother (Paula) would shut down the plant and draw social security before accepting a union (Supp. A. 17, 23, 24-25).

have to "fight him first", stating that it would not "get in" (A. 268-270; 62, 94-96, 102-104, 111-112, 134, 141).[11]

In this context, on February 10, Spencer by letter renewed the Union's request for recognition, pointing out that "[t]he coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election by the employers is most difficult for us to combat" (A. 258; 235). Spencer again offered to deliver the signed cards to the Company for check against payroll records to prove the Union's majority (A. 258; 235). Vice president Gissel answered on February 12, asserting that the Union's "approach * * * bolsters our opinion that you do not really honestly represent a majority of the employees." No other reason for doubting the Union's majority was given (A. 259; 237-238). Replying on February 16, the Union made a final unsuccessful attempt to achieve recognition from the Company, again offering the authorization cards for inspection (A. 260; 239).

In March and April the Company continued its anti-Union campaign (1) by interrogating employee Burchell as to whether employee Mount had said anything about a Union, directing him to stay away from Mount, who would be "bad" for him (A. 268-269; 103-104), (2) by further inquiring of Burchell as to whether employee Hysell had induced Burchell to attend a Union meeting or sign a card (A. 269; 104), (3) by engaging in surveillance of a Union meeting (A. 268, 271-274, 283-286; 63-65, 89-90), (4) by asking Mount, in the presence of Frye, whether he attended the meeting, telling him Gissel had knowledge of such Union meeting attendance (A. 275; 65, 90), and (5) by changing

11. Charles Gissel was repeating the threat made by his mother a few years before that attempts by employees to designate a union as their collective bargaining representative were futile gestures because the Company would not recognize the Union even if the employees desire it (Supp. A. 20-21).

the hours of work of Mount and Frye and subsequently discharging them with a profane reference in respect to what they could do with the Union (A. 276-283, 286; 67-68, 93).

MAJORITY.

As noted above, thirty-one employees in a unit of forty-four to forty-seven employees signed unambiguous union authorization cards. No employee was told that the card would be used to get an election, that a majority had already signed, that initiation fees would be waived or that he would lose his job if he did not sign.[12] Indeed, the only statements made to employees pertinent to the cards were that the cards would be presented by the Union to the Employer to achieve recognition and bargaining (A. 56). Moreover, there is no evidence that any of the employees changed his mind about designating the Union to represent him. On the contrary, there is evidence of continued adherence to the Union, for the record reflects that a substantial number of employees, "perhaps all but three", attended a Union meeting in April (A. 274; 138).

B. The Board's Conclusion and Order.

The Board concluded that the Company interfered with, restrained and coerced employees in violation of Section 8(a)(1) of the Act by interrogating employees about their Union activities and the conduct of the Union, asking them to learn of the Union activities of others, threatening them with discharge, promising economic benefits, and creating the impression of and engaging in surveillance; the Board also concluded that employees Mount and Frye were discriminatorily discharged in violation of Section 8(a)(3) and (1), and further concluded that the Company violated

12. All of the Union's authorization cards herein were obtained without misrepresentation, coercion or taint of any kind.

Section 8(a)(5) and (1) of the Act in respect to its refusal to recognize the Union which had been designated by a substantial majority of employees by their execution of unequivocal authorization cards in a clearly appropriate unit (A. 299).

The Board rejected the claim that the Company had a good faith doubt as to the Union's majority status[13] for the reasons that (1) it ignored the Union's offer to submit for examination and comparison with payroll signatures the signed authorizations upon which the Union relied; (2) it failed to file an employer's representation petition with the NLRB; (3) its asserted reasons for refusing to recognize the Union were unsubstantiated or insubstantial;[14]

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13. The Trial Examiner, after finding that the Company's refusal to bargain was not motivated by a good faith doubt of the Union's majority, noted that "there is language in *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 738-740, which suggests that a good faith doubt concerning the Union's majority is no defense to a refusal to bargain if the Union in fact represented a majority." (A. 291, n. 41). The Board stated that it "need not" rely upon the Trial Examiner's interpretation of the *Bernhard-Altmann* case, *op. cit.*, in concluding that Respondent violated Section 8(a)(5) of the Act (A. 315, n. 2), see *infra*, pp. 80-83.

14. (1) As noted above, no evidence was presented to support the Company's charge that authorization cards were obtained by misrepresentation or other means incompatible with a free exercise of an employee's choice (A. 263-264, 288; 56).

(2) The Company understood that the Union's requested unit was the same as that found by the Board to be appropriate in 1961. The Board, citing *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 291 (4 Cir. 1964), held further "that 'even if the company entertained doubt [as to the appropriateness of the unit], it is no defense to a refusal to bargain charge where the unit is proper'" (A. 287, n. 38).

(3) The Company's evidence that its representatives "decided that maybe they [the Union] might not have a majority" because it lost an NLRB election four years earlier was inconsistent with the frequently exercised right of employees to change their minds. The Board further found that a similar argument had been rejected by the Fourth Circuit in *N. L. R. B.* v. *Overnite Transportation Company*, 308 F. 2d 279, 283 (4 Cir. 1962).

(4) its course of unfair labor practice conduct both before and after the Union's request for recognition constituted (a) an "absolute refutation" of the Company's good faith claim, (b) a program to destroy the Union's majority, and (c) "a positive rejection by the Company of the principle of collective bargaining." The Board also rejected the contention of the Company that a Union can never establish its majority on the basis of cards but can do so only in a Board-conducted election.[15]

The Board ordered the Company to cease and desist from the unfair labor practices found, to offer reinstatement with back pay to the employees discriminatorily discharged, to bargain with the Union upon request, and to post appropriate notices (A. 301-303, 315).

C. The Decision of the Court of Appeals.

The Court held that substantial evidence supported the Board's findings that the Company coerced its employees in the exercise of their rights in violation of Section 8(a)(1) of the Act and discriminatorily discharged two employees because of their Union membership and activity in violation of Section 8(a)(3) and (1) (A. 317). The Court rejected the Board's conclusion that the Company had re-

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15. In finding a violation of Section 8(a)(5), the Board relied upon this Court's decision in *United Mine Workers of America* v. *Arkansas Oak Flooring Company*, 351 U. S. 62, 74-75, 76 S. Ct. 559, 566-567 (1965); the Fourth Circuit's decisions in *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 291, 292 (4 Cir. 1964); *N. L. R. B.* v. *Overnite Transportation Company*, 308 F. 2d 279, 283 (4 Cir. 1962) and *N. L. R. B.* v. *Inter-City Advertising Co.*, 190 F. 2d 420, 422 (4 Cir. 1951); and the following decisions in other circuits: *N. L. R. B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179 (2 Cir. 1962); *N. L. R. B.* v. *Wheeling Pipe Line, Inc.*, 229 F. 2d 391, 393 (8 Cir. 1956); *N. L. R. B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206, 209 (9 Cir. 1954) (A. 287-291).

fused to bargain in violation of Section 8(a)(5) and (1). *Inter alia*, the Court said (A. 317-318):[16]

> In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election.[3] The reasoning elaborated in those decisions applies with equal force here * * *.

3. *Crawford Mfg. Co.* v. *NLRB*, 4 Cir., 386 F. 2d 367, cert. denied 36 LW 3403, [390] U. S. [1028]; *NLRB* v. *S. S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562; *NLRB* v. *Sehon Stevenson Co., Inc.*, 4 Cir., 386 F. 2d 551; *NLRB* v. *Heck's Inc.*, 4 Cir., [398] F. 2d [337] (decided this day).

1. The 1947 Amendments.

To appreciate the full impact of the cryptic decision of the Fourth Circuit herein, it must be considered in the light of the cases cited in its opinion[17] and other of its

16. The Court made reference to the Company's claimed doubt of the Union's majority "buttressed by the fact that a few years earlier the Union had lost a valid secret election after a similar claim of majority status." The Court made no mention of the unfair labor practices of the Company which antedated the election. See *supra* pp. 3-4, ns. 7-11 (A. 317).

17. See n. 3 of quotation, above (App. 318). Particularly inapposite is *Crawford Mfg. Co.* v. *N. L. R. B.*, 386 F. 2d 367 (4 Cir. 1967), certiorari denied, 390 U. S. 1028 (1968). That case presented issues involving the Board's *Cumberland Shoe* doctrine [*Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F. 2d 917 (6 Cir. 1965)], and *Bernel Foam* doctrine [*Bernel Foam Products, Inc.*, 146 NLRB 1277], neither of which is involved in the instant *Gissel* case. In *Crawford, op. cit.*, the Court found that considerable misapprehension in the minds of employees in respect to the purpose of the authorization cards was generated by representations of the Union's organizer—a fact not extant herein. Apparently *N. L. R. B.* v. *General Steel Products, Inc., etc.*, in No. 573, consolidated herewith, contains issues relating to the *Bernel Foam* and *Cumberland Shoe* doctrines of the Board. *Sinclair Co.* v. *N. L. R. B.*, in No. 585, scheduled for argument on the same day as *Gissel*, also apparently involves the Board's *Bernel Foam* rule.

recent decisions.[18] The Fourth Circuit's doctrine was first and most fully enunciated in *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 568-570 (1967), where the Court held that the elimination in the 1947 amendments of the Act of the phrase "any other suitable method" from Section 9(c) withdrew from the Board the authority to order an employer to bargain with a union, absent an NLRB certification, unless factually the employer has no doubt (based upon evidence other than authorization cards) that the union represents a majority of the employees.[19] The Court said that where the employer has no doubt of the union's majority status "there is no question of representation to resolve", but "[a] question concerning representation exists * * * when a determination of the union's status and the employer's doubt of it is dependent upon a choice of dubious or debatable inferences arising from * * * evidentiary facts" [386 F. 2d at 569]. Hence, the Court concluded that the resolution of a question concerning representation thus defined was restricted to a secret ballot Board-conducted election [386 F. 2d at 562].[20] Conse-

18. Such additional cases include: *General Steel Products, Inc.* v. *N. L. R. B.*, 398 F. 2d 339 (4 Cir. 1968); *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4 Cir. 1968); cf. *N. L. R. B.* v. *Preiser Scientific, Inc.*, 387 F. 2d 143 (4 Cir. 1947); *N. L. R. B.* v. *Lifetime Door Company*, 390 F. 2d 272 (4 Cir. 1968).

19. In *N. L. R. B.* v. *Sehon Stevenson & Co., Inc., op. cit.*, the Court specifically held that the employer's polling of employees gave him such actual knowledge of majority. Analyses of *N. L. R. B.* v. *Preiser Scientific, Inc.*, 387 F. 2d 143 (4 Cir. 1967) and *N. L. R. B.* v. *Lifetime Door Company*, 390 F. 2d 272 (4 Cir. 1968) and the corresponding Board decisions (*Preiser Scientific, Inc.*, 158 NLRB 1375 and *Lifetime Door Company*, 158 NLRB 13) disclose that the Fourth Circuit sustained each refusal to bargain order of the Board on the Court's view of actual knowledge of majority in each case, except that, as noted *infra* n. 20, *Lifetime Door, op. cit.* does not easily fit into this mold.

20. In *N. L. R. B.* v. *Heck's Inc.*, 398 F. 2d 337 (4 Cir. 1968) involved in No. 573, the Fourth Circuit said [at n. 3]: "Even the Board has agreed with our construction of the Act.

"Section 9(c) of the Act, as amended, prescribes the elec-

quently, it held that no violation of Section 8(a)(5) can adhere to an employer who claims a doubt as to the majority status of a union requesting recognition based on authorization cards and employer scienter of the union's majority status being unprovable by means other than such signed authorization cards.

2. The Alleged Unreliability of Authorization Cards.

In *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 565, the Court said "[it] would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check' * * *", that "[t]he unreliability of the cards * * * is inherent * * * and that [386 F. 2d at 566]:

> An employer could not help but doubt the results of a card check as an indication of the wishes of employees, for there is nothing in the process to allay it. Unless the employer is extraordinarily gullible and unimaginative, he will at least suspect unreliability in the cards and their signatures.[21]

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tion by secret ballot as the sole method of resolving the discretion it formerly possessed—but rarely exercised—to utilize other 'suitable means' of ascertaining representatives" Annual Report of the NLRB for 1948 at p. 32.

It is difficult to perceive how the Court can assert Board agreement with its construction of the Act when it has held contrarily in every similar case since the Fourth Circuit's *Logan* decision and where the Court saw fit to reverse the Board in at least four refusal to recognize cases since that time. The language in the Thirteenth Annual Report of the NLRB obviously referred only to cases where it could issue a Board *certification*. In the Fourteenth Annual Report of the NLRB, 1949, at pp. 19-20, the Board made it clear that it could issue a certification to a union which was recognized by the employer, a view diametrical to that expressed by the Fourth Circuit in *Logan, op. cit.* at 568-570.

21. "In *N. L. R. B.* v. *Logan Packing Co.* [386 F. 2d 562 (4 Cir. 1967)], decided this day, we have considered at some length the serious unreliability of signed authorization cards as an indication of the wishes of a majority of the employees. Because of that unreliability, they should not be accepted as proof of the union's

In *Logan, op. cit.* at 567, 568, the Court suggested that upon the receipt of a Union's claim of majority and a request for recognition "[t]he natural response of an employer entertaining real doubt of the Union's claim is an affirmative investigatory one," and "[a] finding of a Section 8(a)(1) violation out of such investigatory conduct of an employer tends to confirm his claim of good faith doubt of the Union's majority • • •. But in typical cases, subsequent unfair labor practices have a tendency to prove only the employer's opposition to the Union's organiza-

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claim of majority status, and an employer is entitled to doubt the union's claim as long as it is so unreliably founded." *N. L. R. B.* v. *Sehon Stevenson & Co., Inc.*, 386 F. 2d 551, 553 (4 Cir. 1967).

In *N. L. R. B.* v. *Lifetime Door Company*, 390 F. 2d 272 (4 Cir. 1968), the Court appeared to predicate its decision of a Section 8(a)(5) violation on the fact that the employer failed to state that it doubted the union's majority status. Judge Sobeloff, speaking for the majority, reiterated the valid analysis made in *N. L. R. B.* v. *Overnite Transportation Co.*, 308 F. 2d 279 (4 Cir. 1962) and *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 292, (4 Cir. 1964), that the resolution of a genuine doubt of a union's majority status lies in the filing by the employer of a petition under Section 9(c)(1)(B) of the Act. Judge Boreman, concurring in *Lifetime Door, op. cit.*, stated that "[t]here was nothing to indicate any doubt whatever by the Company that the Union had been selected by a majority of the employees as their representative." However, *Lifetime Door, op. cit.*, in accepting union majority status based on authorization cards, seems inconsistent with other Fourth Circuit decisions beginning with *Logan* and thereafter. It suggests a division within the Court itself with Judge Sobeloff adhering to the pre-*Logan* construction of the Act, [he dissented in *Crawford Mfg. Co.* v. *N. L. R. B.*, 386 F. 2d 367 (4 Cir. 1967), and wrote a special concurring opinion in *N. L. R. B.* v. *Sehon Stevenson Co., Inc.*, 386 F. 2d 551 (4 Cir. 1967)], Judge Bryan appearing to take an *ad hoc* position predicated on the particular facts in each case [voting to find a Section 8(a)(5) violation in *Lifetime Door, op. cit.*, and *N. L. R. B.* v. *Preiser Scientific Inc.*, 387 F. 2d 143 (4 Cir. 1967), and against such violation in *Crawford Mfg. Co.* v. *N. L. R. B., op. cit.*, and *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4 Cir. 1968)] and the remaining Fourth Circuit Judges apparently subscribing to the rationale of Judge Haynsworth in *Logan*.

tional efforts; they throw no light on his belief or disbelief of the Union's claim of majority status."[22]

SUMMARY OF ARGUMENT.

I.

In 1935, when the National Labor Relations Board Act was passed, Congress stated the policy of the United States to be to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of negotiating the terms and conditions of their employment." In implementation thereof, Congress enacted Section 8(5) (renumbered Section 8(a)(5) in 1947), which "declares it to be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a). * * * § 9(a), which deals expressly with employee representation,

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22. The Court specifically rejected its holding in *N. L. R. B.* v. *Overnite Transportation Co.*, 308 F. 2d 279 (4 Cir. 1962) that violations of Section 8(a)(1) or (3) subsequent to a bargaining demand may constitute "a refutation of any good faith doubt of the union's claim of majority status." *Logan, op. cit.* at n. 23. In *N. L. R. B.* v. *Sehon Stevenson & Co., Inc., op. cit.*, after finding the employer guilty of two illegal discharges, restraint and coercion in violation of Section 8(a)(1) and (3), the Court said [386.F. 2d at 554]:

> If we had no more in this case than the cards and the finding of violation of Section 8(a)(1) and (3) the Board's order to bargain would not be enforced for the reasons we state today in *Logan*.

In *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998, 1000, 1002 (1968), the Fourth Circuit sustained the Board's findings that the employer had engaged in coercive interrogation, surveillance and threats in violation of Section 8(a)(1) and had discriminatorily discharged six employees in a unit of fifty-six, but held that such illegal conduct did not "undercut the substantiality of its [the employer's] doubts [of the Union's majority status]."

says nothing as to how the employees' representatives shall be chosen * * * [and] does not make it a condition that the representatives * * * shall be certified by the Board, or even be eligible for such certifications * * *". *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 76 S. Ct. 559, 564-575 (1956).

Although the National Labor Relations Act was subjected to the white heat of the crucible of Congressional re-evaluation, reconsideration and amendment in 1947 and 1959, both the policy of the Act fostering collective bargaining and the implementation thereof survived unseared and unchanged and exist in the Act today in identical language to that originally authored by Congress in 1935.

Prior to 1967, this Court and all courts of appeals, including the Fourth Circuit, were in agreement that an employer violated Section 8(a)(5) of the Act when he refused to recognize for purposes of collective bargaining a union representative which had been designated by a majority of his employees by virtue of unambiguous, untainted signed authorization cards. Efforts were made in the Congress that passed the Taft-Hartley amendments in 1947 to change this rule. The bill passed by the House of Representatives sought to amend Section 8(a)(5) by substituting the phrase "currently recognized by the employer or certified as such under Section 9" for the existing phrase "subject to the provisions of 9(a)".

The House Report in its version of the bill made it clear that certification following a Board-conducted election would be the exclusive method of achieving recognition and that an employer would not violate Section 8(a)(5) by refusing to recognize a union designated by a majority of its employees, absent such Board certification. Congress in passing the Senate bill, which retained the language of Section 8(a)(5) as written in the Wagner Act, refused to foist

upon Section 8(a)(5) the election and certification requirements of Section 9(c) and thereby expressed its intention to maintain the interpretation accorded Section 8(a)(5) prior to 1947.

The Fourth Circuit has pounced upon the deletion of the phrase "any other suitable method" from Section 9(c) in 1947 as a basis for its novel theory that Congress intended to proscribe the Board from concluding that an employer had violated Section 8(a)(5) predicated upon a refusal to recognize a designated bargaining agent where the majority proof lay in signed authorization cards. The internal design of the Act and the legislative history of the 1947 Taft-Hartley Amendments show unmistakably that this deletion prohibited the National Labor Relations Board from issuing a Board *certification* based upon cards, petitions, strikes, etc. (and such other methods of proof which were acceptable under the Wagner Act), and specifically was intended to withdraw from the Board the power to issue certifications, based upon cross-card checks, a practice which had continued into 1947. However, since Congress rejected certification as a prerequisite to a refusal to recognize violation, the elimination of the above phrase from Section 9(c) could not affect the existing rights and obligations under Section 8(a)(5) which are subject only to the provisions of Section 9(a).

Moreover, the restriction of certifications under Section 9(c) to the Board election processes is consistent with Congressional intent in 1947 to expand the significance of certifications implicit in the design of Section 8(b)(4)(B), (C), and (D) of the Act. More specifically, the change in Section 9 of the Act wrought by the 1947 amendments which has relevance to a refusal to recognize violation is the addition of Section 9(c)(1)(B) wherein the employer is accorded a right to file a petition for an election with the National Labor Relations Board where he has a real doubt

that the union requesting recognition represents a majority of his employees or where competing unions are claiming such recognition, and, wherein the Board is given exclusive authority to determine the existence of a question concerning representation to be resolved by a secret election.

Despite Congressional awareness of this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co., op. cit.* and the uniformity of court decisions predicating Board bargaining orders on authorization card majorities between 1947 and 1959, Congress did not amend Section 8(a)(5) or Section 9. Indeed, the enactment of Section 8(b)(7) in 1959 further upgraded the value of certification by exempting a certified union from the proscriptions against organizational and recognition picketing by unions. The legislative history of that Section accorded full recognition to the continued right of employees to choose their bargaining representative by means other than an election.

II.

The Fourth Circuit's doctrinaire assertion that authorization cards are inherently unreliable is based on a misapplication of Board rules dealing with two-union situations and is in contravention of (1) established law which regards signatures on documents as presumptively valid and reliable indicia of the signer's intent, (2) Board and judicial acceptance of signatures on authorizations as impressing upon an employer the duty to recognize, and (3) Congressional affirmance in Sections 302, 9(c)(1)(A), 9(e), 8(b)(7) and 401(e) that signed authorizations are a reliable and essential element of the Taft-Hartley and Landrum-Griffin labor laws. Analysis of election procedure reveals that, although elections theoretically permit exposure of employees to "both sides of the issue," they also expose employees to employer restraint, coercion, intimidation, discharge and multitudinous other employer influences which

adversely affect the employees' free choice. In sum, the Fourth Circuit's decisions in the instant and all post *Logan* cases are "the product of an obsession with the infirmities of authorization cards, and a romanticizing of the validity of an election. Cards have been used under the Act for thirty years; the Supreme Court has repeatedly held that certification is not the only route to representative status * * *. No amount of drumbeating should be permitted to overcome, without legislation, this history." Lesnick, H., "Establishment of Bargaining Rights Without an NLRB Election", 65 Mich. L. Rev. 851, 861-862.

III.

Factually, Gissel presents a classic example of a respondent who runs the gamut of unfair labor practices—from restraint and coercion through discriminatory discharge—and then complains that its employees were not given a "free choice" in a Board election. But, although Section 9(c)(1)(B) of the Act grants the employer the power to set Board election machinery in motion, the Company here studiously avoided filing a petition. Under these circumstances, the Company's rejection of the Union's request to recognize and bargain with it in an appropriate unit, made contemporaneously with a tender of a majority of unit employees' signed valid unambiguous authorizations, was a violation of Section 8(a)(5) of the Act. And, thereby the Board's order to bargain, upon request, is an appropriate remedy under Section 10(c) of the Act. *International Association of Machinists [Serrick Corp.]* v. *N. L. R. B.*, 311 U. S. 72, 82, 61 S. Ct. 83, 89 (1940); *N. L. R. B.* v. *P. Lorillard*, 314 U. S. 512, 62 S. Ct 397 (1942); *N. L. R. B.* v. *Franks Bros. Co.*, 321 U. S. 702, 703-706, 64 S. Ct. 817, 818-819 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 687, 64 S. Ct. 830, 835 (1944).

Assuming *arguendo*, that the Company had a "good

faith'' doubt in respect to the Union's majority status, its refusal to recognize the Union as the employees' bargaining representative would be violative of Section 8(a)(5), inasmuch as an employer's ''good faith'' doubt is not relevant to his duty to recognize the designated bargaining representative of his employees. This conclusion follows from decisions of the Board and the courts that an employer acts at his peril when he mistakenly, albeit in good faith, refuses to recognize a union where (1) he believes the unit description to be improper, (2) the unit description is unclear and varies from the unit found by the Board to be appropriate, and (3) he believes the election establishing the union's majority is invalid.

In practical terms, the ''good faith'' test *vis-a-vis* a union's majority status has created serious problems of consistent administration because of the intrinsic difficulty of establishing objective and workable standards for delving into the state of mind of an employer. No combination of words or phrases has avoided a cacophony of discordant conflicting and fluctuating opinions emanating from the Board and the courts.

But this Court in *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 738-740, 81 S. Ct. 1603, 1607-1608 (1961), held that a good faith belief that a union represented a majority of its workers was no defense to a violation of Section 8(a)(2) where the union did not in fact represent a majority. Predicating its holding on protected employee rights and acknowledging the relationship between Section 8(a)(5) and Section 8(a)(2) in this respect, the Court said that ''prohibited conduct cannot be excused by good faith'' and where ''an employer in good faith * * * rejects a union claim, the validity of his decision may be tested in an unfair labor practice proceeding,'' citing Section 8(a)(5). In view of the foregoing and the right of an employer to assuage any real doubt of a union's majority by filing an employer

petition for an election, there is no basis in logic, reason, policy or the internal construction of the Act for according an employer the privilege of evading his statutory duty to recognize the union of his employees' choice, by a showing of good faith.

ARGUMENT.

I.

THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, IMPOSES UPON AN EMPLOYER A DUTY TO RECOGNIZE A UNION UNDER SECTION 8(a)(5) WHERE THE UNION HAS BEEN DESIGNATED BY A MAJORITY OF EMPLOYEES BY MEANS OTHER THAN AN NLRB ELECTION.

> [T]he refusal by [some[23]] employers to accept the procedure of collective bargaining lead[s] to strikes and other forms of industrial strife or unrest which have the * * * necessary effect of burdening or obstructing commerce * * *. [P]rotection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the free flow of commerce * * *. It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by encouraging the *practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization and designation of representatives of their own choosing* for the purpose of negotiating the terms and conditions of their employment * * *[24] [emphasis supplied].

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23. The word, "some", was added by the 1947 amendments.

24. The House bill in 1947, H. R. 3020, contained no public policy statement with respect to the promotion of collective bargaining. H. R. 3020, Report No. 245, p. 3, I Legislative History of the Labor Management Relations Act, 1947, p. 33. Significant is the fact, that despite such attempt to eliminate the above quoted

Thus spake Congress in 1935, setting forth its findings and policies in the National Labor Relations Act, 29 U. S. C. § 151. And although this Act has experienced the white heat of the crucible of Congressional reevaluation, reconsideration and amendment in 1947 and 1959, the foregoing stated policy of Congress has not changed.

Unchanged also since 1935 is the section of the Act which, in implementation of Congress' policy to foster union recognition and collective bargaining, rendered it an unfair labor practice for an employer to refuse to bargain with a union which had been designated or selected by its employees in an appropriate unit for the purposes of collective bargaining, 29 U. S. C. § 158(a)(5) [§ 8(a)(5)].[25] Interpreting and applying Section 8(a)(5) of the Act, the Board early recognized that at least two obligations were imposed by such section upon each employer, i.e., (1) a duty to recognize a union which has been designated or selected by a majority of his employees in an appropriate unit, and (2) a duty thereafter to negotiate in good faith with such exclusive bargaining agent of his employees. The issues presented in the instant case involve only the interpretation and application of the employer's duty to recognize the designated or selected majority representative of the employer's employees.

This Court has consistently held that the Board is justified in finding that an employer violates Section 8(a)

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findings and policies of the Wagner Act, Congress adopted the Senate bill which in identical language reaffirmed the national policy to encourage the practice and procedure of collective bargaining. Ross, Phillip, *The Government as a Source of Union Power*, 134-135, Brown University Press, 1965; cf. *N. L. R. B.* v. *Drivers etc., Local No. 639* [*Curtis Bros. Inc.*], 362 U. S. 274, 289-290, 80 S. Ct. 706, 714-715 (1960).

25. In 1947 all employer unfair labor practices were renumbered by the insertion of an "(a)" between "Section 8" and the particular number of the subsection. For consistency herein we shall use the post Taft-Hartley designations throughout.

(5) where he refuses to recognize for purposes of collective bargaining a union representative which has been designated by a majority of his employees who have signed unambiguous authorizations: *N. L. R. B.* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 60 S. Ct. 918 (1940); *N. L. R. B.* v. *Franks Bros. Co.*, 321 U. S. 702, 64 S. Ct. 817 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 64 S. Ct. 830 (1944). Indeed, every court of appeals, including the Fourth Circuit, has accepted such majority designation based upon signed authorization cards as a valid basis for imposing upon an employer the duty to recognize such union pursuant to Section 8(a)(5).[26] In *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562 (1967), upon which the instant *Gissel* decision is based, the Fourth Circuit rejected the right of a union to obtain recognition from an employer based upon authorization cards where the employer does not have actual knowledge (predicated upon evidence other than such cards) that the union represents a majority of its employees. This novel notion has been specifically rejected

26. This rule was accepted by the courts before the 1947 amendments to the Act: *N. L. R. B.* v. *Clinton Hobbs Co.*, 132 F. 2d 249 (1 Cir. 1942); *N. L. R. B.* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756 (2 Cir. 1940); *N. L. R. B.* v. *Schmidt Baking Co.*, 122 F. 2d 162 (4 Cir. 1941); *N. L. R. B.* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552 (6 Cir. 1940); *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. 2d 780 (9 Cir. 1940); see also: *Continental Oil Co.* v. *N. L. R. B.*, 113 F. 2d 473 (10 Cir. 1940), as well as between 1947 and 1959, the year when the Landrum-Griffin amendments were impressed upon the Act: *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), certiorari denied, 341 U. S. 914, 71 S. Ct. 734 (1951); *N. L. R. B.* v. *Ken Rose Motors Inc.*, 193 F. 2d 769 (1 Cir. 1952); *N. L. R. B.* v. *Marcus Brothers*, 272 F. 2d 253 (2 Cir. 1959); *N. L. R. B.* v. *Clearfield Cheese Co.*, 213 F. 2d 70 (3 Cir. 1954); *N. L. R. B.* v. *Harris-Woodson Co.*, 179 F. 2d 720 (4 Cir. 1950); *N. L. R. B.* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 844 (4 Cir. 1950); *N. L. R. B.* v. *Lewis Motor Co., Inc.*, 180 F. 2d 254 (5 Cir. 1950); *N. L. R. B.* v. *Armco Drainage & Metal Products Inc.*, 220 F. 2d 573 (6 Cir. 1955); *N. L. R. B.* v. *Taitel*, 261 F. 2d 1 (7 Cir. 1958); *N. L. R. B.* v. *Wheeling Pipe Line Inc.*, 229 F. 2d 391 (8 Cir. 1956); *N. L. R. B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206 (9 Cir. 1954); *N. L. R. B.* v. *Hamilton*, 220 F. 2d 492 (10 Cir. 1955).

by several courts of appeals,[27] flies in the face of over thirty years of Board and judicial interpretation[28] and is patently inconsistent with the legislative history of the 1947 and 1959 amendments to the Act.

A. The 1947 Amendments Did Not Divest the Board of Its Authority to Order an Employer to Recognize a Union Whose Majority Status Is Based on Authorization Cards.

In considering the amendments to the Wagner Act in 1947, the House passed a bill which sought to amend Section 8(a)(5) to read as follows: "To refuse to bargain collec-

27. The First, Fifth and Sixth Circuits appear to have repudiated the *Logan* rationale [*N. L. R. B.* v. *Sinclair Co.*, 397 F. 2d 157, 161-162 (1 Cir. 1968); *N. L. R. B.* v. *Goodyear Tire & Rubber Co.*, 394 F. 2d 711, 712-713 (5 Cir. 1968); *N. L. R. B.* v. *Atco-Surgical Supports*, 394 F. 2d 659, 660 (6 Cir. 1968)]; the Second Circuit has spurned it [*N. L. R. B.* v. *United Mineral & Chem. Corp.*, 391 F. 2d 829, 836 (2 Cir. 1968); *N. L. R. B.* v. *Big Ben Department Store, Inc.*, 396 F. 2d 78, 82 (2 Cir. 1968); *Bryant Chucking Grinder Co.* v. *N. L. R. B.*, 389 F. 2d 565, 568 (2 Cir. 1967), certiorari denied, ... U. S. ....., 88 S. Ct. 2055 (1968)]; and the Third, Ninth, Tenth, and District of Columbia Circuits, without reference to *Logan* or the Fourth Circuit, have failed to follow or apply it. *Steel City Transport* v. *N. L. R. B.*, 389 F. 2d 735 (3 Cir. 1968), *N. L. R. B.* v. *C. & C. Packing Co.*, ... F. 2d ..... (9 Cir. 1969), 70 LRRM 2245; *N. L. R. B.* v. *Merrill*, 388 F. 2d 514, 519 (10 Cir. 1968); *International Union, United Auto Workers* [*Preston Products*] v. *N. L. R. B.*, 392 F. 2d 801 (D. C. Cir. 1967), certiorari denied, 88 S. Ct. 2058 (1968); see also *N. L. R. B.* v. *Quality Markets, Inc.*, 387 F. 2d 20, 23 (3 Cir. 1967), where the Court, quoting Board language in *Sunbeam Corp.*, 99 NLRB 546, 550-551, out of context (see *infra*, pp. 46-49, n. 86), accepted the principle, often enunciated by the Board, that an employer's rejection of a union's demand for recognition supported by authorization cards signed by a majority of unit employees is violative of Section 8(a)(5), unless the employer "has a 'good faith' doubt that the union actually commands the purported majority." In finding such a violation based upon an authorization card majority the Court, in substance, held that such cards are not inherently unreliable as interpreted by the Fourth Circuit in *Gissel* and *Logan*.

28. See *supra*, p. 23 and n. 26, 27; see *infra*, pp. 30-33, 68-69.

tively with the representative of his employees currently recognized by the employer or certified as such under Section 9", thus substituting the phrase "currently recognized by the employer or certified as such under Section 9" for the language "subject to the provisions of Section 9(a)." H. R. 3020, p. 21, I Legislative History of the Labor-Management Relations Act, 1947, p. 178.[29]

The House Report in its version of the bill made it clear that certification under Section 9 would be the exclusive method of achieving recognition and that an employer would not violate Section 8(a)(5) by refusing to recognize a union designated by a majority of its employees, absent a Board certification. House Report No. 245 on H. R. 3020, p. 30, I Legis. Hist. LMRA, 1947, p. 321. Indeed, the House bill intended to grant an employer the option of deciding whether or not to recognize an uncertified union which had been designated by a majority of his employees. *Ibid.* "If he wishes not to recognize an uncertified union, or having recognized it stops doing so, the union may ask the Board to certify it under § 9." *Ibid.*

If the Congress had adopted the House bill in this context, the Fourth Circuit's interpretation of Section 9(c) *vis-a-vis* Section 8(a)(5) undoubtedly would have been justified.[30] But the Congress rejected the House bill in this respect and accepted the Senate version instead. Since the Senate bill retained the language of Section 8(a)(5) as written in the Wagner Act [S. 1126, p. 13, I Legis. Hist.

29. Hereafter, the Legislative History of the Labor-Management Relations Act 1947 will be abbreviated: "Legis. Hist. LMRA, 1947" and the Legislative History of the Labor-Management Reporting and Disclosure Act, 1959 will be abbreviated: "Legis. Hist. LMRDA, 1959."

30. The Fourth Circuit in *Logan* relied upon the Taft-Hartley amendments to Section 9(c) to conclude that the Board could not determine that a labor organization represented a majority of employees in a unit without the benefit of a Board-conducted secret ballot election, 386 F. 2d at 368-370; see *supra*, pp. 12-13.

LMRA, 1947, p. 511], Congress rendered the refusal to bargain "subject to the provisions of Section 9(a)" and refused to foist upon Section 8(a)(5) the certification requirements of Section 9(c).[31] Cf. *N. L. R. B.* v. *Drivers, etc., Local Union No. 639* [*Curtis Bros. Inc.*], 362 U. S. 274, 289-290, 80 S. Ct. 706, 714-715 (1960); see also, Sutherland, *Statutory Construction,* 3d ed., 1943, Vol. 2, § 5015.

In *Logan,* the Fourth Circuit postulates that the 1947 deletion of the phrase, "any other suitable method," from Section 9(c) divested the Board of its authority to order an employer to bargain with a union where it had rejected the union's majority claim based upon authorization cards. While it is clear that such amendment rendered Board-conducted elections the exclusive road to *certification,* it is equally clear that the design of the 1947 amendments upgraded the value of a Board certification *vis-a-vis* recognition based upon majority designation, though, as noted above, not rejecting the latter. The Wagner Act history of certifications is instructive in this regard.[32]

For a few years after the passage of the Wagner Act, the Board issued, without an election, certifications based upon cards, petitions, strike participation, statements signed by a majority of employees, membership cards, membership applications, affidavits of membership signed by a majority of employees, stipulations of majority signed by the union

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31. See *United Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U. S. 62, 71-73, n. 8, 76 S. Ct. 559, 564-565, n. 8 (1956).

32. Section 9(c) under the Wagner Act provided that whenever a question concerning representation arose, the Board could investigate such controversy and certify a union representative after "a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

and the employer, and various other methods of proof.[33] However, by 1939, the Board had abandoned the use of any basis for certification other than (1) election, (2) stipulation on the record by both parties to representation hearings, or (3) consent cross checks of authorizations against company records. See *General Box Company,* 82 NLRB 678, 683 and n. 17; NLRB, *Seventh Annual Report,* 1942, p. 58. So although the Wagner Act gave the Board wide discretion in determining bases for certification, the Board gradually developed the policy of "investing its *certifications* with more certainty and prestige by basing them on free and secret elections conducted under the Board's auspices" [emphasis added]. *General Box Company,* 82 NLRB at 683. Significantly, where possible, to expedite certification proceedings by obviating the necessity for an election, the Board continued to rely upon consent cross checks of union cards against company payrolls as a basis for issuing certificates of majority status. *Carnegie-Illinois Steel Corp.,* 40 NLRB 532; *Aluminum Co. of America, Chicago Works,* 56 NLRB 216; see *General Box Company,* 82 NLRB at n. 17.[34] Thus, the deletion of the phrase "or utilize any other suitable method" from Section 9(c) withdrew from the Board its authority to issue certifications based upon cross checks. That such was the intent of Congress was made plain by Senator Murray's concern over the

33. See, e. g.: *Delaware-New Jersey Ferry Co.,* 1 NLRB 85 (membership cards); *Atlantic Refining Co.,* 1 NLRB 359 (petition); *Rabhor Co., Inc.,* 1 NLRB 470 (strike participation); *Lykes Brothers Steamship Co., Inc.,* 2 NLRB 102 (sworn testimony); *Duplex Printing Press Co.,* 1 NLRB 82 (stipulation between parties); see also, NLRB, *First Annual Report* 1936, pp. 103-104; NLRB, *Second Annual Report* 1937, pp. 108-109.

34. The Board's Rules & Regulations [Series 4, § 203.48, effective 1946] provided that with the approval of the NLRB Regional Director, the parties to a representation proceeding could enter into (1) a consent election or (2) a consent card check, either procedure held under the Board's direction and supervision. Thereafter, the Regional Director would issue a certification (if the union's majority status was confirmed) or a report of the results of the election or cross check (if no certification issued).

imposition of a ban upon such "useful and appropriate devices"[35] to accelerate resolution of Section 9 cases:[36]

> The effect of the provision of Section 9(c)(4)[37] read together with the provisions of Section 9(c)(1) would be to prohibit the Board from determining an issue concerning representation by means of a consent card check. This procedure is utilized only where the parties consent and consists of a check of the union's membership cards against the names appearing on the employer's pay roll. Consent card checks make possible a quick determination of whether the employees desire a bargaining representative; they obviate the necessity for a formal proceeding in cases in which there are no issues of fact, thus allowing the Board more time to devote to litigated matters, and they have resulted in substantial saving in both personnel and money.

Manifestly, the deletion of the Section 9(c) language "or utilize any other suitable method", requires a Board-conducted election as a condition precedent to the issuance of a *certification*, but, as noted above, Congress rejected certification as a prerequisite to a refusal to bargain violation. See *Ray Brooks* v. *N. L. R. B.*, 348 U. S. 96, 101, 75 S. Ct. 176, 180 (1954). Having tightened the restrictions on procedures for achieving certification, in enacting the Taft-Hartley amendments, Congress accorded a more important role to certification as compared to that which existed under the Wagner Act.[38]. Thus, after the Taft-Hartley amend-

35. 93 Cong. Rec. 6656 (daily ed. June 6, 1947) (remarks of Senator Murray), II Legis. Hist. LMRA 1947, p. 1567.

36. 93 Cong. Rec. 6664 (daily ed. June 6, 1947) (analysis by Senator Murray of Amendments of National Labor Relations Act), II Legis. Hist. LMRA 1947, p. 1582.

37. In view of the deletion of the phrase "or utilize any other suitable method", from § 9(c), Senator Murray was criticizing Congress' inclusion of § 9(c)(4) which as an exception to § 9(c) permitted waiver of hearing in consent election cases without provision for the waiver of election in consent cross-check cases. See *supra*, n. 34.

38. There were few, if any, advantages of certification over recognition in the Wagner Act.

ments, advantages were given to certified unions over unions recognized by the employer without the benefit of a Board certification:

1) A certified union is protected from concerted action engaged in seeking its overthrow by another raiding union;[39]

2) Only a certified union can "lawfully induce the employees of some 'other employer' to engage in a strike * * * for the purpose of compelling the primary employer to recognize it";[40]

3) A Board certification grants a right to a union to engage in concerted action in support of a jurisdictional dispute;[41]

4) The legality of certain concerted activities sponsored by one union to assist another union in gaining recognition has been held by the Board to turn upon whether the latter union had been certified.[42]

In addition, the Board's long-standing "one-year rule" granting a certified union a right to recognition for a reasonable period of time, normally one year from the date of certification[43] "endows a certified union's status with a measure of security and permanence not enjoyed by a union

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39. § 8(b)(4)(C).

40. § 8(b)(4)(B); *General Box Company*, 82 NLRB 678, 680.

41. § 8(b)(4)(D), *ibid.*, at 681. It should be noted that the same right is accorded a union where the Board has issued a refusal to bargain order, but not to a union which is voluntarily recognized. Without question, in jurisdictional cases a certification grants earlier protection than a Board unfair labor practice order.

42. *General Box Company, op. cit.*

43. *Ray Brooks*, 98 NLRB 976, enforced, 204 F. 2d 899 (9 Cir. 1953), affirmed, 348 U. S. 96, 75 S. Ct. 176 (1954).

whose majority standing and right to recognition is established otherwise * * *."[44]

In view of the foregoing, the conclusion is inescapable that Congress in its 1947 amendments rendered Board certifications more meaningful and severely limited the avenues open to certification, but also determined to leave unchanged the duties and obligations of employers to recognize the representative designated by their employees by means other than an election. *Ray Brooks* v. *N. L. R. B., op. cit.; United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 76 S. Ct. 559 (1956); *cf. N. L. R. B.* v. *Drivers, etc., Local Union No. 639* [*Curtis Bros. Inc.*], *op. cit.*

B. In 1956 This Court Acknowledged an Employer's Obligation to Recognize a Labor Organization Designated by a Majority of Employees Upon Signed Authorization Cards.

In *United Mine Workers* v. *Arkansas Oak Flooring Co.*,[45] 351 U. S. 62; 76 S. Ct. 559 (1956), this Court said that "[a] Board election is not the only method by which an employer may satisfy itself as to the union's majority

44. *General Box, op. cit.*, at 681. A union recognized by proof of majority is subject to a rival union petition and a petition for decertification prior to the conclusion of bargaining which will prevent a lawful employer from executing a contract with the recognized union. Not so with a certified union. *General Box, op. cit.* at 681-682.

45. The basic issue in *Arkansas Oak Flooring, op. cit.*, centered upon the rights of a labor organization which had failed to comply with Section 9(f), (g) and (h) of the Act and involved the problem of federal preemption. There it was held that a state court may not enjoin picketing by a union designated by a majority of eligible employees, the object of which was to obtain the employer's recognition, where the union had not filed affidavits and data then required under Section 9(f), (g) and (h) of the Act. It should be noted that this decision was specifically cited with approval on the floor of the Senate during the debates which led to the Landrum-Griffin amendments. 105 Cong. Rec. 16,400 (daily ed. September 3, 1959), II Legis. Hist. LMRDA 1959, p. 1429.

status" [351 U. S. at n. 8, 76 S. Ct. at n. 8], that "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8(a)(5) of the Act" [351 U. S. at 69, 76 S. Ct. at 564] and that [351 U. S. at 71-72, 76 S. Ct. at 564-565]:

> Section 8(a)(5) declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, *subject to the provisions* of section 9(a)." * * * Section 9(a), [n. 7 omitted] which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *National Labor Relations Board*, 76 U. S. App. D. C. 100, 103, 130 F. 2d 404, 407.[46] It does not make it a condition that the representative * * * shall be certified by the Board, or even be eligible for such certification.

Significantly, the cases cited by this Court as examples of methods other than a Board election "by which an employer may satisfy himself as to the union's majority status" are cases in which the employers were found guilty of violating Section 8(a)(5) for refusing to recognize as the bargaining agents of their employees, union which had been designated by authorization card majorities or signatures of a

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46. The interesting discussion in *Lebanon Steel, op. cit.* should not be overlooked: "The Wagner Act requires no specific form of authority to bargain collectively. * * * An application for union membership implies authority to bargain [citations omitted]. Likewise with registration cards [citation omitted], notwithstanding the signers have not paid dues or initiation fees or been admitted to membership. * * * Not form, but intent, is the essential thing. The intent required is merely that the union or other organization or person act as the employees' representative in collective bargaining." Particular attention should be paid to the Court's analysis of the sufficiency of voluntarily executed dues check-off cards as to grants of authority to the union to bargain for the employees. *Ibid.* at 408; see *infra*, pp. 37-44.

majority of employees on petitions[47] [351 U. S. at n. 8, 76 S. Ct. at n. 8].

Thus, in the cited *Bradford Dyeing* case[48] this Court characterized the union which had been designated by a majority of employees' signed cards[49] as "the bargaining representative selected by the untrammelled will of the majority" [310 U. S. at 339, 60 S. Ct. at 929] and sustained the Board's order to bargain with such bargaining representative. *National Labor Relations Board* v. *Knickerbocker Plastic Co.*, 218 F. 2d 917, 921-922 (9 Cir. 1955), cited by this Court in *Arkansas Oak Flooring, op. cit.*, also involved a refusal to recognize violation predicated upon cards signed by a majority of employees designating the union as bargaining representative. So, too, did other cited cases: *N. L. R. B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 260-261 (9 Cir. 1954);[50] *N. L. R. B.* v. *Kobritz*, 193 F. 2d 8, 12, 14 (1 Cir. 1951).[51]

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47. No distinction in principle exists between signatures of a majority of employees on authorization cards and such signatures on a single petition. If anything, the former constitutes a freer expression of employees' choice since it would appear to be less affected by earlier signings.

48. *N. L. R. B.* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 60 S. Ct. 818 (1940).

49. The Board found that on the critical date the charging union had 465 or 467 signed cards out of a total unit of less than 780 employees. See *Bradford Dyeing Ass'n*, 4 NLRB 605, 615; see also, 310 U. S. at 339, 60 S. Ct. at 929.

50. In the *Parma Water* case, *op. cit.*, there was also an informal vote at an employee's home.

51. Interestingly, *N. L. R. B.* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501, 503-504 (7 Cir. 1954) was cited—a case involving a claimed violation of Section 8(a)(2) of the Act where the employer recognized and signed a contract with a new association designated by a majority of employees' signatures on a petition in the face of a representation claim of an incumbent union which had reached an impasse in collective bargaining. Cf. *Indianapolis Newspapers, Inc.*, 103 NLRB 1750 (7 Cir. 1953). The Seventh Circuit said [at 504]: "What respondent has done is merely to accept petitions

Thus, although *United Mine Workers* v. *Arkansas Oak Flooring Co., op. cit.*, did not specifically involve a refusal to recognize violation under Section 8(a)(5), it is clear that this Court determined that the 1947 amendments did not render necessary any judicial alteration in the existing decisional law. Inexorably, it brushed aside the arguments predicated on the 9(f), (g) and (h) of the Taft-Hartley amendments unequivocally to restate the law that Section 8(a)(5) imposes an obligation on an employer to recognize and bargain with the representative of the employees' choosing, whether or not such representative is certified by the Board or designated by a majority of employees on signed cards or petitions. See also, *N. L. R. B.* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 60 S. Ct. 918 (1940); *International Association of Machinists* [*Serrick Corp.*] v. *N. L. R. B.*, 311 U. S. 72, 81-82, 61 S. Ct. 83, 89-90 (1940); *N. L. R. B.* v. *Franks Bros. Co.*, 321 U. S. 702, 64 S. Ct. 817 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 64 S. Ct. 830 (1944).

C. Congress Made No Change in Section 8(a)(5) or Section 9 in 1959, But by Adding Section 8(b)(7) to the Act Increased the Value of a Certification While Maintaining an Employer's Obligation to Recognize a Union Designated by a Majority of Its Employees.

Despite Congressional awareness of this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co., op. cit.*[52] and the uniformity of decisions predicating Board

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tendered by one of the competitors as proof of the success of its campaign. The record discloses no reason why the authenticity of this claim of majority status should have been subject to any doubt. Respondent's recognition of the Association was a legitimate, if not the mandatory, course of action. * * *".

52. 105 Cong. Rec. Sen. (daily ed. 16,400 September 3, 1959), II Legis. Hist. LMRDA 1959, p. 1429(2).

bargaining orders on authorization card majorities between 1947 and 1959,[53] Congress did not attempt in 1959 to amend Section 8(a)(5) or Section 9 to proscribe such action. See *N. L. R. B.* v. *Gullet Gin Co.*, 340 U. S. 361, 365-366, 71 S. Ct. 337, 340-341 (1951). However, the enactment of Section 8(b)(7) in 1959 and the legislative history of that section demonstrates Congress' cognizance of the obligation of an employer to recognize a collective bargaining agent which has been designated by a majority of employees by such means as signed authorization cards[54]

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53. See *supra* n. 26. Courts of Appeals frequently have cited this Court's decision in *Arkansas Oak Flooring, op. cit.*, in support of their decisions to enforce NLRB bargaining orders based on union authorization cards: *District 50, U. M. W.* [*Bowman Transportation, Inc.*] v. *N. L. R. B.*, 237 F. 2d 585 (D. C. Cir. 1956); *N. L. R. B.* v. *Sinclair Co.*, 397 F. 2d 157 (1 Cir. 1968); N. L. R. B. v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 179 (2 Cir. 1962); *N. L. R. B.* v. *Quality Markets Inc.*, 387 F. 2d 20, 23 (3 Cir. 1967); *Bilton Insulation Inc.* v. *N. L. R. B.*, 297 F. 2d 141, 144 (4 Cir. 1961); *Skyline Homes Inc.* v. *N. L. R. B.*, 323 F. 2d 642, 647 (5 Cir. 1963); *N. L. R. B.* v. *Universal Gear Service Corp.*, 394 F. 2d 396, 398 (6 Cir. 1968); *N. L. R. B.* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 755 (6 Cir. 1965); *Borden Cabinet Corp.* v. *N. L. R. B.*, 375 F. 2d 891, 893 (7 Cir. 1967); *Jas. H. Matthews & Co.* v. *N. L. R. B.*, 354 F. 2d 432, 436 (8 Cir. 1965); *N. L. R. B.* v. *Ralph Printing & Lithographing Co.*, 379 F. 2d 687, 693 (8 Cir. 1967); See also: *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 254 (2 Cir. 1963).

54. See 105 Cong. Rec. Sen. 5765, 5963, 5964, 5965, 5977 (daily eds. April 21, 24, 1959), II Legis. Hist. LMRDA 1959, pp. 1080(3), 1186(2)-(3), 1187(1), 1188(1), 1188(2), 1200(3); 105 Cong. Rec. House 13092, 13877, 14183 (daily ed. July 27, August 5, 11, 1959), II Legis. Hist. LMRDA 1959, pp. 1523(2), 1541(2), 1556(2); Senator Cooper stated that when a majority of employees adhered to a union by means other than an election, "[u]nder the Taft Hartley Act they [sic., the union] have a right to be recognized." 105 Cong. Rec. Sen. 5977 (daily ed. April 24, 1959), II Legis. Hist. LMRDA 1959, p. 1200(3). Senator Dirksen said that "[u]nder the present law" an employer who has recognized a majority union representative, without certification may be picketed by another union. "This is an unfair situation because under the law the employer must recognize and bargain with the union having majority status, whether or not it is certified." 105 Cong. Rec. Sen. 1568 (daily ed. February 4, 1959), II Legis. Hist. LMRDA, 1959, p. 994.

and shows the legislative intent to increase the value of a certification[55] (Supp. A. 4-6). Hence, while Section 8 (b)(7) was designed generally to proscribe "blackmail", organizational and recognition picketing by unions, in clear language a "labor organization [that] is currently certified as the representative of such employees" is exempted from its operation. Section 8(b)(7) (Supp. A. 4-6), *Dayton Typographical Union No. 57* v. *N. L. R. B.*, 326 F. 2d 634, 636 (D. C. Cir. 1963). The Court of Appeals for the District of Columbia has said that the legislative history of Section 8(b)(7) "reflects a conscious and intentional acceptance by the Senate Conferees—and by Congress—of the House-sponsored requirement for *current certification* of a union, and conscious and intentional abandonment by the Senate Conferees—and by Congress—of the Senate-sponsored provision which would have exempted unions having majority status, even though not certified, from the ban of picketing imposed by Section 8(b)(7)." *Dayton Typographical Union No. 57* v. *N. L. R. B. op cit.* at 638.[56]

Thus, in 1959 an additional benefit of certification was added to the one year certification rule and the advantages of certification inherent in Section 8(b)(4)[57] (see *supra*, pp. 28-30), while full recognition was accorded to the right of employees to choose their bargaining representative by means other than an election. In the face of this continuing history, it is no wonder that every court of appeals has followed the well-established rule of accepting desig-

55. 105 Cong. Rec. Sen. 5961 (daily ed. April 24, 1959), II Legis. Hist. LMRDA p. 1184(2); 105 Cong. Rec. House 16320, Legis. Hist. LMRDA p. 1263(1).

56. For an analysis of relevant legislative history, see *Dayton Typographical Union No. 57* v. *N. L. R. B., op. cit.*

57. It should be noted that the advantages of certification under Section 8(b)(4) were expanded in 1959 when the loopholes therein were closed. See: *N. L. R. B.* v. *Servette, Inc.*, 377 U. S. 46, 51, 84 S. Ct. 1098, 1102 (1964); *Maritime Union* [*Delta Steamship Lines Inc.*] v. *N. L. R. B.*, 346 F. 2d 411 at n. 8 (D. C. Cir. 1965).

nation by a majority of unit employees based upon signed authorization cards as a valid basis for imposing upon an employer the duty to recognize such union pursuant to Section 8(a)(5).[58]

Surprising, however, is the rejection by the Fourth Circuit of established precedent in the instant cases, particularly in view of its acute awareness of unsuccessful legislative attempts to change an employer's obligation to recognize a majority union under Section 8(a)(5).[59] The most recent bill submitted to Congress (91st Cong. 1st Session, S. 426) would amend Section 8(a) to provide "[t]hat such bargaining representatives shall have been certified by the Board as the result of an election conducted in accordance with subsection (c)" and to divest from the

58. *N. L. R. B.* v. *Greenfield Components Corp.*, 317 F. 2d 85 (1 Cir. 1963); *N. L. R. B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176 (2 Cir. 1962); *Steel City Transport* v. *N. L. R. B.*, 389 F. 2d 735 (3 Cir. 1968); *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289 (4 Cir. 1964); *N. L. R. B.* v. *Overnite Transportation*, 308 F. 2d 279 (4 Cir. 1962); *N. L. R. B.* v. *American Manufacturing Co. of Texas*, 351 F. 2d 74 (5 Cir. 1965); *N. L. R. B.* v. *Nelson Mfg. Co.*, 326 F. 2d 397 (6 Cir. 1964); *N. L. R. B.* v. *Larry Faul Oldsmobile Co.*, 316 F. 2d 595 (7 Cir. 1963); *Jas. H. Matthews & Co.* v. *N. L. R. B.*, 354 F. 2d 432 (8 Cir. 1965); *Retail Clerks Local 1179* [*John P. Serpa*] v. *N. L. R. B.*, 376 F. 2d 186 (9 Cir. 1967); *Snow & Sons* v. *N. L. R. B.*, 308 F. 2d 687 (9 Cir. 1962); *N. L. R. B.* v. *George Groh & Sons*, 329 F. 2d 265 (10 Cir. 1964); *International Union of United Automobile Workers* [*Aero Corp.*] v. *N. L. R. B.*, 363 F. 2d 702 (D. C. Cir. 1966); *International Union of United Automobile Workers* [*Preston Products Co.*] v. *N. L. R. B.*, 392 F. 2d 801 (D. C. Cir. 1967), certiorari denied, 88 S. Ct. 2058 (1968).

59. The Court in *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d at n. 9 (4 Cir. 1967) quoted from the Hearings before the Subcommittee on Labor, 87th Cong. 1st Sess. on S. 256 to Repeal Section 14(b) of the National Labor Relations Act (1965). A prime consideration in those hearings was the possibility of amending "the so-called card check system of compelling union recognition": Senator Javits, Senate Labor Subcommittee Hearings, *op. cit.*, p. 5, *inter alia*, see *ibid.* pp. 16, 19-25, 180-189. Thus, the Fourth Circuit must have been aware that as recently as June, 1965, Congress acknowledged and declined to amend the law requiring an employer to recognize and bargain with a union basing its majority status on signed authorization cards.

Board the authority to issue a bargaining order where the union has not been certified pursuant to a Section 9 (c) election.[60] This bill is identical to S. 22, submitted by Senator Fannin in January 1967, in respect to which the 90th Congress took no action. The fact that the right to obtain majority representation by means other than a Board-conducted election and the "concomitant * * * duty to bargain with the Union"[61] so designated has weathered partisan efforts at emasculation and has survived unrevised through a holocaust of amendments over a thirty-three year period proves the viability of the basic statutory scheme. Cf. *Sinclair Refining Co.* v. *Atkinson*, 70 U. S. 195, 203-204, n. 16, 82 S. Ct. 1328, 1333, n. 16 (1962).

II.

DESIGNATION BY A MAJORITY OF EMPLOYEES ON UNAMBIGUOUS AUTHORIZATION CARDS OBTAINED WITHOUT MISREPRESENTATION OR COERCION IS AS RELIABLE AN INDICATOR OF EMPLOYEE WISHES AS AN ELECTION.

A. Unambiguous Authorization Cards Are Not Inherently Unreliable.

In the instant cases, *Logan Packing* and other recent cases,[62] the Fourth Circuit has asserted its belief that authorization cards signed by employees are inherently

60. This bill submitted by Senator Fannin in January 1969 has been referred to the Committee on Labor and Public Welfare. A copy of this bill is reprinted in the Supplemental Appendix, pp. 40-42, for the convenience of the Court.

61. *Conren, Inc.* v. *N. L. R. B.*, 368 F. 2d 173 (7 Cir. 1966).

62. *N. L. R. B.* v. *Logan Packing Co.*, 386 F. 2d 562 (1967); *N. L. R. B.* v. *Sehon Stevenson & Co., Inc.*, 386 F. 2d 551 (1967); *N. L. R. B.* v. *Gissel Packing Co.*, 398 F. 2d 336 (1968); *N. L. R. B.* v. *Heck's*, 398 F. 2d 337 (1968); *General Steel Products* v. *N. L. R. B.*, 398 F. 2d 339 (1968); *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4 Cir. 1968).

unreliable and should not be "accepted as proof of the union's claim of majority status".[63] This assertion is contrary to the overwhelming weight of common law which historically has extended legal recognition and contractual sanctity to an individual's signature.

Modern society has vastly expanded the utilization of signatures as legally valid and reliable indicia of the signer's intent. The following are but a few of the myriads of uses recognized as legally binding, without question or further proof of intent, to which signatures are put: leases, bank checks and drafts, petitions, charge account sales, options, releases, applications, powers of attorney, loans, notes, wills, and contracts of every use and variety.[64] Reliance on signatures as presumptively valid has become increasingly commonplace. Petitions are utilized to promote the passage of legislation.[65] Pleadings in court invoke judicial processes on the strength of signatures. Garnishment suits based on signatures of confession of judgment notes empower employers to deduct monies from the wages of employees without their approval.[66] On occasion, the most recent in the 1968 presidential campaign, signatures of a certain percentage of the voters on petitions obviates the necessity of a candidate's participation in election primaries in order to be nominated for office.[67] Likewise,

63. *N. L. R. B.* v. *Sehon Stevenson & Co.*, 386 F. 2d at 553.

64. See Wigmore on Evidence, Vol. 7, § 2134.

65. On October 14, 1966, Time Magazine reported (at p. 39) that in the November 1966 elections 346 statewide propositions would appear on ballots in 46 states—many of them placed there on the strength of signatures on petitions.

66. See e.g. Smith-Hurd Illinois Annotated Statutes, Chapter 57.

67. Reference is to the candidacy of George Wallace for the Office of President of the United States. Wallace achieved a place on the November 1968 ballot in many states on the sole strength of signatures on petitions. See MacDonald Austin F., *American State Government and Administration*, Thomas Y. Crowell Co., New York, 1955, pp. 146-149.

in commercial sales law, the consummation and resulting legal obligations of unambiguous contracts depend upon the intention to authenticate the document—an intention presumed from the affixation of signatures.[68]

The reliability and presumptive validity of signatures recognized in commercial law applies with equal force to labor law. Union authorization cards are unilateral contracts wherein the employee offers to delegate authority to the union if the union agrees to represent such employee in bargaining with the employer. When the union takes the initial step to bargaining of gaining recognition on the basis of such authorization cards, they are binding contracts. See *Corbin on Contracts*, § 21. Similarly, agency law considers written authorizations creating the agency relationship as documents of the highest solemnity, binding as long as they express the clear intent to delegate the power to act on behalf of the principal. See *Mechem Outlines Agency*, Sections 25, 40-42. Contingency fee and/or retainer agreements authorizing the lawyer to represent the client are binding contracts on the strength of the client's signature (5 Am. Jur., Attorneys at Law, §§ 31, 32). Similar contracts are recognized and enforced by courts without questioning the intent behind such agreements; indeed the parole evidence rule prevents the courts from looking beyond the terms of a written agreement, clear on its face, to determine the intent of the parties. There is no basis in principle nor logical reason for refusing to accord such lawful contracts in the labor arena the sanctity which their counterparts in every other phase of the law enjoy.[69]

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68. It should be noted that the Uniform Commercial Code Article on Sales Law does not even require the formality of a signature—initials, rubber stamps or even a thumbprint will suffice. Section 1-201 and Comment 39 thereto.

69. See cases cited *infra*, pp. 40-42, ns. 77, 79.

As noted above, since 1935 the Board and the Courts have accepted the signatures of employees on authorization cards, membership applications, petitions, etc. as proof of majority status impressing a duty on employers to recognize the union so designated.[70] Indeed, in recognition of the purposes of the Act, to foster the freedom to organize and the right to collective bargaining of employees a majority of whom choose a union to represent them, the law has properly relaxed the requirements of the formality of an employee's signed authorization.[71] Thus, in *Lebanon Steel Foundry* v. *N. L. R. B.*, 130 F. 2d 404, 407-408 (D. C. Cir. 1942),[72] the Court of Appeals sensibly analyzed the validity of signed cards as indicia of employee's desires:

> The Wagner Act requires no specific form of authority to bargain collectively.[73] It is not a statute of frauds or an act prescribing the formalities of conveyancing. No seal or writing is required by its terms. Nor is any special formula or form of words. Authority may be given by action as well as words. An application for union membership implies authority to bargain [citations omitted] * * *. Not form, but intent, is the essential thing. The intent required is merely that the union or other organization or person act as the employees' representative in collective bargaining * * *.

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70. It should be noted that in the instant cases, *Gissel, Heck's* and *General Steel*, the cards are unambiguous, unequivocal authorizations to represent the undersigned employees in respect to wages, hours and other conditions of employment.

71. The Board has pointed to the acceptance of authorization cards "(a) by agreement by the parties voluntarily through unofficial channels, (b) by the American Arbitration Association, and (c) by a majority of the State labor relation agencies" as support for its refusal to hold such authorizations inherently unreliable. *Levi Strauss & Co.*, 172 NLRB No. 57, n. 10, 68 LRRM 1338, n. 10 (1968).

72. Cited by this Court in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 76 S. Ct. 557 (1956).

73. As discussed *supra*, the language of Section 8(5) of the Wagner Act remains unaltered by the 1947 and 1959 amendments.

> It is only necessary that [intent] be manifested in some manner capable of proof * * *. The agreements or authorizations are laborers' not scriveners' expressions of intention. They are expected to be made in the workingman's manner not in that of management as it conducts corporate affairs, with a lawyer at its side * * *.
>
> The * * * card * * * carries on its face the clear presumption of membership or intention to become a member * * * or authoriz[ation] to the union to bargain collectively for the signer. * * * If evidence can overcome this, it must be strong indeed.

The cards involved in *Lebanon Steel, op. cit.*, were check-off cards, and, as indicated in the above quotation, the issue in that case, whether such cards should be construed as employee designations, was decided in favor of the union. Significantly, the validity of employees' signatures on such authorizations was considered by Congress in enacting the 1947 Taft-Hartley amendments.

Congress was seriously concerned about the effects of payoffs to union representatives on the scheme of obtaining industrial peace through collective bargaining, S. Rep. No. 105 on S. 1126, I Legis. Hist. LMRA 1947, p. 458; 93 Cong. Rec. 4805-4807, 4875-4884 (daily eds. May 7 and 8, 1947), II Legis. Hist. LMRA 1947, pp. 1304-1323; 93 Cong. Rec. 5147 (daily ed. May 12, 1947), II Legis. Hist. LMRA 1947, p. 1498. In Section 302 it declared it unlawful for an employer to pay to and for a union representative to receive from an employer "any money or other thing of value" and imposed upon violators criminal sanctions of "a fine of not more than $10,000.00 or * * * imprisonment of not more than one year, or both." However, it exempted from such prohibitions the payments by employers to union representatives of union dues only where an employee had executed a "written assignment"—a check-off authorization. Section 302(c)(4) (Supp. A. 10-12). Manifestly, Con-

gress considered the signatures of employees of sufficient reliability to render legal what otherwise would be a criminal act.[74] It is significant that in 1959 Congress increased the restrictions on payments to employee representatives, but left untouched the proviso permitting check-offs based on an employee's written authorization. Section 302 (Supp. A. 10-12); S. Rep. No. 187 on S. 155, p. 13, I Legis. Hist. LMRDA 1959, p. 409. And so, as of 1966, signatures of an estimated 16 million American workers[75] granted the right to employers, on the mere strength of such signatures, without any independent proof of employee intent or governmental certification, to deduct moneys from their wages and to make such payments to union representatives.

The value of an employee's signature upon a check-off authorization was enhanced in the 1959 amendments. Section 401(e) (Supp. A. 12-13). In Section 401(e) Congress provided that an employee member of a union could not be deprived of his right to vote or his eligibility for candidacy to union office by reason of "alleged delay or default in the

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74. Senator Taft, explaining the new provision said:

> • • • with regard to check-off,—the amendment provides that it is proper to make such an agreement—provided that the employer has received from each employee,—a written assignment • • •.
>
> So far as the testimony shows, that is the usual form of check-off. Under it the employee himself signs a slip or assignment authorizing the check-off • • •. That, I think is substantially in accord with nine-tenths of all check-off agreements and simply prohibits a check-off made without any consent whatever by the employees.

93 Cong. Rec. 4876 (daily ed. May 8, 1947), II Legis. Hist. LMRA, 1947, p. 1311.

75. The Bureau of Labor Statistics in Chicago has informed the undersigned that as of 1966 there were 19,124,865 workers in the United States covered by union contracts. The Bureau of National Affairs reports that check-off of union dues is provided in 83 per cent of labor contracts (BNA, *Collective Bargaining Negotiations and Contracts,* Section 87.3). The cited figure results from extrapolating these two statistics; no exact information on the number of employees on dues check-off is available.

payment of dues", if he had executed a voluntary check-off authorization.

Moreover, the signing of a check-off authorization has granted an employee protection from discharge under Section 8(a)(3) and Section 8(b)(2) of the Act. Where an employer and a union have signed a union shop agreement consistent with the proviso to Section 8(a)(3), an employee is insulated from discharge and from an attempt by the union to cause his discharge if he has executed a check-off authorization, even where the employer has failed to remit his dues to the union. *Union Starch & Refining Co.*, 87 NLRB 779; *Electric Auto-Lite Co.*, 92 NLRB 1073, affirmed, 196 F. 2d 500 (6 Cir. 1952), certiorari denied, 344 U. S. 823 (1952); *Ferro Stamping & Mfg. Co.*, 93 NLRB 1459. Thus the design of the Act affords additional significance to the rights arising from the affixation of an employee's signature.

Lending further credence to the legislative design which accepts signed authorizations not only as a reliable but an essential element of the labor law are Section 9(c)(1)(A) and Section 9(e). Section 9(c)(1)(A) permits a representation petition and a decertification petition to be processed when each is supported by a "substantial number of employees." Congress in adopting such language accepted the Board's prior practice of insisting upon signatures of 30 per cent of the unit employees on authorizations or petitions. Section 9(e) specifically provides for 30 per cent of the signatures of employees in the bargaining unit to empower the Board to hold a union shop deauthorization election. Since 1947 when Sections 9(c)(1)(A) and 9(e) were passed, the Board has relied on authorizations signed by employees to hold such elections. Although some legislative criticism of such reliance was voiced in 1959, congressional debate on Section 8(b)(7) demonstrates unmistakably that Congress rejected such criticism, accepted

the reliability of authorization cards and, indeed, relied upon their use to achieve "lawful recognition" as an integral part of the design of the Act. 105 Cong. Rec. Sen. 5951, 15121, 16398, 16419 (daily eds. April 24, August 20, 21, September 3, 1959), II Legis. Hist. LMRDA, 1959, pp. 1174 (3), 1361 (1), 1427 (3), 1437 (3); 105 Cong. Rec. House 13087 (daily ed. July 27, 1959), II Legis. Hist. LMRDA, 1959, p. 1518.

In another context, this Court has accepted the reliability of authorization cards and the right of an employer to recognize a union predicated upon a majority of employees' signatures thereon. In *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 81 S. Ct. 1603 (1961), the primary issue involved was the recognition by the employer of a union which had not been designated by a majority of the employees. There, the Court said [366 U. S. at 739-740, 81 S. Ct. at 1608]:

> If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate * * * he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or *authorization cards.* Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so. [Emphasis supplied.]

There is no distinction in principle between the obligations of an employer under Section 8 (a) (2) to cross-check authorization cards and the obligation imposed upon him in this respect under Section 8(a)(5).[76] Indeed, to hold that an employer has a right to recognize a union's majority status by virtue of authorization cards to avoid a Board election where the employer prefers such union, and

76. See *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B., op. cit.*

to reject the obligations to recognize a union which tenders a majority of valid, unambiguous authorization cards where the employer abhors the particular union, is to deny the employees the right to select the bargaining agent of their own choosing guaranteed in Section 7 of the Act. Certainly the reliability of authorization cards is not predicated upon an employer's *animus* or favorable inclinations toward unionism generally or an identifiable union in particular.

In view of the long-standing acceptance of authorization cards by this Court, all courts of appeals (including the Fourth Circuit)[77] and the Board, in light of the scheme of the Act according written authorizations a special significance and in view of the legislative history supporting the reliability of such authorizations, the Fourth Circuit's decision in the instant case should be reversed.

Moreover, the very reasons ascribed by the Fourth Circuit for its conclusion that authorization cards are inherently unreliable and that the presentation of such cards to an employer *ipso facto* creates a doubt as to the union's majority designation, reveal the insufficiency of its basis for digressing from the foregoing long line of cases and well established legal principle. First, the Court said: "No thoughtful person has attributed reliability to such card checks."[78] This *ipse dixit* statement constitutes an indictment of this Court,[79] the various courts of appeals,[80] the

77. See, e.g., *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289 (4 Cir. 1964); *N. L. R. B.* v. *Overnite Transportation*, 308 F. 2d 279 (4 Cir. 1962); *N. L. R. B.* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840 (4 Cir. 1950).

78. *Logan*, 386 F. 2d at 565.

79. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 76 S. Ct. 559 (1956); *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 81 S. Ct. 1603 (1961); *N. L. R. B.* v. *Bradford Dyeing Association*, 310 U. S. 318, 60 S. Ct. 918 (1940); *International Association of Machinists* [*Serrick Corp.*] v. *N. L. R. B.*, 311 U. S. 72, 61 S. Ct. 83 (1940); *N. L. R. B.* v. *Franks Brothers Co.*, 321 U. S. 702, 64 S. Ct. 817 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 64 S. Ct. 830 (1944).

80. See *supra*, ns. 26, 27, 53, 58.

Board,[81] members of Congress,[82] the academic community[83] and untold thousands of representatives of labor and management who have engaged in voluntary recognition and collective bargaining.[84]

Second, the Court stated[85] that the Board "fully recognized" the unreliability of authorization cards as a method of designating the employees' collective bargaining representative, citing *Sunbeam Corp.*, 99 NLRB 546, 550-551 (1952); *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945); *Novak Logging Co.*, 119 NLRB 1573 (1958). The

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81. *Joy Silk Mills*, 85 NLRB 1263, enforced, 185 F. 2d 732 (D. C. Cir. 1950), cert. denied, 341 U. S. 914; *Preston Products Co., Inc.*, 158 NLRB 322, enforced, 392 F. 2d 801 (D. C. Cir. 1967), cert. denied, 392 U. S. 906; *Sinclair Co.*, 164 NLRB No. 49, 65 LRRM 1087, enforced, 937 F. 2d 157 (1 Cir. 1968); *Philamon Laboratories Inc.*, 131 NLRB 80, enforced, 298 F. 2d 176 (2 Cir. 1961); *Quality Markets, Inc.*, 160 NLRB 44, enforced, 387 F. 2d 20 (3 Cir. 1967); *Florence Printing Co.*, 145 NLRB 141, enforced, 333 F. 2d 289 (4 Cir. 1964); *Goodyear Tire & Rubber Co.*, 159 NLRB 834, enforced, 394 F. 2d 711 (5 Cir. 1968); *Nelson Mfg. Co.*, 138 NLRB 833, enforced, 326 F. 2d 397 (6 Cir. 1964); *Elliott Williams Co., Inc.*, 143 NLRB 811, enforced, 345 F. 2d 460 (7 Cir. 1965); *Decker, d/b/a Decker Truck Lines*, 128 NLRB 858, enforced, 296 F. 2d 338 (8 Cir. 1961); *Trimfit of California*; 101 NLRB 706, enforced, 211 F. 2d 206 (9 Cir. 1954); *George Grok & Sons*, 141 NLRB 931, enforced, 329 F. 2d 265 (10 Cir. 1964).

82. See *supra*, pp. 24-30, 33-37.

83. E.g., Professor Bok whose article, "The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act," 78 Harv. L. Rev. 38, is liberally cited in the *Logan* decision, 386 F. 2d at ns. 35, 36, 37, appears to be one who attributes reliability to authorization cards. See *ibid.*, at p. 133. Professor Lesnick would appear to come within the Fourth Circuit's "No thoughtful person" characterization. See Lesnick, H., "Establishment of Bargaining Rights Without an NLRB Election," 65 Mich. L. R. 851, 861, 868, n. 63. See also, Parker, "Labor: Authorization Cards and the National Labor Relations Board," 13 How. L. J. 171, 180.

84. See NLRB, Thirtieth Annual Report, 1965, p. 2; *Levi-Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1342 at n. 10.

85. *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 565, n. 8 (4 Cir. 1967).

Court made no mention of the fact that each of those cases involved the effect to be given to authorization cards where one of two competing unions was seeking recognition of the employer—a situation where dangers of violations of Section 8(a)(2) are manifest.[86] The difference between a one and two union situation *vis-a-vis* the value of authorization cards is apparent. In a two-union campaign employees desiring collective bargaining representation may sign cards for the first union and then, when given a choice of unions, may thereafter sign cards for a second preferred union. Also in a two-union campaign, under existing Board rules, it is generally known that recognition will not be sought and that an election will be held.[87] Cards signed under these circumstances do not have the same value as in the instant case where the employees were told that the cards would be used to seek recognition. It is therefore a mistake to suggest that, because the Board does not rely on cards in cases where two competing unions have obtained signed authorizations, such cards are unreliable in the instant case where only one union organized the employees. Cf. *N. L. R. B.* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (7 Cir. 1954).

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86. In two of the cases cited, i.e., *Sunbeam*, *op. cit.* and *Novak Logging Co.*, *op. cit.*, the Board found that the employer had illegally assisted one of the two competing unions in violation of Section 8(a)(2). In *Midwest Piping & Supply Co.*, 63 NLRB 1060, 1069-1071, 1075-1078, the Board held that the employer assisted a union in violation of Section 8(a)(1), *inter alia*, by entering into a union shop agreement with it at a time when the employer was apprised of another union's conflicting claim of representation and in the face of a representation proceeding then current before the Board. Clearly, the Board in its experience and expertise is justified in differentiating between the use of authorization cards in (1) two-union situations and (2) situations where only one union is involved. *N. L. R. B.* v. *Universal Camera Corp.*, 340 U. S. 373, 71 S. Ct. 456 (1951).

87. See *Midwest Piping & Supply Co., op. cit.; Iowa Beef Packers*, 144 NLRB 615; *Novak Logging Co.*, 119 NLRB 1573.

The Board clearly restated its position in the recent case of *Levi Strauss & Co.*, 172 NLRB No. 57, where it said [68 LRRM at 1342, n. 10]:

> Several commentators and courts recently have improperly attributed to the Board the suggestion that authorization cards are not reliable as an expression of the desire of employees to be represented for purposes of collective bargaining, citing *Sunbeam Corporation*, 99 NLRB 546.
>
> In *Sunbeam Corporation*, the Board said that "authorization cards are a notoriously unreliable method of determining majority status of a union as a basis for making a contract *where competing unions are soliciting cards*, because of the duplications which then occur." [Emphasis supplied.] *Sunbeam Corporation*, 99 NLRB 546, 550-551. On several recent occasions, the phrase "notoriously unreliable" has been excised from its limited context of a two-union situation and attributed to the Board as indicative of its attitude towards authorization cards in one-union situations. When so used, the phrase is inaccurate. The full import of the phrase becomes clear when it is read in its limited and intended context, as follows:
>
> > "What is the law with respect to the rights and obligations of an employer whose employees are simultaneously being organized by two or more labor organizations, the condition which confronted Sunbeam in August 1950? [sic.] The doctrine has long obtained without question that the employer must be strictly neutral—he cannot give any form of support to one of the rival unions; if he does he violates Section 8(a)(2) of the Act. As the Court of Appeals for the Seventh Circuit stated in *Harrison Sheet Steel Co.* v. *N. L. R. B.*, 194 F. 2d 407, 'He must maintain a strictly neutral attitude. Especially is this so where the adherence of the employees is being sought by rival labor organizations.' That the making of a contract with a union is the most potent kind of support imaginable cannot be doubted. This Board has

> also long recognized that authorization cards are a notoriously unreliable method of determining majority status of a union as a basis for making a contract where competing unions are soliciting cards, because of the duplications which then occur. Thus as the Board said in *Midwest Piping and Supply Company:*
>
> > '. . . it is well known that membership cards obtained during the heat of rival organizing campaigns like those of the respondent's plants do not necessarily reflect the ultimate choice of a bargaining representative; indeed, the extent of dual membership among the employees during periods of intense organizing activity is an important unknown factor affecting a determination of majority status, which can best be resolved by a secret ballot among the employees.' "
>
> The utilization of authorization cards to ascertain majority status not only by this Agency but also (a) by agreement of the parties voluntarily through unofficial channels, (b) by the American Arbitration Association, and (c) by a majority of the State labor relations agencies is a sufficiently common, well-established and well-known practice to cast serious doubt on the sweeping denunciations of such proof.

In view of the foregoing, there can be no doubt that the Court erred when it suggested that the Board "fully recognized" the unreliability of cards.

In addition, the Fourth Circuit's decision that authorization cards are inherently unreliable[88] is predicated upon

88. In *Logan, op. cit.*, the Court had a basis for rejecting the authorization cards because of evidence of coercion. See concurring opinion: *N. L. R. B.* v. *Sehon Stevenson & Co.*, 386 F. 2d 551, 556 (4 Cir. 1967). In *N. L. R. B.* v. *Preiser Scientific Inc.*, 387 F. 2d 143, the possibility that the Fourth Circuit might limit its *Logan* doctrine to situations involving authorization cards impressed with coercion or misrepresentation loomed large, when it sustained the Board's Section 8(a)(5) order, stating at p. 144: "Particularly, the cards did not have the infirmities we found to render them unre-

such authority as the "AFL-CIO Guidebook for Union Organizers",[89] a 1962 speech by Board Chairman McCullock[90] (sic.) in which he set forth "data indicating some relationship" between the number of cards signed by employees and the number of Board elections won by unions, a law student's conjecture on union authorization cards[91] and its own speculation as to what conceivably might occur in the solicitation of authorization cards.

Vis-a-vis the "AFL-CIO Guidebook for Union Organizers,"[92] it should be noted that a manual written for

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liable under the principles we stated, and now reaffirm, in *Crawford Manufacturing Co., Inc.* v. *N. L. R. B.* (No. 11,040, 4 Cir. decided Oct. 27, 1967); *N. L. R. B.* v. *S. S. Logan Packing Company* (No. 10,355, 4 Cir., decided Oct. 27, 1967)." However, in the instant case and *N. L. R. B.* v. *Heck's, Inc.*, 398 F. 2d 337 (4 Cir. 1968), where there is no serious claim of misconduct in respect to the signing of any cards, it is clear that the Fourth Circuit erroneously has fashioned a rule of law to reject authorization cards as an indicator of employees' union desires, irrespective of the absence of misrepresentation, coercion or taint of any kind.

89. *N. L. R. B.* v. *S. S. Logan Packing Co.*, 386 F. 2d at 565, n. 9.

90. *Ibid.* p. 565.

91. Comment, "Union Authorization Cards," 75 Yale L. J. 805 (1966). Professor Lesnick characterized this Comment as "a diatribe against reliance on authorization cards." Lesnick, H., "Establishment of Bargaining Rights Without an NLRB Election," 65 Mich. L. Rev. 851.

92. The Fourth Circuit relied upon a report of an excerpted passage of the AFL-CIO "Guidebook for Union Organizers" quoted in Hearings before the Subcommittee on Labor, etc. 89th Cong. 1st Session on S. 256 to Repeal Section 14(b), p. 190, which in turn contains a quotation from the U. S. News & World Report, March 15, 1965, including what appears to be an article by an employer labor attorney. Because of the difficulty in obtaining a copy of such "Guidebook," we have reproduced in the Supplemental Appendix, attached hereto, for the Court's convenience (Supp. A. 39) *in toto* the passage concerning "NLRB PLEDGE CARDS" referred to in such Hearings. We invite the Court to compare the reproduced portion of the "Guidebook" with the statement: "The term 'NLRB Pledge Cards is obviously a misnomer' ", contained in the Hearings before the Subcommittee on Labor, etc., *op. cit.*, p. 190.

internal union purposes would appear to constitute less than overwhelming legal authority. Nevertheless, a brief comment in respect to its misuse may be justified.

Manifestly, cards solicited for an election only do not, and inherently could not, elicit the degree of commitment which motivates a worker to sign a card which he knows (or as to which he is advised, as in the instant case) will be construed as his "official" designation of the union as his bargaining representative. Thus, an employee who would not sign an unambiguous authorization card to be used in a card check, may well sign a card for an election, knowing that in the election booth his anti-union vote will be one that "counts." It is for this precise reason that experienced and knowledgeable organizers will be wary of NLRB pledge cards signed by those who would "get the union off [their] back[s]" in an *election campaign.* The caveat in the AFL-CIO manual is based on experience, and is intended to alert the younger organizers in the field to refrain from relying on inadequate assurances of allegiance in *election campaigns.*[93] Critics of the card check procedure, seizing on this AFL-CIO caveat, conveniently conceal the fact that the entire section of the manual out of which this "semantic plum" has been plucked is a dissertation on pitfalls in an election campaign only.[94]

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93. Compare the type of instructions passed on to organizers in the signing of authorization cards where the object, as in the instant case, is to seek recognition: Schlossberg, Stephen L., *Organizing and the Law,* BNA, 1947, p. 49.

94. All authorities agree that cards signed for an election only (as distinguished from authorization cards) cannot be used to support a refusal to recognize charge under Section 8(a)(5). *Englewood Lumber Company,* 130 NLRB 394; *N. L. R. B.* v. *Koehler,* 328 F. 2d 770 (7 Cir. 1964); see *N. L. R. B.* v. *Cumberland Shoe Corp.,* 351 F. 2d 917; *N. L. R. B.* v. *Winn-Dixie Stores, Inc.,* 341 F. 2d 750 (6 Cir. 1965), certiorari denied, 382 U. S. 380, 86 S. Ct. 69 (1965); *N. L. R. B.* v. *Swan Super Cleaners, Inc.,* 384 F. 2d 609 (6 Cir. 1967). See *Levi Strauss & Co.,* 172 NLRB No. 57, 68 LRRM 1338.

In addition, Chairman McCulloch's speech referred to in the Fourth Circuit's *Logan* decision does not require the conclusion that authorization cards are "seriously unreliable". Indeed, as Judge Sobeloff in his concurring opinion in *N. L. R. B.* v. *Sehon Stevenson & Co., Inc.*, 386 F. 2d 551, 554-555 (4 Cir. 1967), noted: "the only statistical study of cards, upon which the *Logan* opinion relies heavily, concludes: '[A]uthorization cards do have validity'."

No mathematical analysis can be relevant to the reliability of authorization cards. Experiences are all too frequent that Board election campaigns invite employer unfair labor practices, *General Shoe* interferences with fair election procedures [*General Shoe Corp.*, 77 NLRB 124, enforced, 192 F. 2d 504 (6 Cir. 1951), certiorari denied, 343 U. S. 904, 72 S. Ct. 635 (1952)], long delays which chill the fervor of union adherents and multitudinous other factors which adversely affect the free choice of employees.[95] Nor do the number of unfair labor practice charges or the number of objections to elections adequately illustrate the scope of employer interferences with such employee free choice. Frequently unions fail to file such charges or objections because of futility arising from the inadequacy of Board remedies, the unlikelihood of success in re-run elections (see e.g., Pollitt, NLRB Re-run Elections: A Study, 41 N. Car. L. Rev. 2091 (1963)), Board administrative problems, cost, internal union problems, further loss of prestige, etc.

Chairman McCulloch's figures in the speech cited by the Court came from an unpublished field survey by Professor Ross of the University of Pittsburgh. Ross' study was based on a small[96] sampling of cases in a geographically

95. See *infra*, pp. 55-66.

96. The study concerned only 214 elections held during 1960.

limited area[97] involving no qualitative analysis of its results.[98] Yet such value as can be attributed to the Ross study shows that there is a positive relationship between the number of authorization cards and the likelihood of success in elections, in spite of the dangers of delay, interference, etc., involved in the NLRB representation and election process. See *infra*, pp. 55-66. As Judge Sobeloff said [concurring in *Sehon Stevenson*, 386 F. 2d at 555]:

> The facts of the instant case are instructive. The employer was presented with authorization cards from nearly 70% * * * of the employers in the unit. The statistics relied upon in *Logan* to designate cards point out that when 70% of the employees have signed up, three out of four times the union will be successful in the subsequent election. In addition, in this case there was no allegation of any ambiguity in the cards or any misrepresentation or threat or any of the other abuses so painstakingly catalogued in *Logan*.[99]

Heedless to Judge Sobeloff's persuasive arguments, the Fourth Circuit arrogated unto itself the right to pronounce a sweeping rule of law, not limited to the facts of the case before it, that authorization cards cannot sustain Section 8(a)(5) violations. Under the statutory scheme, however, it is the Board "whose findings within [the] field [of labor law] carry the authority of an expertness which courts do not possess and therefore must respect * * *", and which is commissioned with the formulation of judgments on the basis of its "experience in dealing with a specialized field of knowledge", *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488, 71 S. Ct. 456 (1951). Thus, since Congress

97. The jurisdiction of the Atlanta Regional Office is all of Georgia, eastern Tennessee and northern Alabama.

98. See McCulloch, Frank W., "A Tale of Two Cities: Or Law in Action", ABA Section on Labor Relations Law, Report of Proceedings, 1962, pp. 14-20.

99. The force of Judge Sobeloff's words fit the instant *Gissel* case "like a glove".

has entrusted the Board with such findings and since with its full experience in respect to authorization cards and petitions under Sections 9(c) and 8(a)(5) [and occasionally Section 302], both before and after Chairman McCulloch's 1962 speech, it has uniformly held that unambiguous authorization cards are reliable indicators of employees' wishes in one-union cases, absent fraud, coercion, misrepresentation or other taint. Neither the meager experience, the legal forensics nor the delusive conjecture and speculation of note writers or courts should be permitted to set aside the Board's conclusion. In sum, the Fourth Circuit's view seems "to be the product of an obsession with the infirmities of authorization cards,[100] and a romanticizing of the validity of an election. Cards have been used under the act for thirty years; the Supreme Court has repeatedly held that certification is not the only route to representative status * * *. No amount of drumbeating should be permitted to overcome, without legislation, this history."[101]

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100. "The proper solution of the problem arising from the possible abuse of this long-established procedure lies in a case-by-case analysis of the use made of the cards and not in their outright repudiation. Evaluation of the reliability of authorization cards should be made in two distinct contexts. One is where there is no election and no employer unfair labor practice other than a refusal to bargain; the other is where there has been an election which is vitiated by an employer violation.

"The first category, illustrated by the instant case, is where the union submits to the employer cards from a majority of employees and demands recognition and collective bargaining. The majority opinion here and the *Logan* opinion indicate that on these facts alone the employer would be justified in refusing to bargain, basing a claim of doubt on the asserted inherent unreliability of cards. This smacks of policy-making by stereotype." Judge Sobeloff (concurring), *N. L. R. B.* v. *Sehon Stevenson Co.*, 386 F. 2d 551, 555 (4 Cir. 1967).

101. Lesnick, Howard, "Establishment of Bargaining Rights Without an NLRB Election," 65 Mich. L. Rev. 851, 861-862.

B. Representation Elections Are Not Necessarily the Most Reliable Indicators of Employees' Desires.

In *Logan*, the Fourth Circuit espoused its view, correlative with its holding on the inherent unreliability of cards, that a representation election under the auspices of the NLRB is the sole method reliably to determine employees' wishes. However, careful analysis of and familiarity with the election processes and the human variables incident thereto belie the validity of the Fourth Circuit's belief.

1. A "Secret Ballot" Is No More Indicative of Employees' Intent Than an Authorization Card.

The *Logan* court noted that cards are unreliable, *inter alia*, because they are "obtained before the employees are exposed to any counter-argument and without an opportunity for reflection or recantation" [386 F. 2d at 566]. This conclusion overlooks the realities of the employer-employee relationship, for whereas the employee is exposed to the union's arguments only during an organizing campaign, he is subjected to daily exposure of the employer's views.[102] From the day he is hired the employee is indoctrinated with management's views of unionization, labor economics and employer prerogative.[103] Thus, numerous studies have demonstrated that long prior to the advent

102. Concommitantly, the union organizer is at an additional handicap because "he must develop a personal relationship of trust over a short period while the management has had a rather extended period in which the workers get to know him." Butler, Donald T., "Factors Affecting Trade Union Organizing Of Manufacturing Firms", p. 131, unpublished doctoral thesis, University of Wisconsin, 1959.

103. E.g., in the instant case, shortly after his hire and more than a year before the Union's organizational campaign commenced, employee Mount was told by Vice President Gissel that the shop was non-union and any employee would be discharged if the Company learned that he even talked to a Union representative (A. 60).

of a union organizational campaign, many employers have imbued employees with an "elemental fear of reprisal" sufficient to forestall any union activity.[104] Moreover, it should be noted that employees are acutely aware that if the union loses the election, it will hold no sway over their economic lives, whereas, if the union wins the employer still maintains his economic life-and-death power over his employees.[105]

Nonetheless, the Fourth Circuit asserts that "exposure of each employee to both sides of the issue" renders the employee's choice "when the ballot is cast—as reasoned and rational as possible", *N. L. R. B.* v. *Logan Packing Co.*, 386 F. 2d at n. 16. However, even full exposure to both the union's and management's propaganda may be totally irrelevant to the employee's decision to designate a union whether by authorization cards or an election. A study of why workers join unions concludes:[106]

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104. See Bok, "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act", 78 Harv. L. Rev. 38, 125, and authorities cited therein at n. 238. See also, *Butler, op. cit.* at 136. Case studies conducted by Butler revealed that employer threats remained foremost in employees' memories, whereas recollections of other campaign propaganda faded with the passage of time:

> The workers interviewed made no mention of any economic activities on the part of the organizer though they fairly well agreed that the management was set on keeping the union out and two remembered that he said that he would close the plant if the union came in.

In the instant *Gissel* case the evidence disclosed interference, restraint and coercion practiced in respect to employees more than three months prior to the commencement of the Union's organizing campaign. See *supra*, p. 4. Moreover, Gissel's antiunion attitude had been instilled in many of the same employees in 1960 when the company was found to have violated sections 8(a)(1) and (3). See *Gissel Packing Co.*, NLRB case No. 9-CA-2068 (Supp. A. 14-33).

105. Lesnick, *op. cit.* at n. 64.

106. Seidman, London & Karsh, *Why Workers Join Unions*, Annals, March 1951, pp. 75, 84, cited by Bok, 78 Harv. L. R. at 50.

> Often the decision to join a union is not based on logical reasoning in which self-interest figures to a large degree, but upon expediency—a reaction to the pressures of the moment.

Other studies indicate that the decision to vote for the union is made before the election procedure is invoked and thus pre-election propaganda, whether one- or both-sided, may have little influence on the voter:[107]

> After extensive empirical research, various voting analysts have come to suspect that even if election propaganda is read, it will largely serve to provide rationalizations for decisions already reached on other grounds * * *. As some have observed: "Arguments (read or heard by the voters) enter the final stage of decision more as *indicators* than as *influences*. They *point* out, like signboards along the road, the way to turn in order to reach a destination which is already determined.

Further, Bok suggests that votes "as reasoned and rational as possible"[108] may not result in expression of majority will because few voters are able to appraise evidence sufficiently systematically and rationally in the increasingly complex arena of labor relations and because often the adverse arguments of labor and management will not yield to logical analysis.[109] Accordingly, there is reason to doubt

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107. Bok, 78 Harv. L. R. at 88-89, citing Harlow, *Social Science in Public Relations*, 71 (1957); Lazarfeld, Berelson & Gaudet, *The People's Choice*, p. 83 (1948).

108. *Logan*, 386 F. 2d at n. 16.

109. Bok states [78 Harv. L. R. at n. 34]: "The most conscientious voter may be unable to decide on logical grounds whether the indeterminate possibility of a five cent increase, an expanded health insurance program, and a grievance procedure outweighs the indeterminate chance of a strike or a relocation of the enterprise. Moreover, legal rules will have no meaningful effect unless the questionable campaign tactics are truly capable of affecting the decisions of enough conscientious voters to affect the outcome of the election. And even if these conditions are satisfied, the law will only succeed in causing the election to correspond more

that a ballot cast in an NLRB election is, as asserted by the Fourth Circuit, the result of a free choice, "as reasoned and rational as possible."[110]

Moreover, the instability of NLRB election rules and procedures may render expression of free choice an impossibility. The "law concerning representation elections has had a turbulent history."[111] NLRB election policies change frequently, most markedly with every new Board and thus what may constitute a valid election under the Board's rules on one occasion may be held invalid there-

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closely to the values and preferences of the rational voters. If these voters represent a small minority—as most empirical studies would have us believe—the law may still fail to bring about an election result that will correspond to the values and desires of the majority."

110. It is clear that the employer engages in much conduct which, although of seeming little moment to reviewing tribunals, nonetheless just as seriously interferes with the free choice of employees as do unfair labor practices or other conduct sufficient to set aside an election (see *General Shoe Corp.*, 77 NLRB 124). For example, during a union campaign, when a supervisor has prior thereto said, "Hello," to the employees and ceases such practice, this affects employees' votes. When the supervisor, during the election campaign, stands at an employee's station for a number of minutes or even seconds when it was not his practice to do so theretofore, this affects the employee's "free choice." In such innumerable ways of daily contact the employees are affected in their so-called "free choice" and, accordingly, because of the superior position of the employer his daily and even minute by minute contact with the employees can and does affect the employee's vote to the extent that no "free and fair election" is ever truly possible. It is therefore a rebuttable homily when it is said that an election is a more reliable indicator of employees' wishes than unambiguous authorization cards. See *supra*, pp. 37-54; *infra*, pp. 59-66.

111. Bok, 78 Harv. L. R. at 39 and n. 3:

> • • • some [rules] have enjoyed a particularly checkered career, been born in a period, laid to rest in another only to be resurrected, like the Phoenix, garbed in slightly different plumage • • •.
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> • • • • •
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> The legal doctrine relating to election campaigning under the NLRA has traditionally been referred to as a prime example of instability in labor law • • •.

after.[112] In essence then, the employee's right to have his vote in a valid election certified depends on the viscissitudes of the Board's constantly shifting policies.[113] And thus frequently the election procedure fraught with its inherent uncertainties fails to afford adequate protection to the vote and fails to result in the expression of employees' true intent.[114]

2. Elections Are Susceptible to Misrepresentation and Coercion.

Although the Board supposedly conducts its elections only in so-called "laboratory conditions", "no seasoned observer considers [this objective] realistic." "[E]lection campaigns are characterized by 'prattle rather than precision' [citing *Olson Rug Co.* v. *N. L. R. B.*, 260 F. 2d 255 (7 Cir. 1958)] and exaggerations, name calling, inaccuracies, and, to some extent, deliberate falsehoods [which] are sometimes permitted as usual electioneering devices and campaign tactics."[115]

In addition, much objectionable conduct which interferes with the employee's "free choice" is held by the Board to be insufficient to invalidate an election. For instance, inadvertent misstatement, which under Board law will not void an election,[116] deprives the employee of a free choice just as effectively as a fraudulent misrepresentation. Also, misinformation disseminated more than 24 hours before

112. See generally, Bok, 78 Harv. L. R. 38-45.

113. For example, employer statements to employees emphasizing the futility of selecting the union: *Metropolitan Life Insurance Co.*, 90 NLRB 935 (elections set aside); *National Furniture Mfg. Co., Inc.*, 106 NLRB 1300 (election not set aside); *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782 (election set aside).

114. Bok, 78 Harv. L. R. at 45.

115. Agabin, "Labor-Elections-Campaign Literature," 3 ALR 3d 889, 894.

116. *Barber Colman Co.*, 116 NLRB 24, *Avon Products, Inc.*, 116 NLRB 1729; see *Hollywood Ceramics Co., Inc.*, 140 NLRB 221, 224.

an election may impair the employee's freedom of choice regardless of whether there is ample time for the employees to verify it or for the union to rebut it (the Board's tests for validity).[117] Information concerning the misrepresentation may not be communicated to the union in sufficient time for rebuttal. Employees may not have time or may be reluctant to question the union, or the union may not have sufficient access to the employees, especially close to the date of the election, whereas the employer has almost unlimited access.[118]

Employer speeches and interrogation, even if held lawful by the Board, cannot help but have a disproportionate impact on employees.[119]

While the Fourth Circuit imports great weight to the opportunity afforded by the election process, for employees to hear "both sides of the issue,"[120] misrepresentation, in-

117. *Kennametal, Inc.*, 121 NLRB 410; *Fisher Radio Corp.*, 123 NLRB 879; *Lundy Packing Co.*, 124 NLRB 905.

118. See Bok, 78 Harv. L. R. at 96-103.

119. See Butler, "Factors Affecting Trade Union Organizing of Manufacturing Firms", unpublished doctoral thesis, University of Wisconsin, 1959. Butler analyzed the effect on employees of the law regulating election campaigns as follows [at 122]: "One of the most common statements was from the older organizers who spoke of the effect of the Taft-Hartley Act in giving management the right to propagandize their workers. A few of the people in management who had been faced with union organizing campaigns before the campaign with which the interview was concerned, spoke of the problems under the Wagner Act when a manager could do nothing to give the workers his side of the story. This change in the law and in its interpretation by the National Labor Relations Board has probably aided the firm which does not want to have its plant organized."[12]

[12] From the worker interviews, it is observable that the workers remember and sometimes act upon a statement which is clearly the economic coercion which is forbidden by the Taft-Hartley Act. The legalistic interpretation which relies on semantics allows the intent of the law to be circumvented while the letter of the law is adhered to.

120. *Logan*, 386 F. 2d at n. 16.

timidation and a myriad of other influences too often render such opportunity more destructive than protective of employee rights.

Procedurally, many valid objections to conduct affecting the results of an election are never raised because they come to the union's attention, if at all,[121] after the short period for filing objections has run.[122] Also, many unions fail to file objections because of the expense of litigation,[123] the unlikelihood of success in re-run elections,[124] the potential long administrative delay and the possibility that even if the union gains certification in a re-run election, the employer may refuse to bargain to challenge the certification through a lengthy Board and Court unfair labor practice proceeding. An employer need not articulate his anti-union attitudes to "men who know the consequences of incurring [their] employer's strong displeasure"[125]— knowledge gleaned from daily exposure to management's influence. Even the standards set by the Board to protect employees from coercive interrogation[126] may not adequately safeguard the employee's free choice in an election.

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121. After the union loses an election, employees who had theretofore been supporting the union are at the height of their insecurity and thus are reluctant to come forward with evidence of objectionable employer misconduct. For the same reason unions have difficulties producing evidence in support of post election charges or objections.

122. Within five days of the tally of ballots, Section 102.69, NLRB Rules and Regulations and Statements of Procedure, Series 8, reprinted in the Supplemental Appendix, *infra*, p. 13.

123. In representation cases the union is not usually represented by an NLRB attorney, and rarely is represented by private counsel.

124. See, *e.g.*, Pollitt, "NLRB Re-run Elections: A Study", 41 N. Car. L. R. 2091 (1963).

125. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 78, 61 S. Ct. 83, 87 (1940); *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477, 62 S. Ct. 348 (1941).

126. *Struksnes Construction Co.*, 165 NLRB No. 102, 65 LRRM 1385; *Blue Flash Express, Inc.*, 109 NLRB 591; see *Bourne* v. *N. L. R. B.*, 332 F. 2d 47, 58 (2 Cir. 1964).

One commentator discussed the fallibility of these standards [Bok, 78 Harv. L. R. at 109, 108]:

> current standards . . . will not suffice to rule out the existence of coercion; it is quite possible that intimidation will occur even if all, or most of the factors cut in favor of the employer.
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> • • • • • •
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> • • • employees may be somewhat more easily intimidated if top management itself takes the trouble to inquire into their activities • • •.

Nonetheless many elections are upheld despite evidence of employer captive audience speeches and wholesale interrogation on the Board's theory that there is no coercive impact on employees if management gives assurances against reprisal or merely expresses opinion.[127]

Many employer statements held by the Board to be protected by Section 8(c) have persuasive impact on employees inconsistent with free choice, *e.g.*, economically based statements concerning partial or complete plant shut down or expressions of opinion as to economic consequences of selecting a union:[128] strikes, loss of seniority, loss of employer-employee "good will."[129] The Board in evaluating such pre-election conduct balances the employee's right to a "free choice" in a "laboratory election atmosphere" against the employer's right vigorously to argue his side of the issue in accordance with considerations of free speech under Section 8(c). In applying this

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127. *Struksnes Construction Co., op. cit.;* see *Interstate Hosts, Inc.*, 130 NLRB 1614, *Hy-Plains Dressed Beef, Inc.*, 146 NLRB 1253.

128. *Weil-McLain Co.*, 130 NLRB 19; *Fisher Radio Corp.*, 123 NLRB 879; *Seven-Up Bottling Co., Inc.*, 140 NLRB 611; *Carlton Forge Works*, 146 NLRB 750.

129. This is not intended to be an exhaustive compilation of the plethora of conduct in which an employer can engage without invalidating the subsequent election. See, *e.g.*, Bok, 78 Harv. L. R. 38 and Agabin, 3 ALR 3d 892.

test, however, the Board too frequently does not ensure a reasoned and rational vote by failing to restrict pre-election campaigning to legitimate arguments relevant and conducive to the employee's reasoned choice. Almost universally employers utilize the pre-election period not to educate employees, but by planting fear of dire consequences in the minds of employees if the union should win, to prevent unionization of their companies by engaging in conduct inconsistent with employee free choice. In this regard the election procedure is particularly susceptible to employer manipulation to serve not the purposes of the Act, but the ends of the employer.

In many cases the employer ultimately benefits from pre-election misconduct even if it results in the setting aside of the first election and direction of a re-run election. Having implanted fear of reprisal in the minds of employees prior to the first election, the employer need not remind them during the second campaign of the repercussions of voting for the union. Current Board remedies are unable to offset the fear of reprisal implanted earlier by the employer.[130]

If the employer has committed unfair labor practices during the first election campaign, the Board will require the posting of notices before a re-run election can be held. But the posting requirement is often meaningless. The notice is written in legalistic terms, the full impact of which is not easily understood, posted on an often little-read bulletin board, frequently offset by an employer disclaimer of fault, and thus does little or nothing to expunge from the

130. Pollitt, "NLRB Re-run Elections: A Study", 41 N. Car. L. R. 2091 (1963); Note, "The Need for Creative Orders under Section 10(c) of the National Labor Relations Act", 113 U. Pa. L. R. 69; St. Antoine, "A Touchstone for Labor Board Remedies", 14 Wayne L. R. 1039; Subcommittee on NLRB of House Committee on Education and Labor, 87th Cong., 1st Sess., Report on the Administration of the LMRA by the NLRB (Comm. Print. 1961).

minds of employees the anticipation of reprisal for union activity.[131]

Discharge, the employer's ultimate weapon, is used to forestall unionization where the employer fears the union's ultimate success in an election. Since the union's prospects in an election depend significantly upon employee organizing committees, discharge of a few key activists can quash, for fear of similar reprisal, all union activities by employees. In cases where no charge is filed or no complaint issues, discharge is a lethal weapon against the union. For, by discharging a pro-union employee, whether or not it is held to be in violation of Section 8(a)(3),[132] the employer raises in the minds of the remaining employees a spectre of employer reprisal. And that fear, rational or not, prevents a "free choice". The technique of discharging employees without invalidating elections has become increasingly commonplace. Bok described the lengths to which antiunion employers will go to defeat the desires of their employees [78 Harv. L. R. at 132]:

> The discharge has been used with increasing sophistication in recent years. Neutral employees may be dismissed along with union activists to disguise the employer's motive. Particular operations and even product lines may be discontinued, at least temporarily, to ease key union supporters out of the plants. More generally, increasing care has been exercised to develop a variety of plausible reasons for dismissing union members.

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131. See *infra*, n. 133.

132. It cannot be gainsaid that many discharges motivated by employees' union activity are not found to be violations of Section 8(a)(3). The difficulties of obtaining evidence in an anti-union company environment cannot be exaggerated. For example, "cause" for which an employee might not otherwise be discharged, frequently is assigned as the reason for discharge and cannot be rebutted; company knowledge of a particular employee's union activity is hard to come by and even more difficult to prove.

If the employer is found to have violated Section 8(a)(3), the Board will postpone direction of or set aside the election, and require the employer to reinstate the discriminatees. Then, despite the employer's coercive conduct, an election may still be held after posting of notices.[133] There is every reason to doubt that the effects of such unfair labor practices can be expunged sufficiently to permit a "free election."[134] A former NLRB Assistant General Counsel described the lasting effects of discharges on employees.[135]

> The continual and cynical violations of section 8(a)(3) * * * by employers in discharging key union adherents, or known union supporters, have not only a "chilling" but a lethal effect on the organizational efforts of employees. The practical effect of firing a few people is far greater than company speeches, leaflets, letters or films, and demonstrates, far more clearly than any words, the awesome power of the employer over the lives of his employees. Besides this, the power and authority of the Federal Government appears remote and ineffectual.

Thus, although the election procedure theoretically allows exposure of employees to "both sides of the issue", it also exposes them to employer coercion, intimidation and discharge. The opportunities for such employer misconduct are a part of the election process. The historical

133. Even if the discriminatees are ultimately ordered reinstated after the long process of an unfair labor practice hearing and court enforcement proceedings, the employee complement is normally sufficiently altered and the object lesson of the "trouble" a union adherent must accept is not unnoticed by the old and new employees, so that the opportunity for a free uncoerced vote thereafter is virtually non-existent.

134. See O'Hara, James and Pollitt, Daniel, "Section 8(a)(3) of the Labor Act: Problems And Legislative Proposals," 14 Wayne L. R. 1104.

135. Hearings on H. R. 11725 before the Special Subcommittee on Labor of the House Committee on Education and Labor (letter of George F. McInerny), 90th Cong., 1st Sess., p. 459 (1967).

instability of election rules and the myriads of possible abuses of the election processes render it difficult, if not impossible, to justify the Fourth Circuit's sanctification and "romanticizing" of NLRB elections.

As we have shown (*supra*, pp. 37-54), signatures on unambiguous authorization cards properly have been recognized by Congress and the judiciary as presumptively valid and reliable indicia of employees' intent. In view of this historical acceptance of cards and the essential instability and potential abuses in the election procedure prejudicial to the exercise of "free choice", it is clear that unequivocal authorization cards are at least equally, if not more indicative of the employees' choice of bargaining representative.

III.

THE FOURTH CIRCUIT ERRED IN FAILING TO ENFORCE THE BOARD'S ORDER TO BARGAIN.

A. The Operative Facts Require That an Order to Bargain, Upon Request, Be Issued Against the Company.

Gissel is a classic case of a refusal to recognize violation of Section 8(a)(5). Here there is evidence that the Company was sensitive to any favorable talk about a union and that the Company engaged in illegal interrogation and threat of discharge on suspicion of any such activity, even prior to the initiation of the union's organizing campaign (A. 263; 60-61, 93-94). When the Union did commence organizing, it used an unambiguous designation which authorized the Union to represent the signer in collective bargaining concerning wages, hours and working conditions (A. 264; 241). In the solicitation of employee signatures, no misrepresentation or coercion of any kind was engaged in; no mention of the potentiality of an election was ever made; indeed, employees were told that the authoriza-

tions would be presented by the Union to the Employer to achieve recognition and bargaining (A. 56). Thus, it is clear that *Gissel* is not a case involving the problems of a dual card, a tainted card, or cards signed under false or misleading impression.[136]

The unfair labor practices evident during the period while cards were being solicited, e.g. the Company vice president's coercive comment to a group of employees (A. 270; 134), reached a crescendo of restraint and coercion practiced upon its employees by the Company, after the Union in late January presented its bargaining demand and offered to prove its majority status by submitting its signed authorization cards to the Company. Gissel refused recognition, *inter alia,* advising the Union to file for a Board election (*supra,* p. 5, *infra,* pp. 70-77), while orchestrating its medley of unfair labor practices to render a free election impossible. Thus, in February the Employer engaged in at least eight separate violations of Section 8(a)(1) of the Act, involving a minimum of seven named[137] employees and an unspecified group of others. The February unfair labor practices included interrogation of employees about their union activities and those of other fellow employees, inquiry concerning the identity of the leading employee Union adherent, invitation to spy on the Union and other employees, a promise of benefit, threats of discharge, questioning about potential strike activity and threats of plant abandonment (A. 268-270; 62, 94-96, 102-104, 111-112, 134, 141). In March and April the Company compounded its unfair labor prac-

136. E. g. *International Union of Electrical, etc. Workers* [S. N. C. Mfg. Co.] v. *N. L. R. B.*, 352 F. 2d 361 (D. C. Cir. 1965), certiorari denied, 382 U. S. 902, 86 S. Ct. 235 (1965); *N. L. R. B.* v. *Peterson Brothers, Inc.*, 342 F. 2d 221, 225 (5 Cir. 1965); *N. L. R. B.* v. *Cumberland Shoe Corp.*, 351 F. 2d 917 (6 Cir. 1965); *Crawford Mfg. Co., Inc.* v. *N. L. R. B.*, 386 F. 2d 367 (4 Cir. 1967), certiorari denied, 390 U. S. 1028, 88 S. Ct. 1408 (1968); *N. L. R. B.* v. *Gorbea, Perez & Morell,* 300 F. 2d 886 (1 Cir. 1962).

137. Burchell, Frye, Kidd, Maynard, Moore, Mount and Watts.

tice course of conduct by adding the discriminatory discharge of the two suspected employee leaders of the Union[138] and five additional violations of Section 8(a)(1) involving further interrogation of employees and participation in surveillance of a Union meeting (A. 258-260, 268-269, 271-274, 283-286; 63-65, 67-68, 89-90, 93, 103-104, 235, 237-249). In all NLRB proceedings the unfair labor practices found are like the visible portion of an iceberg, because [to paraphrase the Fourth Circuit in *Logan* (386 F. 2d at 567)]: "If threats were employed ineffectively upon * * * [some employees] there is a natural inference that they were effectively used [on] * * * others with lower powers of resistance, and those intimidated by the [Employer] threats are not likely to go babbling about it to the * * * [Union]".

In view of the foregoing unfair labor course of conduct of the employer,[139] and since the Union had tendered a

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138. It is incongruous, indeed, that the Fourth Circuit holds that "'[f]ew employees would be immune from a frightened concern when threatened with job loss when the union obtained recognition unless the card was signed[; w]hether or not the organizers could ever obtain the power to procure the discharge of uncooperative employees is beside the point as long as they claim the power and the employee is without a basis for a firm disbelief of it,'" [*Logan, op. cit.*] and sanguinely considers the actual discharge of union adherents as of such small moment as not to relate to the alleged good faith of the employer in refusing to recognize their union representative. *Benson Veneer Co.* v. *N. L. R. B.*, 398 F. 2d 998 (4 Cir. 1968); *Crawford Mfg. Co., Inc.* v. *N. L. R. B., op. cit.*, *N. L. R. B.* v. *Gissel Packing Co.*, 398 F. 2d 336 (4 Cir. 1968); see *N. L. R. B.* v. *Sehon Stevenson Co., Inc.*, 386 F. 2d 551 (4 Cir. 1967).

139. No attempt shall be made in this brief to respond to the *Logan* argument that unfair labor practices prove an employer's good faith doubt of the Union's majority status. First, the undersigned reasonably anticipates that this matter will be fully and adequately explored in the brief of the National Labor Relations Board; second, the plethora of cases cited *supra*, hold antithetically, and third, on the basis of the argument herein we believe the Board's order to bargain should be enforced, even assuming *arguendo* the good faith of the employer.

majority of valid unambiguous authorization cards when it requested recognition, the Board was compelled to find that the Employer in refusing to recognize the Union had violated Section 8(a)(5) of the Act and to order it to bargain with the Union, upon request, to effectuate the policies of the Act. *N. L. R. B.* v. *Bradford Dyeing Ass'n.*, 301 U. S. 318, 60 S. Ct. 918 (1940); *International Association of Machinists* [*Serrick Corp.*] v. *N. L. R. B.*, 311 U. S. 72, 82, 61 S. Ct. 83, 89 (1940); *N. L. R. B.* v. *Franks Bros. Co.*, 321 U. S. 702, 64 S. Ct. 817 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 64 S. Ct. 830 (1944); *N. L. R. B.* v. *P. Lorillard*, 314 U. S. 512, 62 S. Ct. 397 (1942); *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), certiorari denied, 341 U. S. 914, 71 S. Ct. 734 (1951); *N. L. R. B.* v. *Kobritz*, 193 F. 2d 8 (1 Cir. 1951); *N. L. R. B.* v. *Ken Rose Motors, Inc.*, 193 F. 2d 769 (1 Cir. 1952); *N. L. R. B.* v. *Taitel*, 261 F. 2d 1 (7 Cir. 1958); *N. L. R. B.* v. *Mid-West Towel & Linen Service Inc.*, 339 F. 2d 958 (7 Cir. 1964); *N. L. R. B.* v. *Economy Food Center, Inc.*, 333 F. 2d 468 (7th Cir. 1964); *N. L. R. B.* v. *Crean*, 326 F. 2d 391 (7 Cir. 1964); *N. L. R. B.* v. *Elliot-Williams Co., Inc.*, 345 F. 2d 460 (7 Cir. 1965), *N. L. R. B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (9 Cir. 1953), affirmed, 346 U. S. 482, 74 S. Ct. 214 (1953); *N. L. R. B.* v. *Trimfit of California, Inc.*, 211 F. 2d 206 (9 Cir. 1954); *N. L. R. B.* v. *Geigy Co., Inc.*, 211 F. 2d 553 (9 Cir. 1954), certiorari denied, 348 U. S. 821, 75 S. Ct. 33 (1954); *N. L. R. B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, certiorari denied, 348 U. S. 829, 76 S. Ct. 51 (1954); *N. L. R. B.* v. *Idaho Egg Producers, Inc.*, 229 F. 2d 821 (9 Cir. 1956); see especially, Bok, "The Regulation of Campaign Tactics in Representation Elections Under the NLRA", 78 Harv. L. R. at 132-140.

B. The Company's Defenses Are Insufficient to Rebut Its Duty to Recognize the Union.

1. The Failure to File an Employer Petition.

None of the reasons for refusing to recognize the Union professed by the Company derogates from the foregoing conclusion. Four days after the initial request to bargain, the Company sent a letter declining to grant the Union recognition. *Inter alia,* it asserted (contrary to fact) that the Union did not represent a majority of its employees and suggested that the Union file a petition with the National Labor Relations Board "to hold a fair and honest election, giving our employees the right to express their opinion as provided for in Section 7 of the Act, and their choice could be made in an appropriate bargaining unit in a fairly held election" (A. 234); simultaneously, however, the Company engaged in the course of conduct hereinabove described, to interfere with the employee's free choice, rendering impossible "a fair and honest election", to hedge against the possibility that the Union might file a petition. Significantly, the Employer did not file a petition to ascertain the truth of the Union's claim to majority status nor did he agree to view the authorization cards tendered by the Union (A. 288). These two facts, standing alone, prove that the Employer was convinced that the Union represented a majority of his employees.

"[I]f the company had any doubts [of the union's majority status] when it was approached by the union, it could have agreed to the private election suggested by the union or it could have itself petitioned the Board under Section 9(c)(1)(B) for a representation election. Refusing to pursue either course it acted at its peril" [*Florence Printing Co.* v. *N. L. R. B.*, 338 F. 2d 289, 292 (4 Cir. 1964)]; accord: *N. L. R. B.* v. *Elliot Williams Co.*, 345 F. 2d 460 (7 Cir.

1965); see *N. L. R. B.* v. *Remington Rand Inc.*, 94 F. 2d 862, 869 (2 Cir. 1938), certiorari denied, 304 U. S. 576, 585, 58 S. Ct. 7046 (1938)]. In *N. L. R. B.* v. *Overnite Transportation Company*,[140] 308 F. 2d 279 (4 Cir. 1962), the Fourth Circuit said [at 283]:

> If the company * * * sincerely doubted the union's majority status, it could have challenged the union to substantiate its claims by checking the union cards against the payroll or by requesting the Labor Board to hold a representation election as is its right under section 9(c)(1)(B) of the Act, 29 U. S. C. A. § 159(c)(1)(B) (1956). But the company may not now claim that it has a right to such an election after having first attempted to defeat the union by means of conduct violative of sections 8(a)(1) and 8(a)(3). Such a rule would encourage employers to commit unfair labor practices rather than promote the freedom of employees to decide for or against a union in an atmosphere free from restraint or coercion.

The Court's pre-*Logan* interpretation of the effect of Section 9(c)(1)(B) upon Section 8(a)(5) is manifestly correct[141], inasmuch as that section was designed to afford an employer who doubts a union's majority status the right to have the Board determine whether the union does in fact represent a majority of its workers.[142] Section

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140. Both *Florence Printing, op. cit.*, and *Overnite Transportation, op. cit.* are pre-*Logan* cases. No observable change in the law or Congressional intent has rendered the words of the Fourth Circuit prior to *Logan* less true today.

141. It should be noted that the right to designate a bargaining representative and to be represented in collective bargaining is a right granted to the employees. This statutory right cannot be extinguished by the naked assertion of an employer that a majority of his employees have not designated a union to represent them, when indeed they had.

142. Senator Taft, in respect to the employer petition, said: "Today an employer is faced with this situation. A man comes into his office and says, 'I represent your employees' * * *. The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board under those circumstances, and say, 'I

9(c)(1)(B) also provides a means to an employer to avoid illegally recognizing a union which does not in fact represent a majority of his employees. Thus, when Congress in 1947 granted to an employer the right to file a petition for an election it accorded him safe passage between the Scylla of a violation of Section 8(a)(2) and the Charybdis of a violation of Section 8(a)(5) when he is confronted with a request for recognition predicated upon a claimed authorization card majority. *Cf. United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 72, n. 8, 76 S. Ct. 559, 565, n. 8 (1956) with *International Ladies' Garment Workers* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 738-740, 81 S. Ct. 1603, 1607-1608 (1961). It thereby granted an expeditious election option[143] to the employer who

want an election. I want to know who is the bargaining agent for my employees.'" 93 Cong. Rec. 3954 (daily ed. April 23, 1947), II Legis. Hist. LMRA, 1947, p. 1013. Another strong proponent of the Taft-Hartley Act, Senator Ball, in reference to Section 9(c)(1)(B), said: "One such right [given to employers] is the right to petition the National Labor Relations Board for an election to determine the bargaining representative of an employer's workers, whenever one or more unions present to the employer a demand for recognition as representing the employees * * *. [W]hen he is presented by a union with a demand for recognition, I think the employer is also entitled to know, through the secret ballot provided by the bill, whether the union really represents and is the choice of the majority of his employees." 93 Cong. Rec. 5146 (daily ed. May 12, 1947), *ibid.* p. 1496. At another point Senator Ball entered remarks of Senator Taft in the record, including: "The President objects to an employer having the right to ask for an election when someone claims to be a representative of his men. Surely, an employer ought to have the right to find out whether the union leader really has organized his men, or hasn't." 93 Cong. Rec. A 3232, *ibid.* p. 1627.

143. The limited right to file an RM (employer) petition does not insulate a Company from a Section 8(a)(5) violation where it seeks delay or engages in other unfair labor practices, since such tactics would be inconsistent with a desire on the part of the employer to learn "who is the bargaining agent for my employees" [Senator Taft, 93 Cong. Rec. 3954 (daily ed. April 23, 1947), II Legis. Hist. LMRA, 1947, p. 1013]. Nor does the right to file an RM petition create a right to impede the quick holding of an election by demanding that the union file an RC petition where, under the Board's rules, employer prospects of intruding procedural stumbling blocks are improved.

chooses to avoid the obligation to take "reasonable steps to verify union claims • • • [to] ascertain their validity • • • by cross-checking • • • well-analyzed employer records with union listings or authorization cards. *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 739-740, 81 S. Ct. 1603, 1608 (1961), see also *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 73, 71-75, n. 8, 76 S. Ct. 559, 564-566, n. 8 (1956).

Where an employer rejects a union's request for recognition, refuses to check the authorization cards and fails to file an RM petition, as it did in the instant case, the Board should infer company knowledge of the Union's majority status. *Retail Clerks Union, Local No. 1179* [*John P. Serpa, Inc.*] v. *N. L. R. B.*, 376 F. 2d 186 (9 Cir. 1967). Under these circumstances such rejection of the employees' designated bargaining representative violates Section 8(a)(5) of the Act. *Retail Clerks Union Local No. 1179, etc., op. cit.; N. L. R. B.* v. *Overnite Transportation Co.*, 308 F. 2d 284 (4 Cir. 1962); *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289 (4 Cir. 1964); *N. L. R. B.* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756 (2 Cir. 1940); *N. L. R. B.* v. *Elliott Williams Co.*, 345 F. 2d 460 (7 Cir. 1965). The principle involved in *Ray Brooks* v. *N. L. R. B.*, 348 U. S. 96, 75 S. Ct. 176 (1954), supports the above conclusion.

In *Ray Brooks, op. cit.*, this Court held that the existence of Section 9(c)(1)(B) imposed an obligation on the employer to refrain from refusing to recognize the incumbent union until he exercised the right to petition the Board for an election, albeit the employer had a valid basis for be-

lieving that his employees had deserted the union.[144] There, the Court said [348 U. S. at 103, 75 S. Ct. at 181]:

> If an employer had doubts about his duty to continue bargaining it is his responsibility to petition the Board for relief * * *. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end [industrial peace], it is inimical to it.

The instant case is *a fortiori* to *Ray Brooks, op. cit.*, inasmuch as Gissel's refusal to recognize the Union did not seek "to vindicate the rights of his employees to select their bargaining representative" [*Ray Brooks, etc.*, 348 U. S. at 103, 75 S. Ct. at 181]. Indeed, Gissel's action was in contravention of such employees' rights. If Gissel doubted "his duty to [commence] bargaining, it [was] his responsibility to petition the Board for relief" or to challenge "the Union to substantiate its claims by checking the Union cards against the payroll". *Ray Brooks* v. *N. L. R. B., op. cit.; N. L. R. B.* v. *Overnite Transportation*, 308 F. 2d 284 (4 Cir 1962); *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 81 S. Ct. 1603 (1961). Having failed to do either, Gissel violated Section 8(a)(5) of the Act.

Moreover, the rationale of the Court, in the instant case, following *Logan*, misconstrues the statutory mandate regulating the determination of the existence of and the resolution of a question concerning representation. Under the Court's rationale, where, as here, an employer rejects a request for recognition, refuses to check the authorization cards and fails to file an RM petition (cf. *Retail Clerks Local 1179* [*John P. Serpa*] v. *N. L. R. B.*, 376 F. 2d 186 (9

144. *Ray Brooks, op. cit.*, involved a violation of Section 8(a)(5) where an employer refused to bargain with a union which had won an NLRB election and where a majority of the employees a week later advised the employer that they did not wish to be represented by the union.

Cir. 1967), the employer would, nevertheless, be immune from any obligation to bargain with the Union because, the employer's alleged doubt, . . . "dependent upon a choice of dubious or debatable inferences" gives rise to "a question concerning representation". *Logan*, 386 F. 2d at 569.

However, under the Taft-Hartley Section 9(c) provisions, *no question concerning representation can be recognized as existent until and unless the Board investigates and makes such a finding*; i. e. "if it has reasonable cause to believe that a question of representation * * * exists"—after a petition has been filed. An employer confronted with a union demand for recognition based on employee authorization cards cannot arrogate the Board's exclusive power to determine whether there is a question concerning representation which would necessitate an election. Therefore, in the absence of a petition,[145] the employer cannot refuse recognition because he believes there is a question concerning representation. If he so believes, the statutory scheme in 9(c)(1)(B) of Taft-Hartley, as explained by Senator Taft, affords him an opportunity to file a petition in which the Board, alone, can resolve that "question".

2. Shotgun Pretexts.

The other reasons for refusing to recognize the Union asserted in the Employer's letter of January 26, 1965, constitute a scatter shot of excuses in an effort to find some defensible basis within the purview of the Board and court exceptions to avoid the employer's duty to recognize. The Board properly rejected each of the reasons. At the hearing not a scintilla of evidence was adduced to show that the

145. "*Wherever a petition shall have been filed* * * * by an employee or group of employees or any individual or labor organization * * * or by an employer, * * * the Board shall investigate such petition and *if it has reasonable cause to believe that a question of representation affecting commerce exists* shall provide for an appropriate hearing * * *. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election * * *".

Union in obtaining a majority of signed authorization cards had engaged in any misrepresentation or used "any means or representations [in]compatible with the free exercise of an employee's choice" (A. 233; 288). The reliance on an election four years earlier, held after the employer had admitted its guilt in violating Section 8(a)(1) of the Act, was a transparent camouflage, since the Company stated that it did not believe there had been any change in opinion of their employees and yet engaged in illegal interrogation concerning Union activities in September 1964 and January 1965, prior to the sending of such letter.[146] The claim that the unit was unclear and inappropriate was another red herring, particularly in view of the identity of the requested unit with the unit determination in the former election which, as noted above, the Company interposed among its several pretexts. Moreover, the Board, following its usual procedure, properly held "that 'even if the company entertained doubt [as to the appropriateness of the unit], it is no defense to a refusal to bargain charge where the unit is proper' ", citing the Fourth Circuit's decision in *Florence Printing Company* v. *N. L. R. B.*, 333 F. 2d 289, 291 (A. 291, n. 41).

The foregoing proves that Gissel had no valid reason for refusing to recognize the Union and, in the language of the Board, was devoid of a "good faith doubt" concerning the Union's majority status. Without question, Gissel's conduct was violative of Section 8(a)(5) and the Board's bargaining order should be enforced. *N. L. R. B.* v. *Bradford*

146. The Company's evidence that its representatives "decided that maybe they [the Union] might not have a majority" because it lost an NLRB election four years earlier constitutes a function of wish rather than conviction. In addition, the Board properly found, that the Company's position was inconsistent with the frequently exercised right of employees to change their minds. The Board also noted that a similar argument had been rejected by the Fourth Circuit in *N. L. R. B.* v. *Overnite Transportation Company*, 308 F. 2d 279, 283 (4 Cir. 1962).

Dyeing Association, 301 U. S. 318, 339-340, 60 S. Ct. 918, 929 (1940); *International Association of Machinists* [*Serrick Corp.*] v. *N. L. R. B.*, 311 U. S. 72, 82, 61 S. Ct. 83, 89 (1940); *N. L. R. B.* v. *P. Lorillard*, 314 U. S. 512, 62 S. Ct. 397 (1942); *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702, 703-706, 64 S. Ct. 817, 818-819 (1944); *N. L. R. B.* v. *Medo Photo Supply Corp.*, 321 U. S. 678, 687, 64 S. Ct. 830, 835 (1944).

The question of "good faith" as an element of a violation of Section 8(a)(5) is essential to the proper interpretation of the fulfillment of an employer's duty to *negotiate*, but it has no relevant application to an employer's duty to *recognize*, as we show below. Accordingly, even assuming *arguendo* that the employer had a good faith doubt concerning the Union's majority designation, his refusal to recognize under the circumstances of the instant case nevertheless would constitute a violation of Section 8(a)(5), inasmuch as the Company refrained from checking the tendered authorization cards and refrained from filing a petition for an election under Section 9(c)(1)(B), see cases cited *supra*, pp. 70-71, 73.

C. The Good Faith of an Employer Is Not Relevant to His Duty to Recognize the Bargaining Representative Designated by a Majority of His Employees.

As noted above, the imposition on an employer of a duty to recognize the majority representative of his employees constitutes one of the primary purposes of Congress in passing the National Labor Relations Act, a purpose which has remained unsullied through its various amendments. In respect to the various phases of the duty to recognize, other than majority status supported by authorization cards, the Board and the courts have made it unmistakably clear that "good faith" is totally irrelevant. Thus it has been held

that an employer acts at his peril when he mistakenly, albeit in good faith, refuses to recognize the union because he believes the unit description to be improper.[147] This rule has been extended by the Board to cases where the union's unit description in its request to bargain was unclear, and, indeed, where it varied in some degree from the unit ultimately found to be appropriate.[148]

Significantly, the Board and the courts have rejected good faith as a defense to a Section 8(a)(5) violation where an employer has refused to recognize a union based on an erroneous but genuine belief that such union's majority was established by an invalid election. *Cone Bros. Contracting Company* v. *N. L. R. B.*, 235 F. 2d 37 (5 Cir. 1956); *Rockwell Manufacturing Co.* [*Kearney Div.*] v. *N. L. R. B.*, 330 F. 2d 795 (7 Cir. 1964), cf. dissent of Judge Swygert at 798-800, certiorari denied, 379 U. S. 890, 85 S. Ct. 161 (7 Cir. 1964); *Follett Corporation* v. *N. L. R. B.*, 397 F. 2d 91 (7 Cir. 1968). In *Cone Bros. Contracting Company* v. *N. L. R. B.*, 235 F. 2d at 41, the Court said: "The refusal to bargain was asserted in the genuine belief that the election was invalid, but, as we have held, this mistaken belief does

147. *United Aircraft Corporation* v. *N. L. R. B.*, 333 F. 2d 819, 833 (2 Cir. 1964), certiorari denied, 380 U. S. 910; *Florence Printing Co.* v. *N. L. R. B.*, 333 F. 2d 289, 291 (4 Cir. 1964); *Northern Virginia Steel Corp.* v. *N. L. R. B.*, 300 F. 2d 168, 175 (4 Cir. 1962); *N. L. R. B.* v. *Economy Food Center Inc.*, 333 F. 2d 468 (7 Cir. 1964); *N. L. R. B.* v. *Primrose Super Market of Salem, Inc.*, 353 F. 2d 675 (1 Cir. 1965); *Retail, Wholesale & Department Store Union* v. *N. L. R. B.*, 385 F. 2d 301, 308 (D. C. Cir. 1967).

148. *Heck's Inc.*, 156 NLRB 760, 767, enforcement denied on other grounds, 386 F. 2d 317 (4 Cir. 1967); *Ash Market and Gasoline*, 130 NLRB 641; *Hamilton Plastic Molding Co.*, 135 NLRB 371, 373, modified on other grounds, 312 F. 2d 723 (6 Cir. 1964); *Edward Fields, Incorporated*, 141 NLRB 1182, 1195, modified on other grounds, 325 F. 2d 754 (2 Cir. 1963); *Sabine Vending Co., Inc.*, 147 NLRB 1010, 1011, enforced, 355 F. 2d 932 (5 Cir. 1966); *Dixie Color Printing Corp.*, 156 NLRB 1431, 1432, enforced, 371 F. 2d 347, 348 (D. C. Cir. 1966); *Post Houses, Inc.*, 161 NLRB 1159, 1160, n. 1, enforced, 384 F. 2d 463 (3 Cir. 1967).

not, cannot, excuse the Employer from the consequences of this basic violation of the Act."

Thus, the mental attitude of the employer is not relevant to either of the basic elements of his duty to recognize, i. e. the appropriate unit or majority status. It is thereby difficult to perceive by what legerdemain the good faith state of mind of the employer becomes a valid defense to a violation of the duty to recognize where the union's majority status is proved by means other than an election.

In practical terms it is the issue of "good faith" that in large part has created difficulty in respect to refusal to recognize Section 8(a)(5) violations. The Board, the courts and the legal writers, without benefit of psychoanalysis or psychiatric tools, the science of cybernetics or subliminal testing, vainly have sought to delve into the cerebrations of an employer to determine whether a refusal to recognize was predicated upon a "good faith" doubt as to the majority status of the union. Some have suggested that the test should be based upon whether the employer rejects the principle of collective bargaining or whether he seeks undue delay to gain time in which to undermine the union. *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950); certiorari denied, 341 U. S. 914, 71 S. Ct. 734 (1951); *Aaron Brothers Co.*, 158 NLRB 1077; *Retail Clerks Union, Local No. 1179* [*John P. Serpa Inc.*] v. *N. L. R. B.*, 376 F. 2d 186 (9 Cir. 1967). Others have suggested that the test should be whether the conduct of the employer has been of such a character as to render a free election impossible and, therefore, that the Board should order the employer to recognize the union upon authorization card designations because of the impossibility of remedying the improperly influenced states of mind of the employees. *Irving Air Chute Co., Inc.*, 147 NLRB 627, enforced, 350 F. 2d 176, 182 (2 Cir. 1965); *Heck's Inc.*, 172 NLRB 255, 69 LRRM 1177; see Lesnick, *op. cit.* None of these tests has worked. In each

case the test is incapable of objective analysis and thereby dependent on the view of the decision-making body, be it a trial examiner, the Board, or a reviewing court of appeals. Further attempts to substitute different word combinations or categories to justify a "good faith" violation of the employees' right to designate their bargaining representative by means of authorization cards will merely exaggerate the logorrhea in this area.

Indeed, at least one court, toying with the question of good faith, shifted to the shoulders of the General Counsel the burden of proving that the employer was in "bad faith" in refusing to recognize the bargaining representative designated by a majority of his employees, and held further, that to prove such bad faith, the General Counsel must prove the negative of a state of mind. *Textile Workers Union* [*Hercules Packing Corp.*] v. *N. L. R. B.*; 386 F. 2d 790 (2 Cir. 1967). Lost in the shuffle is the purpose of the Act, to grant full freedom to employees to organize and to designate a bargaining agent of their own choosing, and the explicit legislative mandate in Section 7, 9(a) and 8(a)(5). Nowhere is there a satisfactory explanation of why the rights of the employees, a majority of whom have selected a union to represent them, should be subordinated to the so-called "good faith" of the employer—and only in authorization majority cases.[149]

149. The genesis of "good faith" is instructive. The term was first introduced into the lexicon of Section 8(a)(5) in respect to the *duty to negotiate*, to avoid its emasculation if an employer were permitted to sit and meet with a mind hermetically sealed against arriving at a collective bargaining agreement. *Atlantic Refining Co.*, 1 NLRB 359, 368; *International Filter Co.*, 1 NLRB 489, 498; *S. L. Allen & Co., Inc.*, 1 NLRB 714, 727-728. However, it was sometime later that the matter of good faith was applied to the *duty to recognize*. Initially, the concept of good faith was introduced in a two-union situation where both unions claimed to have been designated by a majority of the employer's employees. *Brewer-Titchener Corp.*, 19 NLRB 160, 167-168; *American Products, Inc.*, 34 NLRB 442, 449-450; *Bradford Machine Tool Co.*, 44

This Court has considered and rejected the relevance of an employer's good faith to proof of majority status by authorization cards, in another context. *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 738-740; 81 S. Ct. 1603, 1607-1608 (1961). In *Bernhard-Altmann, op. cit.*, the employer was held to have violated Section 8(a)(2) when he, in good faith but erroneously, recognized the union as the majority representative of his employees. No difference in principle exists between the duty of an employer to recognize a union designated by a valid majority of its employees and the obligation under Section 8(a)(2) to refrain from recognizing one which has not been so designated, since in both instances, the Section 7 rights of the employees must be protected.

The relationship between Section 8(a)(2) and Section 8(a)(5) was vigorously urged by the petitioning union in *Bernhard-Altmann, op. cit.* as a basis for reversing the Board's finding of a violation of Section 8(a)(2).[150] The petitioner there argued that a violation of Section 8(a)(2) should not exist where an employer erred in recognizing a union which in good faith it believed had been designated by a majority of its employees. The Union predicated this position on the theory that an employer who had a good faith doubt in respect to a union's majority status may, with impunity, refuse to recognize a majority representative without violating Section 8(a)(5). In re-

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NLRB 759, 767, n. 6. The Board held, under the Wagner Act, that the employer might refuse to recognize both unions if he had a good faith doubt in respect to which of the two unions was validly designated by a majority of his employees. *Sbicca, Inc.*, 30 NLRB 60. Later, without rational analysis, the same principle was applied to a one-union situation. *Roanoke Public Warehouse*, 72 NLRB 1281.

150. Brief for Petitioner [ILGWU] at 31-34, *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 81 S. Ct. 1603 (1961).

jecting the union's argument, this Court said [366 U. S. at 739-740, 81 S. Ct. at 1608-1609]:

> We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices [which] are involved. * * * Here that [employer] support is an accomplished fact. More need not be shown for, even if mistakenly, the employees' rights have been invaded. It follows that *prohibited conduct cannot be excused by a showing of good faith.*
>
> This conclusion, while giving the employee only the protection assured him by the Act, places no particular hardship on the employer or the union. * * * We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so. Moreover, no penalty is attached to the violation. *Assuming that an employer in good faith* accepts or *rejects a union claim of majority status, the validity of his decision may be tested in an unfair labor practice proceeding.*[13] *If he is found to have erred in* extending or *withholding recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act* * * *. No further penalty results. [Emphasis supplied.]

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13. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." [Citation omitted.]

The foregoing quotation considered in the light of the vigorous argument based on a Section 8(a)(5) good faith defense made by the petitioner therein reflects the agreement of this Court with that petitioner's contention that good faith as a defense be treated identically in cases involving violations of Section 8(a)(2) and violations of Section 8(a)(5). The Court, however, properly concluded that conduct prohibited by Section 8(a)(2) or Section 8(a)(5)

"cannot be excused by a showing of good faith." In the instant case it is difficult "to see any onerous burden" in "giving the [Gissel] employee only the protection assured him by the Act" by requiring the Company to cross-check "well-analyzed employer records with * * * authorization cards." "Assuming that an employer [Gissel] in good faith * * * reject[ed] a union [Local 347] claim of majority status" and, as herein found, erred in "withholding recognition, he is subject only to a remedial order" to bargain with the Union, upon request.[151]

Inasmuch as the employer's "good faith" is not relevant to his doubts about the appropriateness of the unit nor to his genuine and reasonable doubts about the validity of an election in cases involving violations of Section 8(a)(5), and since his "good faith", but mistaken, belief that a union has been designated by a majority is no defense to a violation of Section 8(a)(2) [*Bernhard-Altmann op. cit.*], there is no basis for a ruling that such a "good faith", but mistaken, belief that the union has not been designated by a majority of authorization cards is a valid defense to a Section 8(a)(5) violation, particularly in view of the right granted to an employer in Section 9(c)(1)(B) to file a petition for an election to resolve his legitimate doubts.

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151. *International Ladies' Garment Workers Union* [*Bernhard-Altmann*] v. *N. L. R. B.*, 366 U. S. 731, 739, 740, 81 S. Ct. 1603, 1608 (1961).

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the decision below be reversed with directions to enter a decree enforcing the Board's order.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Secs. 151 *et seq.*) are as follows:*

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth

* The text of the Wagner Act as amended by the Taft-Hartley Act of 1947 is printed in Roman type. Matter added by the Landrum-Griffin Act of 1959 is in italics. Matter deleted in 1959 appears in brackets.

day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, [and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with Section 9(f), (g), (h)], and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement; *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(4) *(i)* to engage in, or to induce or encourage [the employees of any employer] *any individual employed*

by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a [concerted] refusal in the course of [their] *his* employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services [,]; *or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce,* where *in either case* an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization [or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;] *or to enter into any agreement which is prohibited by section 8(e);*

(B) forcing or requiring any [any employer or other] person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [;]: *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;*

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if

another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution:*

* * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an

object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual

employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

* * * * * *

SEC. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recog-

nized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees [on strike] *engaged in an economic strike* who are not entitled to reinstatement shall [not] be eligible to vote *under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.* In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * * * *

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

* * * * *

SEC. 10. (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated

with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(*l*) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), *or section 8(e) or section 8(b)(7)* the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except of like character * * * If, after such investigation, the * * * regional attorney * * * has reasonable cause to believe such charge is true and that a complaint should issue, he shall, * * * petition any United States district court * * * for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. * * * [.]: *Provided further,*

That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue.

SEC. 302. (a) It shall be unlawful for any employer *or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer* to pay, *lend,* or deliver, or agree to pay, *lend,* or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce[.]; *or*

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) *(1)* It shall be unlawful for any [representative of any employees who are employed in an industry affecting commerce] *person to request, demand,* receive, or accept, or [to] *agree to receive or accept,* [from the employer of such employees] *any payment, loan, or delivery of* any money or other thing of value [.] *prohibited by subsection (a).*

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) [with] *in* respect to any money or other thing of value payable by an employer to any [representative who is an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer;] *of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer;* (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment

of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; [or] (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents):

* * * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * * *

SEC. 401. (e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, dis-

cipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement, shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

NLRB RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, SERIES 8.

SEC. 102.69 *Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.*—(a) • • • Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served on the other parties by the party filing them, and a statement of service shall be made.

IR-196
Huntington, W. Va.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Division of Trial Examiners

Washington, D. C.

GISSEL PACKING COMPANY
and
FOOD STORE EMPLOYEES UNION, LOCAL No. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO. } Case No. 9-CA-2068.

Mr. Michael A. Lasher, for the General Counsel.

Greene, Morgan and Ketchum, by *Mr. Edward H. Greene,* of Huntington, W. Va., for the Respondent.

Mr. Jack Brooks, of Charleston, W. Va., for the Charging Party.

Before: *Stanley Gilbert,* Trial Examiner.

INTERMEDIATE REPORT.

STATEMENT OF THE CASE.

This proceeding, with all parties represented, was heard before the undersigned Trial Examiner in Huntington, West Virginia, on May 24, 1960, on complaint of the General Counsel and answer of Gissel Packing Company, herein called the Respondent. The issues litigated were whether the Respondent violated Section 8(a)(1) of the Act. The

parties waived oral argument and only the Respondent filed a brief.

Upon the entire record and my observation of the witnesses, I hereby make the following:

Findings and Conclusions.

I. The business of the Respondent.

Respondent, a West Virginia corporation, has its office, plant and principal place of business in Huntington, West Virginia, and is engaged in the business of slaughtering and wholesale meat packing. During the year just prior to the filing of the complaint, a representative period, the Respondent had a direct inflow of goods from States other than West Virginia of a value in excess of $1,000,000. I find, as admitted by Respondent, that it is engaged in commerce within the meaning of the Act and that assertion of jurisdiction is warranted.

II. The labor organization involved.

Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter called the Union), as admitted by Respondent, is a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices.

The issues involved are whether the actions and statements of various persons who the Respondent admits were supervisors as defined in Section 2(11) of the Act constituted violations of Section 8(a)(1) of the Act.

The Respondent Company is owned and managed by Paula Gissel, president of the Company since 1950, and various members of her family including her several sons.

There is no indication that prior to the period pertinent to this matter any attempts were made by the employees of Respondent to form a union or that any union attempted to organize the employees. During the first or second week of February 1960 Paula Gissel received word that the Union, the Charging Party in this matter, was soliciting the employees of the Respondent to sign membership cards. She became convinced of this fact toward the end of the working day of February 11 when Carson Dillard, a salesman for Respondent, informed her of the activity of the Union.[1] The next morning, February 12, shortly after work commenced, Paula Gissel decided "on the spur of the moment" to address her employees. The plant opened at 6:30 a.m. and the meeting was held between 7 a.m. and 8 a.m. She had never before called a meeting of all the employees and admittedly called this meeting for the purpose of talking to the employees about the Union.

In essence, it is alleged in the complaint that Paula Gissel during the course of the meeting stated or strongly implied:

(a) That before letting in the Union she would close the plant and sell the equipment;

(b) That if the Union got in she would cut down the amount of work so that the plant could be operated by her family;

(c) That she had intended to take out group insurance for the employees but had dropped the idea since some were in favor of the Union;

(d) That employees who were in favor of the Union could get out and find other jobs; and

1. She testified that she had heard about the Union's activities sometime prior thereto but could not identify the persons who had told her. Since she was quite vague as to the details of her prior information and in light of her actions after the report from Dillard, it is quite clear that if she had received earlier word of the Union's activities she was not impressed by its authenticity.

(e) That since she was old enough to draw social security she would rather retire than allow a union to represent the employees.

There is substantial accord among all the witnesses as to what Paula Gissel stated at the meeting except for, in a few instances, variances in wording which would be susceptible of different inferences. Mrs. Gissel at the outset stated that she had heard that a union was trying to get into the plant and that for those who wanted it—a union was a "fine thing" or a "good thing." While it is clear that she made such a statement with reference to "a union," it is quite evident that within the context of the rest of her statements the branding of a union as a "fine thing" did not apply in her mind to the operation of Respondent's plant. At best it can be inferred that she did not object to unions in general or in principle. She left no doubt that she would not accept a union as a bargaining representative of Respondent's employees.

Paula Gissel testified that she said she *might have to* close the plant if the Union came in. Respondent urges that she only indicated that such a result might become an economic necessity in view of the small margin of profit the Respondent enjoyed. In the main, Respondent's position is that Paula Gissel's statements were protected under the right of freedom of speech and constituted nothing more than predictions of economic consequences of unionization of the plant. However, the record is replete with the testimony of credible witnesses which discloses that her statements as a whole were not susceptible to the limited inference Respondent urges. An analysis of the testimony of these witnesses discloses that Mrs. Gissel indicated that she did not intend to accept a union and that rather than do so she would sell the plant, close it, or operate it on a small basis with only her family and possibly a few loyal employees.

Employees who were called as witnesses by General Counsel testified as follows:

Roberta Molihan: that Paula Gissel stated that she knew some of the employees were against her; that she knew about the Union coming in; that no one was going to come in and tell her what to do; that they could operate on a smaller basis and those that wanted to walk out could walk out; and that none of her children would work under a union.

Henry B. Gunnoe: that Mrs. Gissel said she could not stand union wages and would either sell the plant, close it up or operate it with her own family.

Russell Sowards: that Mrs. Gissel said she was an old lady and had worked hard and before she accepted the Union she would close the doors.

Herbert Dunfee: "She said she wouldn't accept no union. That she was too old to have any young smart aleck come in and tell her how to run her business; that she would sell the trucks and equipment and go on social security before she would have the union."

Gaines E. Smith: "As clearly as I can remember she began by saying she had understood we were going to strike, or walk out on her that morning. And she went on to say that she was prepared for us if we were to strike. And she explained to us how since she had worked, and her and her children had worked hard and put their efforts together to build the Company up to what it was. And she said if necessary that she could cut down on the kill, and they could just slaughter enough livestock to keep her immediate family going. And she also said that she was an old lady, and that she wouldn't have any young man to come in and tell her how to run her plant."

Paula Gissel testified that she had said that if the Union came in each employee would have to do a specific job and

that as a result their working hours would be shortened. She admitted that she said that she would not have a young man from the Union come into her plant and tell her how to run it. She also testified that she said that if the plant closed she might have to draw on her social security.

I was impressed by the sincerity of Paula Gissel in her attitude toward the welfare of her employees as individuals and believe her to be a credible witness in this proceeding. By her own testimony it is quite clear she did not limit her statements to economic predictions of unionization of the plant, but clearly indicated that she would not accept the Union as a bargaining representative of her employees.

The testimony, however, does not sustain the allegation that Mrs. Gissel stated that those employees who were in favor of a union should get out. It appears that she might have been laboring under the misapprehension that a strike was imminent and with that in mind she said, as was testified to by Roberta Molihan, that those who wanted to walk out could do so and that the plant could operate on a smaller basis. This was corroborated by the above-quoted testimony of Gaines E. Smith. It cannot fairly be inferred that she was threatening the discharge of any employee or suggesting that those who were in favor of the Union should "get out." At most the testimony as to this part of her statements indicated merely that she was claiming not to be in fear of a strike in that she could operate on a smaller basis if there were one.[2]

With reference to the allegation in the complaint that Paula Gissel told the employees that since some of them were in favor of the Union she was dropping a plan she had been considering to take out group insurance for them,

2. The statements with reference to curtailing operations, however, were not limited merely to the consequences of a strike but extended also to the possibility of the success of the Union's solicitation of membership among the employees.

there seems to be little contradiction in the testimony except as to whether the employees had received word of such plan prior to the meeting of February 12, 1960. The only testimony, however, to support the earlier announcement of the plan was that a slip was sent around the plant to get the names and addresses of the employees. Alfreda Closterman, one of management personnel, testified that the information was requested in connection with arranging for insurance. Gaines E. Smith corroborated the fact that such information was sought but insisted that he had no knowledge that it was for that purpose. I find there was no prior announcement of the plan to the employees and no employee was told of it.

The first announcement that group insurance was being considered was made by Paula Gissel at the meeting on February 12. She testified that she had been planning it from the early part of January 1960 and had been getting estimates and that at the meeting of February 12 she stated that she had been planning to take out group insurance for the employees. The testimony of several of the employees, particularly Roberta Molihan and Henry B. Gunnoe, discloses that Paula Gissel indicated that because of the possibility of the Union coming in she was dropping the plan. She obviously implied that if the Union did not come in they would get the benefit of group insurance. She had no reason to raise the point otherwise, for it had never been announced to the employees and, therefore, this would be the logical inference.

In view of the foregoing I conclude that Paula Gissel's statements were not, as contended by Respondent, limited to merely economic predictions and thus protected, but constituted violations of Section 8(a)(1) in the following respects:

(a) She informed the employees that the Respondent

would not recognize the Union as their bargaining representatives even if the employees desired it.

(b) She indicated to the employees that rather than accept the Union she would close the plant or greatly curtain its operations thus implying that wide spread discharges or layoffs would result.

(c) She clearly implied that if they rejected the Union they would be given the benefit of group insurance.

During the course of the meeting, apparently at the end or toward the end of Paula Gissel's statements, Bonnie Bennett, a foreman, asserted that if he could find out who (apparently in his department) was trying to bring in the Union they would be discharged.[3] Both Bennett and Mrs. Gissel admitted that the statement was made, but insisted, and I so conclude, that it was not authorized by her. However, it is admitted that he had the power to hire and fire without consulting any one.

Respondent contends this statement was adequately counteracted by immediate responses from Paula Gissel and Leoris Gissel. Paula Gissel testified that she said "No, I won't fire nobody. If they don't want to work for me no more they have to quit; they have to lose their own job on their own accord." And that her daughter-in-law, Leoris Gissel, said: "Look, Bonnie, we will fire nobody." Bennett confirmed this testimony. On the other hand Roberta Molihan testified that Leoris Gissel said "No, I don't believe that you should take that attitude; that the Union people can make it look nice" or "can make it look like a bed of roses." Gaines E. Smith testified that Leoris said "No, let's not fire them." Henry B. Gunnoe testified when asked what response Paula Gissel made to Bennett's

3. Although the complaint, in alleging this as a violation of Section 8(a)(1), charged that the statement was made on March 12, 1960, it is assumed that the complaint was referring to this statement made at the meeting of February 12, 1960.

statement: "Well, she didn't tell him to. I think she said, 'That's okay, Bonnie'."

The witnesses are fairly well in accord that it was indicated that the top management did not endorse his statement which he testified he made because he was "half mad." The contradictions only exists with respect to the degree of emphasis with which his utterance was rejected. Paula Gissel was a credible witness and for the most part candid in her testimony. I do not find the testimony of the other witnesses to the incident sufficiently convincing in its exactness as to what she did or did not say to disregard her testimony that she stated that nobody would be fired. Since Bennett had the right to hire and fire without consulting her I have considered whether her repudiation constituted sufficient assurance to those employees in the department in which Bennett was foreman that he would not be able independently to fire an employee whom he thought to be responsible for bringing in the Union. However, the record discloses that thereafter the employees in his department freely indicated to him their attendance at union meetings. Therefore, I am led to conclude that his statement did not, in fact, have the effect of interfering with the rights of the employees guaranteed them under Section 7 of the Act.

After the meeting of February 12, Herbert Gissel, a son of Paula Gissel serving as vice president and foreman of the Respondent, admittedly called a meeting of the meat packers in the latter part of February.[4] It is alleged in the complaint that during the course of this meeting he told the employees (a) that only those who did not sign union

4. Roberta Molihan, who was present at the meeting, testified it was held about a week before the meeting of February 12, 1960. From the record I conclude that Roberta Molihan was mistaken or inadvertently placed the meeting at a time prior to the one of February 12, but that this had no effect on the credibility of the witnesses.

cards would retain their jobs; and (b) that his mother would shut down the plant and draw social security before accepting a union.

Roberta Molihan, whom I have found to be a credible witness, testified as follows with respect to Herbert Gissel's statements:

> A. Well, he said that we knew, some of us knew that there was trying to be a union come in there, and maybe some of us did not know it, but that the children would not work for a union or under a union.
>
> Q. What children?
>
> A. The Gissel family.
>
> Q. Okay. Go ahead.
>
> A. And he said that his mother was old, and that she was going to try to stick by her employees, and the employees that stuck by her would be the ones that would be able to work, and that she was going to try to take out an insurance on us and that would pay us when we were sick and not able to work.
>
> And he said that none of the children would work with a union because they had seen things that were done from a union, and they would not work with a union.
>
> Q. Was anything mentioned about closing?
>
> A. I am not positive, but he did mention that they could—run the plant on a smaller basis, or they could —a family basis, but they could shut down the plant and sell the machinery.
>
> Q. You say you're not positive. Are you positive—
>
> A. He did bring it up, closing, that they would do that.
>
> Q. Was anything said about social security by Mr. Herbert Gissel on that occasion?
>
> A. Just that his mother was old, and that she could draw her social security.

Herbert Gissel in his testimony denied that he had made the statements to which Roberta Molihan testified. His

version of the incident is that he was asked a question by her as to what would happen to the employees who did not sign with the Union and that he replied: ". . . if you didn't sign, and the Union came in, they would have to accept her."

I do not find Herbert Gissel to be a credible witness. He appeared evasive and no explanation was offered as to why he called the meeting or what was discussed therein. I assume that it was called for the purpose of discussing the Union.[5] Under the circumstances and considering the demeanor of the two witnesses I conclude that Herbert Gissel did make the statements attributed to him by Roberta Molihan and that they were violative of Section 8(a)(1) of the Act in that they indicated to the employees: (a) that the management would not accept a union as a bargaining representative of the employees; (b) that there would be discrimination against those employees who did join the Union; and (c) that if the Union came in the management might close the plant or run it on a smaller basis, implying that it would result in wide-spread discharges or layoffs.

Early in March, another son of Paula Gissel, Edward Gissel, who is a vice president of the Respondent and serves as a foreman, engaged in a conversation with a group of several employees in the boning room, during the course of which, it is alleged in the complaint, he stated that his mother would close the plant before she would let a union represent them. William Molihan, an employee called as

5. On cross-examination his testimony was as follows:

Q. (By Mr. Lasher) I direct your attention to the latter part of February, 1960, and ask you if you did not speak at a meeting with employees in the sausage department for the purpose of presenting your side, or the management's side to the so-called Union propaganda which was being disseminated among the employees? Is that true or not? Did you have such a meeting?

A. Yes, I had a meeting.

a witness by the General Counsel, testified that he was present at the time and that Edward Gissel made the statement alleged. Edward Gissel denied making the statement and asserted that he only discussed the subject of a union with employees when they brought it up. He did not recall any particular incident in which he discussed the Union with an employee. William Molihan appeared to be a credible witness and his testimony is accepted as truthful not only because of his demeanor but also because it is consistent with the testimony of other credible witnesses as to the attitude of the management with which undoubtedly Edward Gissel was in accord. Edward Gissel did not impress me as being candid or forthright in his testimony. Therefore, I conclude that Edward Gissel made the statement testified to by William Molihan and that it was a violation of Section 8(a)(1) of the Act.

Also during the early part of March, it is alleged in the complaint, Paula Gissel told an employee that she would not let the Union in and would give the Union $1,000 if they would get out and stay out. Henry B. Gunnoe, who testified with respect to this allegation, was somewhat confused as to when such a statement was made. From his testimony it appears that part of the statement was made in one conversation and part in another. While I do not doubt the sincerity of the witness, his testimony was too confused and inexact to be of much value in ascertaining with sufficient detail what Mrs. Gissel did say to him to enable me to establish its significance. At the most it would appear merely to be corroborative of other testimony with regard to Paula Gissel's attitude toward the Union.

Bonnie Bennett, a foreman, was charged in the complaint to have made a series of statements over the course of the month of March violative of Section 8(a)(1) of the Act, namely:

(a) Telling an employee that Paula Gissel had said she would not have a union in the plant;

(b) Telling several employees on at least two occasions that he did not want to see them at a union meeting and on one of these occasions adding the threat that they would be discharged.

(c) Telling Paula Gissel in the presence of an employee that if she gave him the word he would make it so tough the employees would have to quit; and

(d) Telling Edward Gissel in the presence of an employee that if he, Bennett, had proof as to who had signed union authorization cards, he would discharge them.

I do not find that the record supports the allegation that on or about March 3, 1960, Bennett told an employee that Paula Gissel said she would not have a union. No witness testified to the fact that he made such a statement and Bennett denied making it. This is also true of the allegation that he told Mrs. Gissel in the presence of employees that if she gave him the word he would make it so tough that employees would have to quit.

With respect to the allegation that Bennett told Edward Gissel in the presence of an employee that if he had any proof as to who signed union authorization cards he would discharge them, it appears that the incident started with Gissel asking Bennett whether, if he had proof of their membership in the Union, he would discharge the employees. Apparently more than one employee was present, for Herbert Dunfee testified that Bennett made no answer and Gaines E. Smith testified that Bennett answered that if he were furnished proof, he would. Bennett admitted that he asked Gissel whether he had proof but that the conversation went no further. Bennett also stated in testifying that he did not need proof, that he knew who belonged to the Union, that in their conversations with him the employees indicated their union affiliation. In view of the fact that Bennett's version of the occurrence was corrobo-

rated by Dunfee, I accept it as being correct and conclude that this allegation is not supported by the record.

With respect to the two allegations in the complaint that Bennett told employees that he did not want to see them at union meetings, implying or stating a threat of some discrimination against them if they should attend, Respondent contends that Bennett was joking, that his remarks were not made in a serious vein. Apparently there was a series of conversations between Bennett and employees in his department with reference to their union activities. There were quite a few references to the fact that he, on more than one occasion, said something to the effect that he did not want to see their "smiling faces" at union meetings which Bennett admits saying. Bennett testified that the employees made it quite clear to him in their conversations that they had attended or planned to attend meetings and that there were jokes about the food they ate at the meetings. It is admitted by the employees who testified with respect to the conversations that it was customary for Bennett to joke with them and that they did joke about the union meetings they attended. However, they insist that Bennett was serious when he made the statements alleged in the complaint.

The fact that the conversations and joking about the Union continued over the course of the pertinent period belies the contention that the employees considered Bennett to have been serious. Otherwise they certainly would not have persisted in such conversations and would not have so heedlessly indicated to him their actions with respect to the Union. Bennett appeared to be a candid witness and I do not discredit the employees who testified. As a matter of fact there is little, if any, contradiction in the testimony as to the occurrence to which these two allegations refer. A substantial contradiction only arises with respect to the witnesses' interpretations of Bennett's

manner or intent. Considering the conduct of the employees in continuing to joke with Bennett about their union activities, I conclude that his statements did not have the effect of interfering with any of the rights guaranteed employees under Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce.

The conduct and statements of various persons in the management of the Respondent set forth in Section III, above, considered in connection with the operations of Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes obstructing commerce and the free flow of commerce.

V. The remedy.

Although I have found that some of the allegations of the complaint have not been sustained by the evidence, I believe that the remaining allegations of unfair labor practices which I have found to have been sustained are of sufficient substance to require a remedial order. While the Respondent is free to indicate its opposition to the Union and reasons therefor it may not in exercising its freedom violate Section 8(a)(1) of the Act, by, as I have found, indicating to its employees: that it would not recognize the Union as their bargaining representative; that if the Union were successful in soliciting membership the Respondent would close its doors or curtail its operations; that if the Union were rejected by the employees the Respondent would give them the benefit of group insurance; or that there would be discrimination against those em-

ployees who did join the Union.[6] In view of these findings, I believe that the affirmative action hereinafter recommended is necessary to effectuate the policies of the Act.

Upon the basis of the above findings and upon the entire record in the case, I make the following:

Conclusions of Law.

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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6. The freedom of management is limited by the prohibition that it may not violate the Act. *N. L. R. B.* v. *McGahey*, 233 F. 2d 406 (C. A. 5).

RECOMMENDATIONS.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the Gissel Packing Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Stating or intimating that the Gissel Packing Company will not recognize the Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other union as a bargaining representative which may be selected by its employees;

(b) Stating or intimating that its plant will be closed or operations will be curtailed in the event its employees select the aforesaid union or any other union as their bargaining representative;

(c) Stating or intimating that it will discriminate against any employee in regard to his or her conditions or terms of employment for union membership or union activities;

(d) Stating or intimating that it will grant group insurance or any other benefit to its employees in the event they reject the aforesaid union or any other union as their bargaining representative;

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above named or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in any other mutual aid or protection, or to refrain from any or all such activi-

ties, except to the extent that such right may be affected by any agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act;

(a) Post in conspicuous places at its plant in Huntington, West Virginia, including all places where notices to employees are customarily posted, copies of the notice attached hereto as the Appendix. Copies of such notice, to be furnished by the Regional Director for the Ninth Region shall, after being duly signed by the Respondent's authorized representative, be posted by it immediately upon receipt thereof in conspicuous places, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notice is not altered, defaced, or covered by any other material;

(b) File with the said Regional Director within twenty (20) days from the receipt of this Intermediate Report a written report setting forth in detail the steps which Respondent has taken to comply herewith.

It is further recommended that, unless within twenty (20) days from the date of receipt of this Intermediate Report the Respondent notifies the said Regional Director that it will comply with the foregoing Recommendations, the Board issue an order requiring the Respondent to take the aforesaid action.

Dated at Washington, D. C. this 21st day of July 1960.

STANLEY GILBERT,
Trial Examiner.

APPENDIX.

Notice to All Employees

Pursuant to

The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not state or intimate that the Gissel Packing Company will not recognize the Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other union as a bargaining representative which may be selected by its employees.

We will not state or intimate that its plant will be closed or operations will be curtailed in the event its employees select the aforesaid union or any other union as their bargaining representative.

We will not state or intimate that it will discriminate against any employee in regard to his or her conditions or terms of employment for union membership or union activities.

We will not state or intimate that it will grant group insurance or any other benefit to its employees in the event they reject the aforesaid union or any other union as their bargaining representative.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above named or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in

any other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

GISSEL PACKING COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GISSEL PACKING COMPANY, INC.[1]
Employer,

and

FOOD STORE EMPLOYEES UNION, LOCAL No. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,[2]
Petitioner.

Case No. 9-RC-3966.

DECISION AND DIRECTION OF ELECTION.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

---

1. The Employer's name appears as amended at the hearing.

2. The Petitioner's name appears as amended at the hearing.

3. The hearing officer refused to continue the hearing until afternoon for the purpose of calling Mr. Mollohan as a rebuttal witness to testify as to his own alleged supervisory status. Although this ruling constituted error, it was not prejudicial so we shall permit Mr. Mollohan, the alleged supervisor of the boning room, to vote subject to challenge. See *American Potash & Chemical Corporation,* 117 NLRB 1508, ftn. 1.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[4]

All production and maintenance employees of the Employer at its Huntington, West Virginia, plant including truck drivers, truck driver salesmen and the janitor, but excluding office clerical employees, salesmen, professional employees, guards, officers of the Employer, the salesmen foreman, the truck salesmen foreman, the working foremen

---

4. The parties stipulated as to the appropriateness of the unit except for the truck driver salesmen, and the placement of certain employees. As the truck driver salesmen, like the truck drivers, have sufficient interest in common with the production and maintenance employees, we include them in the unit. The *Valley of Virginia Cooperative Milk Producers Association,* 127 NLRB No. 95. As the janitor, who spends 3 hours per week cleaning the office, is a regular part time employee, we include her in the unit. *Brown Cigar Co.,* 124 NLRB 1435, 1437. We also include in the unit L. R. Hutchinson, a vice-president's son-in-law, who works in the processing and packaging department, as there is nothing in the record to indicate that he enjoys a special status by virtue of his relationship. *Adam D. Goettl and Gust Goettl, d/b/a International Metal Products Company,* 107 NLRB 65. Alfreda Hutchinson and R. E. Lewis are the daughter and son respectively of vice presidents of the corporation. As the record is inadequate to enable us to determine whether these 2 employees should be excluded from the unit under Sec. 2(3) of the Act, or because they enjoy a special status by virtue of the relationship, we shall allow them to vote subject to challenge.

of the processing and packaging department, the slaughter house, the freight and delivery department, and the maintenance department, and all other supervisors as defined in the Act.

DIRECTION OF ELECTION.

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for the Region where this case was heard shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by[5] Food Store Em-

5. Employees engaged in an economic strike which began less than 12 months from the date of the election who have been permanently replaced and their replacements shall vote by challenged ballot.

ployees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

Dated, Washington, D. C. Jan. 27 1961.

PHILIP RAY RODGERS,
Member,

JOHN FANNING,
Member,

ARTHUR A. KIMBALL,
Member,

National Labor Relations Board.

NLRB PLEDGE CARDS.

Under NLRB rules, a 30 percent showing on union pledge cards is all that is required to petition for an election. These days, however, few elections are won with such a showing. NLRB pledge cards are at best a signifying of intention at a given moment. Sometimes they are signed to "get the union off my back." In other cases, the employer urges workers to sign the cards to get a premature election. In still others, workers sign to scare the boss into a raise. Whatever the reason, there is no guarantee of anything in a signed NLRB pledge card except that it will count toward an NLRB election.

For these reasons and out of long experience, most organizers will not move forward by filing for an election unless they have at least a majority of the workers signed and that majority looks reasonably solid.

There may be times when, because interest shows signs of waning, the organizer will petition for an election with fewer than 50 percent of the workers signed up. This will depend upon whether it is felt necessary to move ahead regardless of results.

If an election is lost or if an organizer determines that further progress is not possible in a campaign at a given time, thought must be given to withdrawal. The worst thing possible is to "pull out" without warning, leaving workers high and dry.

Aside from other considerations, the union may want to return another day. It may be advisable to counsel with the plant leaders to this effect and to try to keep a nucleus alive. In any case, good-byes in this kind of situation should involve full consideration for those who supported the union and who must continue to work in the plant.

91ST CONGRESS

1ST SESSION

S. 426

A BILL

To amend the National Labor Relations Act so as to require a Board-conducted election in representation cases.

By MR. FANNIN, MR. BENNETT, MR. CURTIS, MR. ERVIN, MR. THURMOND, and MR. WILLIAMS of Delaware.

JANUARY 21 (legislative day, JANUARY 10), 1969

Read twice and referred to the Committee on Labor and Public Welfare

91ST CONGRESS

1ST SESSION

S. 426

IN THE SENATE OF THE UNITED STATES

JANUARY 21 (legislative day, JANUARY 10), 1969

MR. FANNIN (for himself, MR. BENNETT, MR. CURTIS, MR. THURMOND, and MR. WILLIAMS of Delaware) introduced the following bill; which was read twice and referred to the Committee on Labor and Public Welfare.

A BILL

To amend the National Labor Relations Act so as to require a Board-conducted election in representation cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 9(a) of the National Labor Relations Act, as amended (29 U. S. C. 159(a)), is amended by inserting before the first proviso therein the following: "*Provided further,* That such bargaining representatives shall have been certified by the Board as the result of an election conducted in accordance with subsection (c):".

SEC. 2. Section 10(c) of such Act (29 U. S. C. 160(c)) is amended by inserting before the period at the end of the third sentence thereof a colon and the following: "*Provided further,* That the Board shall not issue an order to bargain in any case in which the bargaining representative shall not have been certified as a result of an election conducted in accordance with section 9(c)".

SEC. 3. The amendments made by this Act shall not be construed to require the holding of an election in any case in which an employer is required to recognize and bargain with a labor organization pursuant to a valid existing bargaining order entered by the National Labor Relations Board prior to the date of enactment of this Act, or in any case in which on such date an employer is voluntarily recognizing and bargaining with a labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERCAN RETAIL FEDERATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE*

The American Retail Federation (hereinafter referred to as the "Federation") is an organization composed of 73 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry.

*This brief is filed with the written consent of both parties, pursuant to Rule 42(2) of this Court.

The interest of the Federation, in urging reversal of the Board and Court below, is predicated upon the potentially substantial and far-reaching consequences that any decision in this case may have for the retail industry. The retail industry has been intimately involved in many landmark cases involving employer speech and communication and the limitations placed thereon. See *e.g. Bonwit Teller, Inc.*, 96 NLRB 608 (1951), *enf't den'd* 197 F.2d 640 (1952), *cert. den'd* 345 U.S. 905 (1953); *May Department Stores Co.*, 136 NLRB 797 (1962); *enf't den'd* 316 F.2d 797 (1963); *Montgomery Ward & Co.*, 145 NLRB 846 (1964), *enf'd* 339 F.2d 889 (1965). Likewise the use of bargaining orders based upon authorization cards as a penalty approach limiting employer speech as well as an abridgement of rights granted to employers and employees under the National Labor Relations Act, 29 U.S.C. 151 et seq., has a significant impact on labor relations in the retail industry. This has been of such continuing vital concern that the Federation has sought and has been given permission to present its views before appropriate congressional committees in this area. *Hearings Before the Special Committee on Labor, Committee on Education and Labor, House of Representatives,* 90th Cong., 1st Sess. (1967), H.R. 1175, *To Amend the National Labor Relations Act to Increase Effectiveness of Remedies,* pp. 383, 386-387, 393 (Committee Print); *Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare,* Senate, 89th Cong., 1st Sess. (1965) S. 256, *To Appeal Section 14(b) of the National Labor Relation Act,* pp. 195, 196-198, 181-185 (Committee Print); *Hearings Before the Subcommittee on the Separation of Powers of the Committee on the Judiciary,* Senate, 90th Cong., 2nd Sess., *Congressional Oversight of Administrative Agencies* (NLRB), April 30, 1968.

PRELIMINARY STATEMENT

In July, 1965, the Teamsters Union began organizing the Sinclair Company's employees. From July to December, 1965, the Company, by written and oral communication, engaged in a campaign to persuade the employees to vote against the Union as their collective bargaining representative (App. 171). During this period, the Union claimed to have obtained signatures on authorization cards from a majority of the employees and requested recognition. The request for recognition was declined by the Company and the Union petitioned for a National Labor Relations Board (herein the "Board") election. In this election, the employees rejected the Teamsters Union, 7 votes to 6 (App. 166, 188). The Union objected to the conduct of the election, filed unfair practice charges alleging the employer's communication coerced the employees in the exercise of their statutory rights and alleging the employer unlawfully refused to bargain collectively with it. The Board found the communications violated section 8(a)(1) of the Act (App. 183, 164 NLRB No. 49). The election was set aside and, as the Board found the Company's refusal to grant recognition to the Teamsters was not motivated by a "good faith doubt", Sinclair was ordered to bargain with the Teamsters. The First Circuit Court of Appeals, 397 F.2d 157, granted enforcement of the Board's order (App. 210, 212).

SUMMARY OF ARGUMENT

I.

The National Labor Relations Act was designed to give employees the right to choose, or not to choose, a collective bargaining representative through a Board conducted secret ballot election.

The National Labor Relations Board has no authority to compel an employer who refuses to recognize a labor organization on the basis of authorization cards to bargain with the labor organization for the reason that the employer "lacked doubt." The policies and priorities of the Act, except in certain limited circumstances where the holding of a fair election is clearly impossible, are not effectuated by the determination of representative status on the basis of authorization cards. Congress rejected the use of authorization cards which are highly unreliable, and provided a more conclusive method for the determination of employee choice, the secret ballot. Because of the conflicting and confusing Board and Court interpretations, this Court should delineate the Board's remedial authority to use authorization cards in lieu of secret ballot determinations.

II.

The Board and First Circuit abridged employer's freedom of speech as guaranteed by the First Amendment by utilizing a test which severely limits rather than fosters the traditional constitutional concept of free debate. Free debate and discussion is as vital in the labor-management arena as it is in any other area of our society. Unless the employer by clear language threatens to use his economic power by way of reprisal or promise of benefit, any curtailment of such debate and discussion casts the Board in the role of censor, and impinges on the First Amendment to our Constitution and Section 8(c) of the National Labor Relations Act.

ARGUMENT

I.

THE BOARD HAS NO AUTHORITY TO COMPEL EMPLOYERS TO BARGAIN BASED ON UNION AUTHORIZATION CARDS UNLESS THE CONDUCT OF A FAIR ELECTION IS IMPOSSIBLE.

A. Where a Question of Representation Exists, Section 9(c) of the Act Requires That Employee Choice Shall Be Determined by Secret Ballot.

(1) The Nature of the Issue.

The dominant theme of the National Labor Relations Act[1] is the right of employees to exercise a choice with respect to whether they desire a bargaining agent. Section 7 of the Act[2] provides that employees shall have the right to determine whether or not they desire union representation; Section 8[3] provides that neither employers nor labor organizations shall interfere with that right; and Section 3[4] establishes an agency, the National Labor Relations Board, to protect the exercise of this right through remedial powers granted in Section 10[5]. Thus, in numerous sections of the Act, using numerous forms of expres-

1. 29 U.S.C. § 151, *et seq.*

2. 29 U.S.C. § 157, which provides:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

3. 29 U.S.C. § 158.

4. 29 U.S.C. § 153.

5. 29 U.S.C. § 160.

sion, "Congress in the statute hammered home the right of the employees to a choice in respect to a bargaining agent."[6]

Section 9 of the Act establishes procedures to determine union representation. Section 9(a) provides that "representatives designated or selected . . . by the majority of employees . . . shall be the exclusive bargaining representative of all the employees" in an appropriate bargaining unit. A union may be "designated," (usually by means of authorization cards) by the employees and where the employer *voluntarily* and properly[7] accepts such designations, no question of representation[8] thereafter exists; or where the employer does not voluntarily and/or properly agree to such designations, a question of representation exists and the union may be "selected" by the employees through the election processes of Section 9(c).

The critical question in the instant case involves an asserted[9] judicial gloss on this statutory scheme: the

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6. *Amalgamated Clothing Workers (H. I. Siegel Co.)* v. *NLRB*, ____ F.2d ____, 70 LRRM 2207 (C.A. D.C., Jan. 9, 1969).

7. Where there are competing unions an employer may not properly extend voluntary recognition to one of the unions. See, e.g., *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060; *Novak Logging Co.*, 119 NLRB 1573, and cases cited therein. Voluntary recognition is also considered an improper denial of employee freedom where the union does not, in fact, have designations from a majority of the employees involved. See *International Ladies' Garment Workers Union (Bernard Altman)* v. *NLRB*, 366 U.S. 731 (1961).

8. A "question of representation," as used in Section 9(c) of the Act, is defined as "a claim of representative status in the unit covered by the petition, and rejection or questioning by the employer of the union's claim to be the present representative of the employees in the unit." *Kingsport Press, Inc.*, 150 NLRB 1157, 1157-8.

9. *Amicus* here assumes *arguendo* that the Board has authority to issue card check bargaining orders in a proper case. However, persuasive argument can be made, and will presumably be made by the Respondent in *NLRB* v. *Gissel Packing Co. et al.*, Nos. 573, 691, this term, that the Board has no authority to issue card-based bargaining orders *in any case*. Such a contention

Board policy to issue orders *requiring* that an employer extend recognition to a union without a secret ballot election. Thus, in the instant case, the Board concluded, and and the court below affirmed,[10] that the Union's authorization cards, in addition to their potential means of acquiring *voluntary* recognition, also served the further function of nullifying any question of representation and resultant need to utilize Section 9(c) election machinery. The basis for this conclusion, and for the issuance of an order requiring the employer to recognize the union as the employees' bargaining representative, was that the Teamsters' success in obtaining a majority of authorization cards, some four months prior to the employees' rejection of Union representation in a Board election, gave rise to a two-fold inference: that based on Sinclair's subsequent conduct (1) its earlier refusal to extend voluntary recognition was negatively inferred not to be "motivated by any good faith doubt as to the Union's majority status in an appropriate bargaining unit"[11] and (2) that such refusal was affirma-

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will, no doubt, emphasize that the Board has a number of devices to remedy pre-election employer misconduct, such as re-run elections, cease and desist orders and injunctions, and that these remedies were apparently considered adequate by the Board in many cases for the ten years prior to the Board decision in *Bernel Foam Produc Co.*, 146 NLRB 1277. The importance is in encouraging the Board and courts "to focus on the problem of the re-run election and the importance of searching for imaginative means to ensure that the impact of employer violations is dissipated." Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 860-1.

10. The Board did not, however, in significant contrast to the court below, place the burden of proof on the employer to demonstrate that his assertion of a good faith doubt has "some reasonable or rational basis in fact." (App. 212) Instead, the Board places the burden on the Board General Counsel to prove the lack of a good faith doubt. See *Aaron Brothers Co.*, 158 NLRB 1077; *John P. Serpa, Inc.*, 155 NLRB 99.

11. The Board views as determinative the basis of the employer's asserted doubt. If any reason, other than a doubt of the union's majority status, for example, is advanced for requesting an election, and the employer is in error in believing that such a reason would preclude certification, the fact that the refusal

tively inferred to be "instead motivated by a desire to gain time within which to dissipate that majority status"[12] (App. 212).

While the Board and the court below have thus engrafted on Section 9(a) an involuntary designation process, other Circuits have taken the far different view that such a bargaining order is warranted only where employer misconduct makes impossible the holding of a fair election under Section 9(c). A bargaining order under this approach is utilized only "in those exceptional cases where the employer's unfair labor practices are so outrageous and pervasive and of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies."[13] The criteria is whether the employer's conduct, in the language of the Second Circuit, "was found to be clearly hostile to the union, and *without question* to have contaminated the results of *any* future election."[14] (Emphasis added).

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was made in good faith and that a fair election could still be held would not preclude issuance of a bargaining order. See, e.g., *H & W Construction Co.*, 161 NLRB 852; *Southland Paint Co.*, 156 NLRB 22; *Oklahoma Sheraton Corp.*, 156 NLRB 681.

12. The Board finds a "rejection of the collective bargaining principle" where the employer's conduct, although not involving any unfair labor practices, and not precluding a fair election from being held, nevertheless discloses a lack of a "good faith doubt" as to the union's majority. See, e.g., *Jem Mfg., Inc.*, 156 NLRB 643.

13. *NLRB* v. *Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967).

14. *NLRB* v. *Pembeck Oil Corp.*, ____ F.2d ____, 69 LRRM 2811 (2nd Cir. 1968). See also *NLRB* v. *River Togs, Inc.*, 382 F.2d 198 (C.A. 2). The recent position of the Sixth Circuit is similar. In *NLRB* v. *Priceless Discount Foods, Inc.*, ____ F.2d ____, 70 LRRM 2007 (6th Cir. 1968), that court held that a bargaining order was justified only where "flagrant" unfair labor practices were committed that render "it impossible for the Board to conduct a fair election" and, even in this case, such an order was conditioned on Board notification to the employees involved of their right to petition for decertification. See also the Sixth Circuit decisions in *Pulley* v. *NLRB*, 395 F.2d 870 (6th Cir. 1968), and *NLRB* v. *Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968).

The Board has for example held that bargaining orders should only issue "in the exceptional and relatively infrequent situations in which an employer has, by his unfair labor practices, made a

In short, the critical issue is whether the function of card-based bargaining orders is to serve as a substitute for the 9(c) election machinery or whether, on the other hand, such orders constitute a third substantive means, in addition to the 9(a) voluntary "designation" and 9(c) "selection" processes, by which a union may obtain employer recognition of its alleged status to act as exclusive bargaining agent for employees. The position of the *amicus* is that, in view of the intent of Congress and the policies of the Act, reliance on authorization cards as predicates for bargaining orders should not constitute an alternate means of acquiring recognition and should be limited to the extraordinary case (clearly not present in *Sinclair*) where the election processes of Section 9(c) cannot be utilized.[15]

2. The Statutory Framework.

Section 9(c) provides: "*Whenever* a petition shall have been filed . . . (A) by . . . a labor organization . . . alleging that a substantial number of employees (1) wish to be

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fair election impossible. . . ." *McEwen Mfg. Co.*, 172 NLRB No. 99. See also *Hammond & Irving, Incorporated*, 154 NLRB 1071; *Clermont's Inc.*, 154 NLRB 1397. Supplemental Memorandum of the National Labor Relations Board to the Subcommittee on the Separation of Powers Committee on the Judiciary, *Congressional Oversight of Administrative Agencies (NLRB)*. United States Senate *Hearings*, 90th Cong., 2nd Sess., pp. 1666-7 (Committee Print 1968).

While such language closely resembles the approach of the Fourth, Second and Sixth Circuits, in practice, as in the instant case, the Board's focus has been on the employer's good faith and generally not, as a result, into whether a fair election in fact, may be held or the wisdom of issuing a bargaining order in a particular case. See Lesnick, *supra*, note 9 at 858-61. Such interchangeability and confusion between contradictory approaches, which may even occur in a single decision (e.g., *Aaron Brothers Co., supra*), underscores the need for the formulation of appropriate standards by the Court in the instant case. See Section D, *infra*.

15. The *amicus* also believes, as discussed in Section D of this Brief, that in order to insure that bargaining orders will only be employed in this exceptional situation, the Court should articulate appropriate criteria by which the Board and lower courts might adjudicate when, in fact, the holding of a fair election should be deemed impossible.

represented for collective bargaining and that *their employer declines to recognize* [the union] as the representative defined in section 9(a), . . . the Board shall investigate and . . . [if] a question of representation exists it *shall* direct an election by secret ballot and *shall* certify the results thereof." (Emphasis added.) Thus, unless the employer *voluntarily* recognizes the union, section 9(c) requires that employee choice shall be determined by secret ballot.

This has not always been the case.

Section 9(c) was the result of comprehensive revision by Congress in 1947 when it enacted the Taft-Hartley amendments to the Wagner Act. Section 9 of the Wagner Act, 49 Stat. 449 (1935), in section 9(c) had provided:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representative that has been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding *under § 10 or otherwise, and may take a secret ballot of employees or utilize any other suitable method to ascertain such representative.* (Emphasis added.)[16]

Under this section initially the Board resolved employee choice of representatives by checking authorization cards or by approving recognition agreements,[17] or by unfair labor practice proceedings under section 10.[18] But, the Board was soon "persuaded by [its] experience" that "bar-

16. II, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, 3274 (NLRB Ed. 1935).

17. Section 202.17, 29 C.F.R.—NLRB STATEMENTS OF PROCEDURE, Secs. 202.1-28, 11 Fed. Reg. 177A-619 (Aug. 28, 1946).

18. See *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944); *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512 (1941); *NLRB* v. *Bradford Dyeing Ass'n*, 310 U.S. 318 (1940).

gaining relations from the beginning" would be more satisfactory "if doubt and any disagreement of the parties regarding the wishes of the employees" were eliminated. Accordingly, certifications in contested representation cases were discontinued in favor of resolution by secret ballot. *The Cudahy Packing Co.*, 13 NLRB 526, 531-32 (1939).

By the Taft-Hartley amendments, Congress, in addition to providing the secret ballot as the exclusive means under section 9 for resolving representative status, demonstrated its preference for resolution by secret ballot in other amendments to the Act, thereby attaching greater significance to such resolution by secret ballot. The twelve-month election bar period of section 9(c)(3), which was designed to prevent industrial turmoil by repeated questioning of representation status, does not operate unless there has been an election.[19] Recognitional picketing by a rival union is prohibited by section 8(b)(7)[20] only if the existing bargaining agent won a secret ballot election or has reached a collective agreement. Congress, likewise, chose the secret ballot election as the method for expediting the resolution of recognition strikes,[21] for determining bargaining agent authority to execute union shop agreements[22] and for permitting represented employees to reject their collective bargaining agent.[23]

Congress was well aware of the effect the 1947 amendments had on the authorization card process. When objections were raised by the House Minority Report that the new section 9(c) would have the effect of eliminating the

19. 29 U.S.C. § 159(e)(2); *National Waste Material Corp.*, 93 NLRB 477.

20. 29 U.S.C. § 158(b)(7).

21. 29 U.S.C. § 158(b)(7)(C).

22. 29 U.S.C. § 9(e)(1).

23. 29 U.S.C. § 9(c)(1)(A)(ii).

use of card checks and consent election agreements (which the minority considered to be very useful in cases where no real question existed), the provision from the Senate bill which permitted the use of consent election agreements was adopted in section 9(c)(4). But no recognition was given to the use of card checks, even consent card checks.[24] The Board thereafter recognized that a limitation had been imposed on its powers.[25]

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24. H.R. 3020, as reported, 80th Cong. 1st Sess., did not recognize consent election procedures. House Minority Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., vigorously attacked this omission. S. 1126, 80th Cong., 1st Sess., contained a provision for consent elections, but no provisions recognizing the use of card checks. Senate Minority Report No. 105, Part 2, p. 34, argued that by eliminating card checks Congress "would deprive the Board of a proved and useful technique. . . ."

25. As the court observed in *NLRB* v. *Heck's*, 398 F.2d 337, 340, the 1948 Board Annual Report (p. 32) expressly recognized this limitation:

> "Section 9(c) of the Act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed—but rarely exercised—to utilize other 'suitable means' of ascertaining representatives."

Two years later, however, in the leading case of *Joy Silk Mills* v. *NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. den'd* 341 U.S. 914, the Board's adoption of a "good faith doubt" precondition to invocation of the Section 9(c) election processes was approved in the following language which has provided the touchstone for subsequent Board doctrine:

> "The Act provides for election proceedings in order to provide a mechanism whereby an employer *acting in good faith* may secure a determination of whether or not the union does in fact have a majority and is therefore the appropriate agent with which to bargain. Another purpose is to insure that the employees may freely register their individual choices concerning representation. Certainly it is not one of the purposes of the election provisions to supply an employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by a union." 185 F.2d at 741. (Emphasis supplied).

As a result, the intent of Congress to provide that Section 9(c) be the exclusive means of determining questions of representation, irrespective of the employer's *bona fides* in desiring to utilize this "procedural device", has been completely ignored.

As several commentators[26] have indicated, the legislative history of this revision, particularly when coupled with other concurrent amendments to the Act,[27] fully supports the view that Congress intended to grant employers an absolute right to an election to determine questions of representation and preclude the use of authorization cards for this purpose. Only when no question of representation existed,[28] or when an election under Section 9(c) was rendered impossible, therefore, would a card-based bargaining order be warranted.

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26. Comment, *Union Authorization Cards*, 75 Yale L. J. 805 at 820-3; McGuiness, *Authorization Cards As Basis for Bargaining Order*, 68 LRR 85.

27. Employers, for example, were given for the first time the right to file a representation petition, thereby permitting an employer to question a union's representative status and have the question resolved by the Board election processes (29 U.S.C. 159(c)(1)(B)). By the simultaneous enactment of the Section 8(c) "free speech" provisions (29 U.S.C. 158(c)), such election processes guaranteed employees the "opportunity to hear arguments concerning representation" and placed them "in a better position to make a more fully informed and reasoned choice." *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240.

28. Thus the Supreme Court in *Brooks* v. *NLRB*, 348 U.S. 96, 101 (1954), recognized that while the Taft-Hartley amendments provided that "Board certification could only be granted as the result of an election . . . an employer would presumably still be under a duty to bargain with an uncertified union *that had a clear majority*" (emphasis added). The emphasized language indicates the case where there no longer existed any question of representation, e.g., the factual situation involved in *NLRB* v. *Sehon Stevenson & Co.*, 386 F.2d 551 (4th Cir. 1964).

Similarly, the other post-1947 Supreme Court decision which touched upon the effect to be given authorization cards and which is continually cited as controlling precedent, *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, 68-69 (956), stated merely that while the union there involved could not utilize the Board's certification processes, it was nevertheless not precluded from achieving voluntary recognition from an employer since a "Board election is not the only method by which an employer *may satisfy itself as to the union's majority status*" (emphasis added). Again, the decision is clearly consistent with the position that Congress intended the election procedures of Section 9(c) to be the exclusive method for determining questions of representation, although where no such question exists, Section 9(a) permits voluntary "designation" through authorization cards.

The Board's response to this legislative history has been to argue that the revision of Section 9(c) was merely intended to preclude the use of authorization cards and other non-election means to obtain Board certification through the Act's "selection" machinery; that Congress, by declining to simultaneously amend the reference to Section 9(a) in Section 8(a)(5) of the Act to require employer recognition of certified unions only (H. R. Rep. No. 245, 80th Cong., 1st Sess., 30, 53 (1947)), did not intend to foreclose the use of such other means as a basis for securing voluntary recognition (Bd. Pet. for Cert., *Gissel*, p. 22). Even assuming, however, that Congress did not wish to disturb the 9(a) voluntary designation processes, it is a wholly different proposition to urge that Congress intended to establish card-based bargaining orders as a separate, alternative method of acquiring recognition or that it intended that Section 9(a) embody the "good faith doubt" principle utilized by the Board to justify such orders.[29] At most, Congress

29. The argument of the Board is thus based on what Congress failed to do while ignoring what Congress did. The Board disregards, for example, the following amendments to Section 9(c):

(1) Prior to 1947, the Board had the prerogative to decide whether it would conduct an investigation. The amendments *required* the Board to conduct an investigation whenever a petition was filed by an employer or labor organization and hold an election if an employer denied recognition.

(2) Prior to 1947, Section 9(c) authorized the Board to issue bargaining orders pursuant to Section 10 of the Act. The amendments specifically deleted this reference.

(3) Prior to 1947, the Board was empowered to use "any other suitable method" besides an election to determine a collective bargaining representative. The amendments forbade it.

The retention of the "designation or selection" language in Section 9(a) of the Act, while eliminating the same language from Section 9(c), was to accommodate the process of *voluntary* recognition which did not require an altering of the then existing language of Section 8(a)(5). Thus, since an employer could violate Section 8(a)(5), regardless of whether a union's majority status was established by a 9(c) election or voluntary recognition, there

merely permitted the Board to continue its prior practice[30] of issuing card-based bargaining orders solely as a remedy for situations where an election could not be conducted under Section 9(c).

This is the mandate the Board must follow. As stated by Mr. Justice Holmes sitting as Circuit Judge in *Johnson* v. *United States*, 163 Fed. 30, 32:

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however, indirectly, that will should be recognized and obeyed. The major premises of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: "We see what you are driving at, but you have not said it, and therefore we shall go on as before."

B. Secret Ballot Choice Is a More Reliable Indicia of Employee Choice Than Authorization Cards.

Thus, Congress clearly recognized by amendment, as had the Board earlier, that the secret ballot election conducted under close supervision of the Board was the best vehicle for employees to exercise their right to select representatives of their own choosing wherever questions of representation exist.[31] Today, the election process is still

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was no need to revise that section, particularly since the main concern therewith "was related to the subject of bargaining as distinct from recognition." Comment, 75 Yale L. J. 805 at 820, fn. 103.

30. The leading pre-1947 Supreme Court decision authorizing card-based bargaining orders, *Franks Bros.* v. *NLRB*, 321 U.S. 702, thus justified issuance of such orders solely on the ground that it represented a proper exercise of the Board's remedial powers.

31. Significantly, many of the same circuit courts which have adhered to the Board's "good faith doubt" approach have nevertheless voiced substantial disagreement with the Board's view on card misrepresentations and have suggested that such a test applies a mechanistic and far too lax a standard. See *Engineers & Fabricators, Inc.* v. *NLRB*, 376 F.2d 482 (C.A. 5); *NLRB*

considered by the Board, at least when subject to congressional inquiry, to be the "most conclusive, and therefore the most satisfactory, means of testing a union's majority interest,[32] since authorization cards are not as "reliable as the secret ballot elections which the Board conducts. . . ."[33] Reviewing circuit courts have similarly recognized that ". . . it is beyond dispute that a secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer."[34] Indeed, the AFL-CIO is most candid on this issue: ". . . cards are at best a signifying of intention at a given moment. Sometimes they are 'signed to get the union off my back' . . . whatever the reason, there

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v. *Swan Super Cleaners*, 384 F.2d 609 (C.A. 6); and *NLRB* v. *Dan Howard Manufacturing Co.*, 390 F.2d 304 (C.A. 7). The Second and Fourth Circuits have also questioned the validity of the Board's card misrepresentation principles. See *Crawford Manufacturing Co.* v. *NLRB*, 386 F.2d 367, *cert. den'd* 390 U.S. 1028 and *NLRB* v. *Nichols Co.*, 380 F.2d 438.

However, the question of solicitor misrepresentation and the validity of the Board's sole and only purpose rule, *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced 351 F.2d 917 (C.A. 6), is not directly an issue in this case. This issue was raised in three cases in which petitions for certiorari were denied last term. *NLRB* v. *Crawford Mfg. Co.*, No. 1050, 390 U.S. 1028; *Preston Products Co.* v. *NLRB*, No. 1367, 392 U.S. 906; *Bryant Chucking Grinder Co.* v. *NLRB*, No. 1324, 392 U.S. 908. Indeed, the issue is now before this Court on a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Thrift Drug Co. of Pennsylvania, Petitioner*, v. *NLRB*, No. 906, this term. The memorandum for the National Labor Relations Board opposed granting of the writ on the ground that "As in *Atlas Engine Works v. NLRB*, No. 598, this Term (Memorandum for the respondent, pp. 3-4), the Board sees no reason why review of this issue is any more warranted now than it was last Term."

32. Memorandum from Secretary Wirtz to Senator Javits, TO REPEAL SECTION 14(b) OF THE NATIONAL LABOR RELATIONS ACT, *Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, 89th Cong., 1st Sess., p. 19 (committee print—1965).

33. NOMINATION Hearings, Chairman Frank McCulloch Before the Senate Committee on Labor and Public Welfare, 89th Cong., 1st Sess., p. 4 (committee print—1965).

34. *NLRB* v. *Flomatic Corp.*, 347 F.2d 74, 78 (2 Cir. 1965).

is no guarantee of anything in a signed NLRB pledge card except that it will count toward an NLRB election." AFL-CIO, 1961 GUIDEBOOK FOR UNION ORGANIZERS.

Statistics as well support no other conclusion. Board Chairman McCulloch cites statistics which demonstrate the unreliability of cards:

> In 58 elections, the unions presented authorization cards from 30 to 50% of the employees; and they won 11 or 19% of them. In 87 elections, the unions presented authorization cards from 50 to 70% of the employees, and they won 42 or 48% of them. In 57 elections, the unions presented authorization cards from over 70% of the employees, and they won 43 or 74% of them.[35]

Indeed, because of the circumstances surrounding the organization effort, the conclusion that cards are inherently unreliable has much support. Admittedly, at least where two unions were involved, cards are "notoriously unreliable in determining majority of a union as the basis for making a contract", *Sunbeam Corp.*, 99 NLRB 546, 550-51, and cards "do not necessarily reflect the ultimate choice of a bargaining representative . . ." *Midwest Piping and Supply Co.*, 63 NLRB 1060.[36]

Comparison of the authorization card process with the secret ballot process leads to a similar result. Authorization cards may be signed at work, at home, at union halls or in a number of places.[37] The card signer may not be

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35. 1962 PROCEEDINGS, SECTION OF LABOR RELATIONS LAW, AMERICAN BAR ASSOCIATION 14-17. See also, *NLRB* v. *Johnnie's Poultry Co.*, 344 F.2d 617, 620 (8th Cir. 1965), relying on such statistics in a card check case.

36. In *Levi Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1338, 1342 (1968), the Board argues this only applies in a two-union situation, but does not explain why it is not also significant in any organizing situation.

37. See *Hearings* on Section 14(b), *supra*, note 32, at p. 190, for the many places cards are solicited.

alone; union organizers, fellow employees, or even a working foreman may be peering over the employee's shoulder. But, the ballot, after it is received from election observers and the supervising Board representative, is cast in secrecy in a ballot booth. While the authorization card may abound with fine print and use confusing language, the secret ballot provides simple "yes" or "no" squares for the placing of an "X". Although the employee may have been handed the authorization card seconds before he signs, the sample ballot has been displayed for several days as part of an NLRB election poster which also explains in white and blue lettering the employees' section 7 rights.[38] This election poster has been printed in virtually every significant foreign language to insure full understanding, but the Board has accepted as valid indicators cards which are printed in a language foreign to the signing employee, with no interpreter present.[39] Then, of course, the free debate in many cases has not been held and the employees, when requested to sign, have not received the full information necessary to a reasoned choice:

> "The union is not likely to describe accurately the probable advantages of organizing much less present the disadvantages when cards replace the secret ballot, an employee may sign at any time; and when a majority sign, the contest may be over. Thus, the employer loses the opportunity to rebut the final persuasive union argument. If that argument involves inaccurate or fraudulent assertions about the employer's

38. See NLRB Rules and Regulations 102.1, 102.69, 26 F.R. 3885 (May 15, 1961). The election notice and sample ballot are form NLRB-707(1-67).

39. In *NLRB* v. *River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967), the Court denied enforcement of the bargaining order, rejecting the Board argument that inability to read the authorization card on the part of employees speaking a foreign language is not fatal. By contrast, election notices have been translated into almost every language on the linguistic spectrum, the Court noted. 382 F.2d at 205, fn. 10.

business or the union's past record, any employer rebuttal comes too late to be effective.[40]

Finally, as many reported cases demonstrate, employees because of solicitor statements may have only been initiating the election process by signing the card (nomination petitions are common) rather than making their ultimate choice.[41]

C. The Policies of the Act Are Disregarded by Predicating Bargaining Orders on the Employer's "Good Faith Doubt."

By placing the focus on the employer's subjective state of mind, the Board has rejected clear congressional intent and, instead, has given independent meaning to a catch phrase employed by the circuit court in *Joy Silk Mills, Inc.* v. *NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied* 341 U.S. 914 (1951).

In *Joy Silk Mills*, the employer, immediately prior to the election, interrogated employees as to their union sympathy, threatened employees with reprisals, and promised additional benefits if the union were rejected. There was no question the union had a clear card majority. The Board found the unlawful acts rendered a "free election impossible" and entered a bargaining order. 85 NLRB 1263, 1264. In enforcing the order, the Court stated:

> An employer may refuse recognition to a union when motivated by a good faith doubt as to the union's majority status. . . . When, however, such refusal is due to a desire to gain time and to take action to dis-

40. Comment, 75 Yale L. J. at 827-828, 834.

41. *NLRB* v. *Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967); *NLRB* v. *S. E. Nichols Co.*, 380 F.2d 438 (2d Cir. 1968); *NLRB* v. *Dan Howard Mfg. Co.*, 390 F.2d 304 (7th Cir. 1967); *Bauer Welding and Metal Fabricators, Inc.*, 358 F.2d 766, 774 (8th Cir. 1966); *Crawford Mfg. Co.* v. *NLRB*, 386 F.2d 367 (4th Cir. 1967), *cert. den'd* 390 U.S. 1028 (1968).

> sipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain. . . . 185 F.2d at 741.

The phrase "good faith doubt" was inappropriately taken from precedent decided prior to Taft-Hartley, and the bargaining order was not predicated on a construction of section 9(c) and section 8(a)(5), but on the Board's section 10 remedial powers as its citation to this Court's decision in *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944), demonstrates.

But today, by giving unprecedented emphasis to the Court's prefatory reference to "good faith doubt," resolution of representation status by the card process has equal standing with the secret ballot process. Thus, when presented with a request for recognition based upon an asserted card majority, the duty to bargain is said to have commenced irrespective of the existence of the preferred secret ballot process, and although the employer committed no unlawful acts. *H-W Construction Co.*, 161 NLRB 852.

Likewise, the insistence on an election does not give rise to the inference the employer was rejecting the principle of collective bargaining. If an employer has a right to file a representation petition when presented with a request for recognition (and section 9(c) gives him this right), and if the employer may inform the employees of the "cons" of union representation (and section 8(c) gives him this right), then it follows that the employer has a right not to deal with the union until his employees vote by secret ballot to the contrary. But, in disregard of both employer and employee rights, the Board prefers a Hobson's choice: If the employer refuses to grant recognition, and the union had a majority, it violates section 8(a)(5). If, however, the employer has no "good faith doubt" and bar-

gains with the union, which did not in fact have a majority, it likewise violates the Act. *International Ladies' Garment Workers* v. *NLRB*, 366 U.S. 731 (1961). The statute did not intend such a legal anachronism.[42]

In sum, as Judge Learned Hand aptly observed: "As a penalty [a bargaining order based on subsequent employer conduct] might be proper, but as a link in reasoning it seems to us immaterial."[43] The significance of unfair labor practices is only as a measure of whether a fair election is possible and employer conduct subsequent to a recognition demand, lawful or otherwise, clearly is irrelevant.

D. The Court Should Articulate Criteria to Determine When, in Fact, the Holding of a Fair Election Should Be Deemed Impossible.

(1) The Need to Articulate Appropriate Criteria.

The *amicus* believes that it is essential, for the reasons described in Sections A to C, *supra*, that the Court should limit the issuance of card-based bargaining orders to those situations where it is expressly found that utilization of the Section 9(c) election machinery has been precluded by employer misconduct. In order to insure, however, that such a "fair election impossible" rule will result in a wholly different Board approach, not merely a different Board talisman, the Court we respectfully submit, should also define appropriate standards to determine when, in fact, the election processes cannot properly be invoked.

The necessity for an articulation of specific criteria is evident from the interchangeability of the language of the substantive and remedial approaches, with no apparent

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42. Lesniok, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 855 (1967), criticizes the inference the "doubt" test requires the Board to draw.

43. *NLRB* v. *James Thompson & Co.*, 208 F.2d 743, 746 (C.A. 2).

difference in actual result, reflected in past Board decisions.[44] The current Board practice, in determining whether an employer has evidenced lack of a "good faith" doubt or "a rejection of the collective bargaining principle", is to look at "all the relevant facts of the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct."[45] It is indeed doubtful whether another set of rules or standards could be constructed which would be less predictable, less precise, and give less assistance to those who would seek to employ them as a guide for future conduct.[46] As Judge Friendly has observed with respect to the Board practice in the related field of authorization card misrepresentations: "The extensive discussion of evidence in such cases [citing circuit court decisions] . . . was necessitated by the Board's use of the wrong standard and the courts' desire to avoid a time consuming remand; once the Board adopts the proper standard, judicial review . . . should not be substantially more difficult than under the [present Board standard]."[47]

The concern of the *amicus* is that even if the suggested "fair election impossible" view of card-based bargaining orders is adopted herein, the Board will merely thereafter employ a different vehicle to arrive at its present position. This fear is underscored by the Board's insistence that it

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44. See footnote 14, *supra*.

45. *Aaron Brothers Co., supra.*

46. The vacillating criteria may perhaps explain how the Board can assert on one hand that card-based bargaining orders are used only in "the exceptional and relatively infrequent situations" (*Levi Strauss & Co., supra*) or, as described by Former Secretary of Labor Wirtz, in "rare exceptions" (Wirtz, *supra*, n. 20, 25), while, conversely, suggesting in the instant case that such cases occur "frequently" and "often" (Bd. Pet. for Cert., pp. 17-18).

47. *Bryant Chucking Grinder Co.* v. *NLRB*, 389 F.2d 565 (2nd Cir. 1967) (concurring opinion).

must be left free to broadly determine in which cases a bargaining order is warranted,[48] a degree of discretion which has been readily granted by several courts.[49] The Board has been unable to articulate a rational position. The decisions are replete with confusing and conflicting interpretations, which do not clarify, but which obfuscate. Reviewing courts need not adhere to assumed Board expertise where the matter at issue involves substantial legal questions or fundamental policy decisions. As this Court observed in *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965):

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[50]

Courts have attempted to indicate appropriate criteria to resolve the difficult "determination of whether a re-run election or the cards will more reliably indicate the desires of the employees or whether a re-run election will be contaminated by the prior violations . . ."[51] The significance of this determination, however, requires that it not be left to shifting and conflicting opinions of the Board

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48. See, e.g., Bd. Pet. for Cert., *Gissel*, p. 18, fn. 18.

49. See, e.g., *NLRB* v. *Goodyear Tire & Rubber Co.*, 394 F.2d 711 (5th Cir. 1968); *Furr's, Inc.* v. *NLRB*, 381 F.2d 562 (10th Cir. 1967).

50. See also *NLRB* v. *Gotham Shoe Mfg. Co.*, 359 F.2d 684 (2nd Cir. 1966) (concurring and dissenting opinion), and the Court's utilization of, and reliance on, appropriate standards in the application of another provision of the Act in *Local 761, IUE* v. *NLRB*, 366 U.S. 667 (1961), where the Court articulated specific guidelines for determining the legality of reserved gate picketing under Section 8(b)(4)(A) of the Act.

51. *NLRB* v. *Ben Duthler, Inc., supra*, where the Sixth Circuit went on to define the "pertinent considerations" to be "the nature of the Section 8(a)(1) violations, the percentage of employees signing authorization cards, the wording of the cards and the method of soliciting signatures, and the results of any Board election". See also *Clothing Workers* v. *NLRB, supra*, note 6.

and lower courts but, rather that this Court should alleviate the current confusion rampant in the area by establishing as predictable and specific standards as possible.

(2) Suggested Criteria to Determine When, in Fact, the Holding of a Fair Election Should Be Deemed Impossible.

Any attempt to delineate the limits of that area in which a card-based bargaining order should be utilized as a substitute for the Act's election processes must take into account, as the court observed in *NLRB* v. *Ben Duthler, Inc.*, two values of paramount importance: the right of employees to determine whether they desire to bargain collectively or to refrain from such bargaining; and the need to remedy employer unfair labor practices. There must be adequate recognition of the primacy of secret ballot election for employees, with a workable solution for the extreme situation in which a pattern of coercive and oppressive conduct precludes the holding of a fair election.

One such proposal, which has received both Congressional[52] and Board[53] recognition, is suggested by the *amicus* for consideration. This approach recognizes three separate components of the "fair election" test, each of which must be demonstrated by the Board's general counsel, to provide evidentiary guide lines for a reviewing court in determining whether the "strong medicine" of a card-based bargaining order was justified:

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52. Bill introduced by Senator Fannin during the 1965 hearings on the proposed repeal of Section 14(b) of the Act entitled S. 2226, 89th Cong., 1st Sess. (1965). See 111 Cong. Rec. 14584 (daily ed. June 29, 1965).

53. An approach was advocated in 1968 in a statement presented to the Senate Judiciary Committee Subcommittee on Separation of Powers by Gerard C. Smetana, which was thereafter cited with approval by the Board in its Supplemental Memorandum. See, *Hearings, supra*, note 14, pp. 1078-9 (Committee Print 1968).

(1) That the union obtained authorization cards from a majority of the employees in an appropriate unit without coercion or misrepresentation.[54]

(2) That thereafter, the employer engaged in an intentional course of unlawful conduct, the effects of which cannot be dissipated by other available remedies. This would require a showing of (a) the requisite employer intent (which would exclude minor and advertent violations by lower-level supervision), (b) a course of employer conduct (which would exclude isolated incidents), and (c) the futility of utilizing other remedies, such as those discussed at footnote 2, *supra*, to ascertain the true union desires of the employees.

(3) That each of the improper acts on the part of the employer constituted independent violations of Section 8 of the Act rather than merely conduct which the Board considered sufficient to set aside on election or, as in the instant case, a "totality" of otherwise lawful conduct.

If the test is not met, representation questions should be determined solely by secret election. Otherwise, normal Board curative remedies should be applied.[55]

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54. The standards to determine whether such coercion or misrepresentation occurred should, in the opinion of the *amicus*, be similar to those which have been adopted by the Second, Fourth, Fifth, Sixth and Seventh Circuits. See note 14, *supra*.

55. See note 9, *supra*. Where a union presently does not have authorization cards from a majority of the employees involved, and the employer engages in pervasive and substantial misconduct, the Board has devised imaginative remedies to meet the situation. See, e.g., *J. P. Stevens & Co.*, 157 NLRB 869 and *H. W. Elson Bottling Co.*, 155 NLRB 714.

Conclusion: A Bargaining Order Was Not Appropriate in the Instant Case.

Clearly, the Board's rejection in the present case of the employees' right to choose or not to choose a bargaining agent is not compatible with the intent of Congress and the underlying policies of the Act. There was no finding by the Board, nor could there be, that a fair election would have been an "exercise in futility."[56] Far from it. Sinclair did not engage in a series of independent unfair labor practices; rather, any alleged misconduct could have been easily dissipated by application of traditional Board remedies. The decision of the court below should be reversed.

II.

EMPLOYER SPEECH IS PROTECTED BY FIRST AMENDMENT AND SECTION 8(c) OF THE TAFT-HARTLEY ACT

A. The Nature of the Issue.

It is the view of *amicus* that the Board abridged Sinclair's right to free speech and the employees' equivalent "right to listen" and to make a reasoned choice, by setting aside the secret ballot election in which the employees rejected Teamster representation. The Board did so by improperly finding the employer's speech was an unfair

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56. In an address by NLRB Associate General Counsel H. Stephan Gordon before the George Washington University National Law Center on February 15, 1968, entitled "Union Authorization Cards and the Duty to Bargain", reprinted at 67 LRR 155, 183, in which Mr. Gordon recognizes the importance of the secret ballot by quoting the simple but eloquent phrase of Winston Churchill:

> "At the bottom of all tribute paid to democracy is the little man, walking into the little booth, with a little pencil, making a little cross, on a little bit of paper . . . no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of that point."

labor practice and by using this speech as evidence that the employer refused to bargain. This Court has traditionally held speech, not a part of unlawful conduct as such, entitled to constitutional protection. Congress in 1947 accommodated the right of speech within the policies of the National Labor Relations Act by formulating an objective standard which limited the Board's authority to abridge speech: the Board cannot censor speech when speech contains no threat of reprisal or force or promise of benefit. The Congress and the Constitution intended free debate among all participants so that a reasoned choice could be exercised.

In the campaign preceding the election in the case at bar, there was vigorous debate on the question of representation by both sides. Sinclair expressed its views to the employees vigorously but truthfully on the merits of selecting the Teamsters Union as the bargaining agent. The scope of the campaign is set forth in petitioner Sinclair's brief and need not be here repeated. Suffice it to say that the Board found no single communication to be an unfair labor practice; only that the "totality" of the employer's communications constituted improper threats within the meaning of section 8(a)(1).

In finding the speech an unfair labor practice, we submit that the Board and the Court impinged on the standards set down by the First Amendment and by section 8(c) of the Taft-Hartley Act when (1) it grounded its decision on the "belief" or "impression" allegedly created on the employees rather than on the "speech itself," and (2) it censored speech dissociated from conduct which was subject to free debate.

B. Test Used by Board and Court in Evaluating Employer Speech Offends the Constitutional and Congressional Standards.

Freedom of speech extends to speech in the context of a labor dispute. While decisions do not draw a hard and fast line of demarcation for the outermost limits before speech ceases to be free, it is immaterial that the forum for speech is the working place and not the marketplace. This Court has long recognized that governmental regulation in the labor relations field must yield to First Amendment freedoms and free speech can no more be abridged by invoking the National Labor Relations Act than by invoking state statutes to regulate such activity. *Thornhill* v. *Alabama*, 310 U.S. 82 (1940); *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469 (1941); *Thomas* v. *Collins*, 323 U.S. 516 (1945).

In the case at bar, the Board, in determining the speech and writings were coercive ignored the total absence of illegal activities or conduct. The Board found:

> . . . the series of letters, pamphlets, leaflets, and speeches from and by President Sinclair, hereinabove described, taken together and considered as a whole, reasonably tended to convey to the employees the *belief or impression* that selection of the Union in the forthcoming election *could* lead Respondent to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers. (Emphasis added, App. 183).

The First Circuit, in rejecting Sinclair's argument that since the statements considered separately were lawful, the combination of them was simply cumulative and could not be characterized as illegal conduct, stated:

> The problem is not as simple as that. Conveyance of the employer's belief, even though sincere,

> that unionization will or may result in the closing of the plant is not a statement of fact, unless, which is most improbable, the eventuality of closing is capable of proof. . . . Moreover, in considering coercive effect the test is the totality of the circumstances. . . . (Citations omitted, App. 209).

Then, noting that whether the employer has used language that is coercive in its effect "is a question essentially for the specialized experience of the Board," the Court set out the "coercive" statements:

> It is evident that Sinclair's communications were designed to impress upon the wire weavers (1) that the 1952 strike had left the company in a state of continuing financial difficulty; (2) that the union's only weapon is a strike and the Teamsters Union is a "strike happy outfit"; (3) that another strike could, and in his opinion would, close the plant and (4) that it would be difficult for the wire weavers because of their age and limited education to secure other employment. (App. 210).

The focus by the Board and the Court on what the employees *believed* rather than the words the employer used to determine whether speech was coercive demonstrates clearly the Board has returned to its rejected Wagner Act test.

The Wagner Act, by section 8(1), prohibited an employer from restraining, coercing or interfering with employees' exercise of statutory rights.[57] No portion of the

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57. The same provision appears as Section 8(a)(1), 29 U.S.C. § 158(a)(1): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Section 7, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

Act expressly curtailed the application of section 8(1) in cases involving speech or communication, and any antiunion expression by an employer was initially viewed by the Board,[58] with some circuit court approval,[59] as "interfering" with the exercise by employees of their organizational rights. Thus, it was said in 1941:

> Arguments by an employer directed to his employees have . . . an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of "free speech" protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment.[60]

The standard for review of Board findings was then regarded as limited, with the emphasis on what the employees might think, rather than on what employers said. Judge Learned Hand in 1943, in *NLRB* v. *American Tube Bending Co.*, 134 F.2d 993 (2d Cir. 1943), *cert. den'd* 320 U.S. 768 (1944), summarized what he believed to be the early, erroneous approach:

> . . . any address . . . from an employer made directly to his employees may have, and ordinarily will have, a double aspect: on the one hand it is an expression of his own beliefs and an attempt to per-

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purpose of collective bargaining or other mutual aid and protection, *and shall have the right to refrain from any or all of such activities*. . . .

The italicized portion was added by Taft-Hartley.

58. See, e.g., *Roberts Bros., Inc.*, 18 NLRB 925; *Ford Motor Co.*, 23 NLRB 342.

59. See, e.g., *Continental Box Co.* v. *NLRB*, 113 F.2d 93 (5th Cir. 1940). *But see, Midland Steel Products Co.* v. *NLRB*, 113 F.2d 800 (6th Cir. 1940).

60. *NLRB* v. *Federbush Co., Inc.*, 121 F.2d 954, 957 (2nd Cir. 1941).

suade his employees to accept them; *on the other hand, it is an indication of his feelings which his hearers may believe will take a form inimical to those whom he does not succeed in convincing.* Insofar as it is the first, the Constitution protects him; insofar as it is the second, it does not. *The Board, being composed of those especially versed in the subject matter, must decide how far the second aspect predominates, and if they conclude that it will seriously coerce the employees' freedom of choice, they may forbid it.* (Emphasis added.) 134 F.2d at 994.

and rejected it. He stated:

> But there was no intimation of reprisal against those who thought otherwise; quite the opposite. The most that can be gathered from them was an argument, temperate in form, that a union would be against the employees' interests as well as the employer's, and that the continued prosperity of the company depended on going on as they had been. 134 F.2d at 995.

Judge Hand's conclusion was formulated from this Court's rationale in *Virginia Electric, supra,* decided two years earlier. There, although this Court indicated support for the Board's conclusion of employer domination of a union in violation of section 8(2) of the Wagner Act, this Court, in assessing the statutory prohibition in light of the First Amendment, stated in an opinion by Justice Murphy:

> *The employer in this case is as free now as ever to take any side it may choose on this controversial issue.* But certainly *conduct,* though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total *activities* of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. (Emphasis added.) 314 U.S. at 477.

The Court regarded as critical the *activities* of the company consisting of a discriminatory discharge and unlawful acts of assistance to the union, and questioned whether a bulletin and speech were coercive without regard to the other conduct. The Court therefore remanded. Significantly, the Court noted that if the utterances were *separated* from conduct it would "find it difficult to sustain a finding of coercion with respect to them alone." 314 U.S. at 479.[61]

Any question concerning the applicability of the First Amendment guarantees to employer free speech rights was finally resolved by this Court in *Thomas* v. *Collins*, 323 U.S. 516 (1945). There, in setting aside a Texas licensing statute on constitutional grounds, this Court held that by *Virginia Electric* it had

> . . . recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment guarantee. . . . But, short of that limit [where conduct is added] the employers' freedom cannot be impaired. The Constitution protects no less the employees' converse right. 323 U.S. at 537.

The Court, in *Thomas*, reiterated its earlier position in *Thornhill* v. *Alabama*, *supra*:

> In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and causes of

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61. Judge Hand, reviewing the Court's decision in *Virginia Electric*, said that:

> The conclusion seems inevitable that the Court did not believe that the bulletin and the speech would alone support a finding of coercion. Possibly it so concluded because they could not have, in fact, coerced the employees; but we do not so understand it; the employer had raised his privilege and we read the decision as sustaining it. 134 F.2d at 995.

> labor disputes appears to us indispensable to the effective intelligent use of the process of popular government to shape the destiny of modern industrial society. 323 U.S. at 537.

The Court also rejected the approach which the Board and the First Circuit now takes in its "totality" concept, which failed to distinguish between "speech" dissociated from "conduct." Justice Douglas, joined by Justices Black and Murphy, concurring, distinguished between the use of economic power and speech dissociated from conduct, stating:

> But as long as he [the employer] does no more than speak, he has the same unfettered right, no matter what side of an issue he espouses. 323 U.S. at 544.

Justice Jackson, also concurring, asserted:

> Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men, and if the employer or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's free speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech if the two are separable; and *only rarely and when they are inseparable, to stop or punish speech or publication.* 323 U.S. at 547.

Since *Virginia Electric,* this Court has refused to consider words as an unfair labor practice when they are dissociated from conduct. *NLRB* v. *Exchange Parts Co.,* 375 U.S. 405, 410, n. 3 (1964).

Free speech is no less free speech because the utterances occur prior to a representation election, though robust and vigorous. This Court gave recognition to this in *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1963), and, relying on traditional free speech concepts, held that organizing campaign speeches

> . . . are to be considered "against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." 383 U.S. at 62.

Yet, in the case at bar, the Board, in determining that the speech and writings were coercive, acted as though *Virginia Electric* and *Linn* were dead letters. Ignoring the fact that the speech was in no sense associated with any illegal conduct,[62] the Board found that the employer communications created "the *belief or impression* that selection of the union in the forthcoming election *could* lead" to dire consequences. (App. 183, Emphasis added.)

The Board's conclusion was adopted by the Court. But such a focus on employee surmise has been abandoned, as shown by this Court's pronouncements in *Virginia Electric, supra; Thomas* v. *Collins, supra;* and *Thornhill* v. *Alabama, supra.* To paraphrase Justice Douglas in *Thomas* v. *Collins*, "Here, Sinclair did no more than speak" and the "rare case" referred to by Justice Jackson, where speech was inseparable from other unlawful conduct, patently did not exist.

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62. The only other act involved was the employer refusal to grant recognition. This act is not illegal *per se* and was found to be illegal only *because* the speech was found "coercive". This finding of coercion gave rise to the inference the refusal was unlawful (App. 195). It would indeed be anomalous to continue with the circuitous reasoning and hold the speech was unprotected as it was connected with conduct, otherwise legal, which was illegal because of the speech, which without the illegal conduct would have been protected.

The decision of this Court in *Thomas* v. *Collins* guaranteeing full freedom of speech was approved when Congress, by the Taft-Hartley amendments, enacted section 8(c) of the Act. This limitation on Board authority provides:

> The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act, if such expressions contain no threat of reprisal or force or promise of benefit.[63]

The purpose of the Amendment was made clear by the Committee reports on the proposed bills:

> This guarantees free speech to employers, to employees, and to unions. Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely . . . the bill corrects this, providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. House Report No. 245 on H.R. 3020, Section 8(d)(1), 80th Cong., 1st Sess.

The Senate Committee report provided:

> Another amendment to this section would insure both to employers and to labor organizations full freedom to express their views to employees on labor matters, as long as they refrain from threats of violence, intimation of economic reprisal, or offers of benefit. The Supreme Court in *Thomas* v. *Collins*, (323 U.S. 516), held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of *American Tube Bending* case (134 F.2d 993). The Board had placed a limited

63. 29 U.S.C. § 8(c).

> construction upon these decisions . . . the Committee believes these decisions to be too restrictive . . . . Senate Report No. 105 on S. 1126, Section 8(c), 80th Cong., 1st Sess.

If balancing the interests is a "judgment in the first instance . . . for the legislative [illegible]"[64] the judgment of Congress was clear. The only exception in the judgment of Congress was communication containing "threat of reprisals, or force, or promise of benefit" and no other. Indeed, Congress went further by providing protected statements could not be "evidence" of an unfair labor practice under "any provisions of this Act."[65]

But the Board in this case has again ignored the guarantees of the First Amendment and Congressional intent. In an almost identical case, *NLRB* v. *Golub Corp.*, 388 F.2d 921 (2nd Cir. 1967), the Board found employer speech was likely to create and instill in the minds of the employees fear of economic loss or suffering. There, as here, the focus was not on the language used in the communication but on the "belief" which might be created. Judge Friendly rejected this approach:

> This is reading the Act as if § 8(c) did not exist; while there is a risk that an employer's prediction of adverse consequences from unionization may be taken as a threat to produce them, to hold that this danger alone suffices to convert a prediction into a threat of reprisal would go back to the very position of the early 1940's which § 8(c) was adopted to change. 388 F.2d at 928.

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64. Justice Rutledge in *Thomas* v. *Collins*, supra, 323 U.S. at 531.

65. To be sure the modifying language "by its own term" of H.R. 3020, Section 8(c)(1), was eliminated in final conference, but the conference also eliminated the modifying language "under all the circumstances" of S. 1126, Section 8(c), which would have initiated an unlimited search of the "background", rather than a hard look at the words spoken.

The views of Judge Hand in *American Tube, supra* (which were given congressional recognition by the 8(c) amendments to the Taft-Hartley Act) further support this conclusion. There is no difference between this expression and the *American Tube* expression that "a union would be against the employees' interests . . . and that the continued prosperity of the company depended on going on as they had been." The speeches may not have been as "temperate in form" as those in *American Tube,* but speech is no less protected because of "vehement, caustic, and sometimes unpleasantly sharp attacks." *Linn* v. *Plant Guards, supra.*

Other circuits have rejected the employee "belief" or "impression" test. The focus has properly been placed on the word used and only unless the employer uses his economic power, or threatens to use his economic power, will the words "constitute intimidation" to bring about the "rare" case where speech may be enjoined.[66]

Likewise, requiring the employer to prove economic justification for its views, as did the First Circuit, clearly offends constitutional standards. "Authoritative interpretations of the First Amendment guarantees have

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66. *NLRB* v. *Hobart Brothers Co.*, 372 F.2d 203 (6th Cir. 1967); *NLRB* v. *TRW-Semiconductors, Inc.*, 385 F.2d 753 (9th Cir. 1967); *Amalgamated Clothing Workers* v. *NLRB*, 365 F.2d 898, 909 (D.C. Cir. 1966); *J. S. Dillon & Sons Stores Co.* v. *NLRB*, 388 F.2d 395 (10th Cir. 1964); *NLRB* v. *Threads, Inc.*, 308 F.2d 1, 9 (4th Cir. 1962); *P. R. Mallory & Co.* v. *NLRB*, 389 F.2d 702 (7th Cir. 1967).

The Eighth Circuit, in *NLRB* v. *Herman Wilson Lumber Co.*, 355 F.2d 426 (1966), relying upon decisions of the Fifth, Sixth and Third Circuits, decided:

> It is well settled that under section 8(c) the employer must be regarded as a rightful contestant for his employees' loyalty in a union election. This section permits the employer to state his legal rights under the Act and to predict that dire economic consequences will follow from a union victory . . . it is only when the employer goes further and threatens himself to take economic or other reprisals against the employees that a section 8(a)(1) violation may be found. 355 F.2d at 431-32.

consistently refused to recognize an exception to the test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker," and "the constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered'." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271.

Finally, the Court erred in deferring the speech question to Board expertise. "The Court must examine for itself" the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which principles of the First Amendment . . . protect." *Pennekamp* v. *Florida*, 328 U.S. 331, 335. "Whatever vitality decisions . . . giving weight to an agency's construction of statutory language may have generally . . . such considerations have little weight when the statute being enforced approaches the limits of constitutional power." *NLRB* v. *Golub Corp.*, 388 F.2d 921, 928 (2d Cir. 1967).

Thus, when proper recognition is given to constitutional principles, the statement of Sinclair "that another strike could, and in his opinion would, close the plant" is recognized by all other circuits as a prediction of "dire consequences" and not a threat that the employer himself will take economic reprisals. This is particularly true as Sinclair told the employees it would bargain in good faith (G.C. Ex. 14; App. 126) and "we would not close the plant in retaliation for employees voting for the union" (G.C. Ex. 17; App. 132). For this reference to strike and the other statements enumerated by the First Circuit, the remedy under the principles of the free debate "is for the union to answer them, not a cease and desist order." *NLRB* v. *TRW-Semiconductors, Inc.*, 385 F.2d 753, 760 (9th Cir. 1967). Or, put another way, ". . . it is up to the participants in a cam-

paign to find and counteract any statements that they deem inaccurate or misleading." *NLRB* v. *Hobart Brothers Company*, 372 F.2d 203, 206-07 (6th Cir. 1967).

And short of clear threats by an employer to take reprisals or of vote buying by promising benefits, all other views, arguments or opinions must be protected, as Congress recognized. If this were not the case, the free debate would cease to be useful as a tool to provide information to facilitate a reasoned choice concerning the direction the plant or industrial democracy is to take.

The selection of a bargaining representative, with its manifold long-term ramifications on the industrial life of an employee, is a sufficiently weighty decision to warrant a free discussion of all the relevant considerations involved and to test the durability of the union's alleged majority in the crucible of a pre-election campaign. The need for such a discussion, in addition, is not only contemplated by the statute to permit a reasoned choice by employees, but also properly may be considered to find justification in the interests of the employer to exercise its free speech rights and in a need to protect employees "from the hazards of letting their militancy outrun their power".[67] Employees should be informed by such debate

> . . . of the realities that may result from union representation in choosing whether to accept or reject a collective bargaining representative. Moreover, if the choice by employees as to union representation is to be rational, employees should be entitled to know the possible consequences of strike action and how such action may affect them and their future. . . . The employer's bargaining attitude, the possibilities of losing present customers, long and crippling strikes, replacement of strikers, are all signficant factors which em-

67. *Lesnick, supra*, note 9, at 857-8.

ployees should be able to weigh in making a reasoned choice. . . .[68]

But while the Board has traditionally[69] and just recently[70] been concerned with providing every opportunity for union rebuttal to employer's speech, it has returned to the Wagner Act by regulating the contents of the speech, particularly if the views stated are unpopular with it.[71] It

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68. Pokemper, *Employer Free Speech Under the National Labor Relations Act*, 25 Md. L. Rev. 111, 146-47 (1965).

69. *Peerless Plywood Co.*, 107 NLRB 427, provided "captive" audience speeches within the 24-hour period preceding the election would be the basis for setting aside the election. *Hollywood Ceramic Co.*, 140 NLRB 221, declared material misrepresentations of material facts made on the eve of the election and thereby precluding reply would be the basis for setting aside the election. Other rules for the conduct of the "debate" limit captive audience speeches if union access or solicitation is limited by company rule. See, *Livingston Shirt Co.*, 107 NLRB 400, and the decision of this Court in *NLRB* v. *United Steelworkers* (*Nutone, Inc. and Avondale Mills*), 357 U.S. 357 (1958).

70. *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239 (1966). Within seven days after the election is directed, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all eligible voters. The Regional Director, in turn, makes this information available to all parties. The purpose of this rule, as well as the rules in note 69, was to establish a free debate. In *Excelsior*, the Board noted:

> Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to the choices available. In other words, an employee who has had an effective opportunity to hear arguments concerning representation is in a better position to make a more fully informed and reasoned choice. 156 NLRB at 1240.

Thus, another step was taken in this direction by providing the union with names and addresses of eligible employees so the union might distribute its views in writing (the mode of expression found so inimical by the Board here) or visit employees at their homes. This is analogous to the very limited regulation of federal elections by such measures, for example, as the equal time provision of the Federal Communications Act.

71. The motion picture "And Women Must Weep" has been roundly condemned by the Board as "it pictures a labor dispute as one in which Americanism, religion, family, motherhood, and innocent childhood are arrayed on one side, and goons, brutes, and murderers on the other or pro-union side." *Carl T. Mason*, 142 NLRB 480, 486. Showing of the movie has been held by the Board to violate Section 8(a)(1), but enforcement was denied

has failed to recognize, as an eminent commenator has suggested:

> . . . the policies adopted towards rebuttal [are] intimately related to those that govern the context of hat may be said and written on both sides. More specifically, as the opportunity to reply is enhanced, the need for regulating the context of speech tends to diminish. Of course, the two policies are not perfect substitutes; one can hardly reply on rebuttal to cure clear threats of retaliation or serious misrepresentations on the eve of the election. But in the gray areas with which doctrinal controversy has been concerned, an adequate opportunity to reply will go far to remove the need for expanding controls over the context of speech.[72]

CONCLUSION

We respectfully submit that speech here involved was entitled to constitutional and 8(c) protection. The whole span of the constitutional history of the First Amendment in labor relations demonstrates a clear recognition that restraint of speech presenting only the most serious danger should dampen the free discussion and free debate envisioned by the Constitution. Where, as here, speech is dissociated from unlawful conduct and in itself contains no

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in *NLRB* v. *Hawthorn Co.*, ____ F.2d ____, 70 LRRM 2193 (8th Cir. 1969). The Court relied in part on the fact organized labor's answer, another film "Anatomy of a Lie," was shown at the next union meeting.

72. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Har. L. Rev. 38, 91 (1964). This somewhat restrained criticism of the Board was written before the adoption of *Excelsior*, *supra*, note 70, and Professor Bok's concern over the opportunity for reply would seem to be obviated.

threat or promise of benefit, it is fair comment and free speech. Where, as here, speech otherwise free is determined by the Board to be unlawful because in the Board's view the "totality of speech" unfairly "impresses" the listener's state of mind then the Board is acting as a censor and applying its own standards, not the standards set down by law. The answer is found not in *censorship*, but in *debate*. This answer was supplied by this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 and in *Linn*, 383 U.S. at 162, where this Court recognized that 8(c) encouraged "debate on issues dividing labor and management"; debate which should not be limited but which may be "uninhibited, robust, and wide open"; debate which "may well include vehemency, caustic and sometimes unpleasantly sharp attacks." Debate then, and the opportunity to reply, is the answer—not censorship.

This Court spoke of our constitutional guarantees of freedom of speech in *Thomas* and in related decisions. Congress spoke through the 8(c) amendments to the Taft-Hartley Act, and that will is to be obeyed. The Board, no less than the courts, must give the law its full effect "in accordance with its design and purpose. . ."[73]; it must "look to the provisions of the whole law and to its object and policy."[74] This the Board failed to do.

Deference to the teachings of this Court and Congress, we submit, would have required a finding that the commu-

73. *Takao Ozawa* v. *United States*, 260 U.S. 178, 194.
74. *Maestro Plastic Corp.* v. *NLRB*, 350 U.S. 270, 280.

nications to the employees here was free speech and fully protected. The decision of the Board should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1968
No. 585

THE SINCLAIR COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

AMICUS CURIAE BRIEF OF MECHANICAL SPECIALTIES COMPANY, INC.

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AMICUS CURIAE BRIEF OF MECHANICAL SPECIALTIES COMPANY, INC.

I.

INTEREST OF THE AMICUS CURIAE and PRELIMINARY STATEMENT.

Mechanical Specialties Company, Inc., is a corporation engaged in business in the manufacture of tools, gauges, special machines, missile components and nuclear components and is located in the metropolitan Los Angeles California, area. This brief is filed upon the written consent of the parties and pursuant to Rule 42(2) of the Revised Rules of the Supreme Court of the United States. Your *amicus* is the petitioner in the case of *Mechanical Specialties Company, Inc. v. NLRB,* Case No. 22,538 now pending in the United States Court of Appeals for the Ninth Circuit, which was argued and submitted on December 4, 1968. Thereafter on

January 9, 1969, the court notified your *amicus* that its case had been resubmitted pending the decision of this court in the instant case and its companion cases *NLRB v. Gissel Packing Co. and Food Store Employees Local 347 v. Gissel Packing Co. Inc.*, docket No. 573. Because of this action and since the Ninth Circuit case involving your *amicus* presents issues the same and closely related to those upon which this Court granted certiorari in the instant case it is clear that the Court's decision herein will have a significant bearing on that appeal. Accordingly, the interest of your *amicus* will be directly and significantly affected.

It is the intention of your *amicus* to devote this brief to the discussion of two major issues: (1) the propriety of the utilization of authorization cards to gain recognitional status and (2) the existence of an employer's "good-faith doubt" of union majority status and its effect upon the Board's authority to impose a bargaining order.

II.
ARGUMENT.

A. The Utilization of Authorization Cards, if Permitted at All, Should Be Limited to Situations Where Their Validity Has Clearly Been Established.

The initial issue in this case is the efficacy, if any, which is to be given to union authorization cards when a union attempts to utilize them to gain recognitional status from an employer in circumstances where the union has petitioned for, and lost, an election. It is well-recognized that authorization cards provide an extremely unsatisfactory method for determining a ma-

jority wish for representation. The National Labor Relations Board itself once acknowledged that cards were "notoriously unreliable" (*Sunbeam Corporation,* 99 NLRB 546, 550-551 [1952]) and numerous courts of appeal have subsequently indicated their emphatic agreement.[1] Nonetheless this amicus will abstain from argument with respect to the absolute preclusion of cards as a basis for recognition, leaving that to the able briefs of the parties, and will here assume that certain limited circumstances may warrant resort to cards rather than a Board-conducted election. Our point of emphasis is that the reliance upon cards in lieu of an election is so fraught with danger—to the rights of employees, employers and to labor relations stability—that this Court should not permit their utilization except with clearly defined safeguards which must certainly be more rigid than those presently employed by the NLRB.

This Court must appreciate that the much more commonly litigated issue is not whether cards may be used, *per se,* but rather, *when* may they be resorted to in lieu of the election referred to in Section 9 of the Act[2] The principal factor in determining the propriety

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[1]In addition, in a memorandum submitted to Senator Javits, former Secretary of Labor Wirtz admitted that, "[T]he procedure for determining a majority wish for union representation by means of cards is uniformly recognized as less satisfactory than a secret vote in an election." *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor & Public Welfare,* 89th Cong., 1st Sess., 92-96 (1965).

[2]The following cases each involved this issue: *Atlas Engine Works v. NLRB,* 68 LRRM 2635, certiorari C.A. 6, No. 598; *Engineers and Fabricators Inc. v. NLRB,* 376 F. 2d 482 (5th Cir. 1967); *NLRB v. S.E. Nichols Company,* 380 F. 2d 438 (2d Cir. 1967); *NLRB v. The Golub Corp.,* 388 F. 2d 921 (2d Cir. 1967); *NLRB v. S.S. Logan Packing Company,* 386 F. 2d 562 (4th Cir. 1967); *Crawford Mfg. Company Inc. v. NLRB,* 386

(This footnote is continued on the next page)

of utilizing a card to establish majority status is its *validity*—does it truly reflect the desire of the employee who signed it? In each of the decided cases cited in the preceding footnote the Courts of Appeal reversed a Board finding that a union was entitled to recognition based upon an authorization card showing where the evidence demonstrated that the cards were obtained through misrepresentations, direct or indirect, as to their purpose and therefore could not be considered an unequivocal grant of authority from the employees to the union. A plethora of litigation has been caused by the Board's application of a totally unjustified and inequitable rule in judging the validity of cards. That rule, first articulated in the Board case of *Cumberland Shoe Corporation,* 144 NLRB 1268 (1964), aff'd 351 F. 2d 917 (6th Cir. 1965), is that the Board will accept at face value the language of cards signed by employees as to their intention to designate the union as their bargaining representative, unless and only unless, union solicitors of the cards have misrepresented their purpose by asserting that the cards were to be used "only" or "solely" for purposes of obtaining an election.

While the *Cumberland* rule is not directly before this Court in the instant or companion cases it must cer-

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F. 2d 367 (4th Cir. 1967) cert.den. 390 U.S. 1028, (1968); *NLRB v. Lake Butler Apparel Company,* 392 F. 2d 76 (5th Cir. 1968); *NLRB v. Swan Super Cleaners,* 384 F. 2d 609 (6th Cir. 1967); *NLRB v. Shelby Mfg. Co.,* 390 F. 2d 595 (6th Cir. 1968); *NLRB v. Dan Howard Mfg. Co.,* 390 F. 2d 304 (7th Cir. 1968); *Bauer Welding and Metal Fabricators Inc. v. NLRB,* 358 F. 2d 766 (8th Cir. 1966); *NLRB v. Southland Paint Company,* 394 F. 2d 717 (5th Cir. 1968); and pending in the Ninth Circuit Court of Appeals, *Mechanical Specialties Inc. v. NLRB,* No. 22,538 and *NLRB v. South Bay Daily Breeze,* No. 21,949.

tainly be dealt with if the Court decides that cards may support a claim for recognition. The Board's "blind" approach to the validity of cards has been rejected by almost all courts confronted with the question. Cards should not be permitted in those cases where the evidence is that their purpose was misrepresented. The Boards rule allows a union with impunity to mislead by omission, innuendo, subtlety, inference and implication. By silence the union at critical times permits employees to believe that only a union election victory could bring about unionization. By innuendo, the union may skillfully lead employees to believe that the cards may be utilized only to obtain an election; by subtlety in its choice of words, the same unjust result can be brought about; by constant harping about the impending or inevitable election, the deceiving point is achieved; and by union conduct inconsistent with the language in the card, employees are led down the primrose path.

Even the Sixth Circuit itself has recognized that the *Cumberland* rule, which it had originally affirmed, cannot be rigidly applied and has retreated from its former position. In *NLRB v. Swan Super Cleaners,* 384 F. 2d 609 (6th Cir. 1967), that court declared that any language calculated to lead an employee to believe that a holding of an election is all he had signed for is sufficient to invalidate all cards solicited under such misrepresentations. But to date the Board has never expressly rejected *Cumberland,* nor the idea that there is no misrepresentation unless the solicitor "assures" the signer that the *only* purpose of the card is an election. See *Levi Strauss & Co.,* 172 NLRB No. 57 (1968).

Assuming that cards may be used, the following approach, which most Courts of Appeal have already adopted, is one which we urge this Court to accept and promulgate: because the solicitation of authorization cards by unions is unsupervised, any representation of a solicitor misleading an employee as to the purpose of the card should be sufficient to invalidate it if the import of what was said or done indicates that an election is the end sought. Because of the recognized dangers inherent in card solicitation any conduct which suggests that signing a card signifies something less or different than a direct grant of authority for the union to act as collective bargaining agent for the employees should operate to preclude a union from claiming a majority based upon those cards.

In addition, the Board has shown a marked tendency to reject evidence of the subjective understanding of employees solicited as to the purpose of the card, on a theory akin to the parol evidence rule—that a clear and unambiguous card may not be contradicted by the contemporaneous beliefs of its signers. It is submitted that where the evidence casts a doubt upon the propriety of the method of card solicitation, the employees' subjective beliefs should be admissible. This is particularly necessary to avoid injustice where, for example, employees are shown to have a limited educational background, are unversed in the English language or demonstrate by other conduct that their intent in signing the card was contrary to its "plain meaning".

In sum, should this Court rule that unions may base refusal-to-bargain charges on an authorization card majority, either before or after an election, it should realize that the Board's past policies have served to aggravate

rather than aid in a just solution of the over-all problem and should concurrently delineate realistic standards for determining when authorization cards may, and when they may not be, so used.

B. The Court Should Establish Guidelines as to When an Employer's Good-Faith Doubt of Union Majority Status Will Insulate Him From a Bargaining Order.

The second major issue involved in the instant case is that relating to the right and duty of an employer not to recognize a union on the basis of employee authorization cards either in the absence of the commission of unfair labor practices by the employer or in their presence when at the same time, for one or more of a multitude of reasons, the employer may have possessed a good-faith doubt as to the union's majority in an appropriate unit. The Board's present *ad hoc* policy of deciding when a good-faith doubt may properly be advanced as a defense to a Section 8(a)(5) charge has lead to ambiguous, inconsistent decisions which have produced patently incongruous and illogical results. The stability and predictability of labor-management relations requires that this Court establish understandable and reasonable guidelines as to when a good-faith doubt may operate to preclude a bargaining order and thus clarify this important area of the labor law.

A whole series of Board and court decisions establish that an employer is bound to refuse the recognitional demand of a union if it possesses a good-faith doubt of that union's majority status.[3] When such a good-

[3]See, as examples, *Peoples Service Drug Stores, Inc. v. NLRB*, 375 F. 2d 551 (6th Cir. 1967); *NLRB v. Johnnie's Poultry Co.*,

(This footnote is continued on the next page)

faith doubt exists the employer may insist on a Board-conducted election, for if he risks recognition and bargaining with a minority union he will have violated Sections 8(a)(1) and 8(a)(2) of the Act.

International Ladies Garment Workers Union v. NLRB, 366 U.S. 731 (1961).

Nonetheless, the good-faith doubt defense has too often received untoward and cavalier treatment, as exemplified in this case, necessitating, it is submitted, a thoroughgoing discussion of the issue by this Court. Your *amicus* submits the following propositions as reasonable and just guidelines for decision where a union seeks a bargaining order notwithstanding that it has lost a Board election:

(1) Even though an employer can produce no objective evidence justifying his good-faith doubt, that is, where such defense is a mere assertion, no bargaining order should issue in those cases where the employer has not engaged in conduct requiring that the election be set aside. *Irving Air Chute Co. Inc.*, 149 NLRB 627, 630 (1964), aff'd 350 F. 2d 176 (2d Cir. 1965). The reason is that, all things being equal, an election is preferable to cards as an indicator of employee choice. Where the election is shown to have been fairly conducted, it should control, and the good-faith, or lack of it, on the part of the employer becomes irrelevant.

(2) Where an employer merely asserts a good-faith doubt, without factual justification, and commits unfair labor practices during the pre-election period, no bar-

344 F. 2d 617 (8th Cir. 1965); *Hammond & Irving, Inc.*, 154 NLRB 1071 (1965); *McQuay-Norris Mfg. Co.*, 157 NLRB 1661 (1966).

gaining order should issue unless there is substantial evidence and a finding that such conduct *caused* the loss of the union's majority.[4]

Undoubtedly, if there is no proven causal connection between the unfair labor practices and the union's election loss, then the election has truly reflected employee sentiment, employer conduct notwithstanding, and the results should be upheld.

(3) Where the employer's defense of good faith is not accepted and he is found to have committed unfair labor practices during the critical period prior to the election which caused a loss of union majority a bargaining order should still not issue unless it is proven and found that the nature of the employer's conduct was so inimical to free employee choice as to permit the authorization card procedures to govern choice of the union rather than a second election. *NLRB v. Flomatic Corp.*, 347 F. 2d 74, 78-79 (2d Cir. 1965). On the contrary, where the employer conduct proven is, on its face, or under the evidence, sufficiently minimal so that its effects can be dispelled prior to a re-run election, then such election should be ordered, for again, elections are preferable to authorization cards. The instant case should be reversed upon this ground alone.

(4) Where the employer has not merely "asserted" a good-faith doubt, but has produced independent evidence substantiating that doubt, his defense may not be overcome by a finding of the commission of employer

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[4]The Board has stated in *McQuay-Norris Mfg. Co.*, 157 NLRB 1661, 1665 (1966),

> "It must at least appear that the unfair labor practices were committed in an effort to dissipate the union's majority, and that the unfair labor practices were in fact responsible for the loss of the union's majority."

unfair labor practices in the period before the election, no matter how numerous or how aggravated they may be. The courts and commentators have emphasized that there is no logic in the view that a good-faith doubt is negated by an employer's desire to thwart unionization by proper or even improper means. *NLRB v. River Togs, Inc.*, 382 F. 2d 198 (2d Cir. 1967). *NLRB v. James Thompson & Co.*, 208 F. 2d 743 (2d Cir. 1953). Such efforts are "as consistent with a desire to prevent the acquisition of majority status as with a purpose to destroy an existing majority." *Lesnick, "Establishment of Bargaining Rights Without an NLRB Election,"* 65 Mich. L. Rev. 851, 855 (1967).

Therefore, there is no warrant for a bargaining order (except to penalize the employer, an aim totally foreign to the purposes of the Act), unless the General Counsel of the Board succeeds in refuting the employer's evidence of good-faith doubt by *other evidence* apart from that of unfair labor practices. It must always be remembered that it is employees' rights we are expounding.

III.
CONCLUSION.

Should this Court decide that circumstances exist which may warrant giving a preference to authorization cards over a Board-conducted election as an indicator of employee choice, in that event your *amicus* submits that the limitations thereon suggested in this brief be adopted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC., ET AL.

and

No. 691

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, PETITIONER

v.

GISSEL PACKING CO., INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions of the court of appeals (RI 316; RII 553; RIII 893) [1] are reported at 398 F. 2d 336 (*Gis-*

[1] The petition in No. 573 covers three decisions presenting the same legal issue. The record in the first, involving Gissel Packing Company, Inc., is designated "RI"; the record in the second, involving Heck's Inc., is designated "RII"; and the record in the third, involving General Steel Products, Inc., and Crown Flex of North Carolina, Inc., is designated "RIII."

sel), 337 (*Heck's*), and 339 (*General Steel*). The decisions and orders of the National Labor Relations Board are reported at 157 NRLB 1065 (*Gissel*), 166 NLRB Nos. 32 and 38 (*Heck's*), and 157 NLRB 636 (*General Steel*) (RI 314; RII 551; RIII 893).

JURISDICTION

The judgments of the court of appeals were entered on June 28, 1968 (RI 319; RII 555; RIII 895). The petition for a writ of certiorari in No. 573 was filed on September 26, 1968, and in No. 691 on October 26, 1968.[2] Both petitions were granted on December 16, 1968 (RI 321). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit has erroneously construed Section 8(a)(5) of the National Labor Relations Act, which requires an employer to bargain collectively with the representative "designated or selected" by a majority of his employees, by its rule that, irrespective of his other unfair labor practices, an employer is justified in refusing to recognize a union that bases its claim to representative status solely on the possession of authorization cards signed by a majority of the employees.

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[2] On September 17, 1968, Mr. Justice Black extended the time for filing the petition in No. 691 to and including October 26, 1968.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151, *et. seq.*) are set forth in the Appendix, *infra,* pp. 59–61.

STATEMENT

No. 573 covers three decisions of the Court of Appeals for the Fourth Circuit which present one legal issue in different factual contexts. We shall set forth the facts in one of the cases (*Gissel*) in somewhat greater detail than the other two (*Heck's* and *General Steel*).

A. THE BOARD'S FINDINGS OF FACT

1. GISSEL

In the summer of 1964, the Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO, began an organizing campaign at the Company's meat packing plant in Huntington, West Virginia. The Union was obliged to suspend its campaign for several months, however, because of its participation in Board unfair labor practice hearings concerning two other employers in the same town. As soon as Company Vice President Gissel became aware of the Union's activities at the other plants, he questioned employees Frye and Mount about their contacts with the Union, threatening to discharge them if he had any reason to suspect they had become involved (RI 265–266; 60–61, 93–94).

The Union resumed its campaign in January 1965; by January 22, it had obtained valid authorization

cards[3] from 31 of the 47 employees in the unit. On that day a union representative, Spencer, telephoned Gissel, told him the Union represented a majority of the employees, and requested recognition. Gissel referred Spencer to the Company attorneys. The same day, Spencer wrote Gissel confirming his telephonic request for recognition and offering to turn the signed authorization cards over to the Company "so that there will be no possible doubt as to our majority status." His letter also specified that "truck drivers" were included in the claimed unit (RI 255–257; 232).

In a reply dated January 26, Gissel rejected the Union's request for recognition because (1) the Union had lost an election held four years previously and the Company did not believe that there had been any change in employee sentiment since that time; (2) the Company had been advised of certain improprieties in the Union's organizing techniques, including instances of direct misrepresentation in obtaining authorization card signatures;[4] and (3) the Company did not know which employees were eligible voters,

[3] The wording of the card (RI 242) was as follows:

APPLICATION

FOOD STORE EMPLOYEES UNION, LOCAL #347

P.O. Box 2751, Charleston, W. Va.

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions.

The card then provided spaces for the employee to sign his name and write his address, telephone number (sometimes omitted), the name and address of his employer, and the date.

[4] No evidence to substantiate this claim was introduced at the hearing (RI 264, 288).

and did not think that truck drivers were part of the unit.[5] The letter concluded by stating that, if the Union really believed it represented a majority, it would have petitioned the Board for an election (RI 257–258; 233–234). The Company did not seek an election.

On February 10, Spencer renewed the Union's request for recognition and again offered to deliver the signed cards to the Company. He explained that the Union had not sought an election because "[t]he coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election by the employees is most difficult for us to combat." He concluded by announcing the Union's intention of filing unfair labor practice charges against the Company for its refusal to recognize the Union. These were filed the next day (RI 258–259; 235–236).

Gissel answered on February 12, asserting that the Union's approach only bolstered the Company's opinion that it did not represent a majority of the employees. The Union responded on February 16, again urging the Company to check the signed authorization cards, and stating that the cards would be available for inspection at any time (RI 259–260).

During the five-week period in which he was corresponding with the Union, Gissel interrogated employees about union activity in the plant; sought information about the union activity of specific em-

[5] The Board found that Vice President Gissel in effect acknowledged at the Board hearing that he understood the Union was requesting the unit found appropriate in 1961 (RI 287, n. 39; 215–217).

ployees; threatened to close the plant if the Union came in; promised employees benefits; and warned that there was to be "no more of this Union stuff," that the Union would not get in, and that the Union would have to "fight [Gissel] first" (RI 265–270; 94–96, 102–104, 133–134, 140–141). After learning in April of a union meeting scheduled for later that month, Gissel let it be known that the Company would send a representative there to report which employees attended. He sent someone to the meeting who reported such information to the Company (RI 271–273; 64, 89–90). Two days after the meeting, Gissel forced Mount to admit that he attended the meeting, and then reduced both his and Frye's hours of work. Three days after this incident, Mount and Frye were discharged, to the accompaniment of derogatory remarks about the Union (RI 275–283; 65–68, 90–93).

2. HECK'S

By October 9, 1964, Chauffeurs, Teamsters & Helpers Local No. 175, after a brief organizational campaign, had obtained valid authorization cards from 13 employees out of a unit of 26 in the Company's Charleston area warehouses.[6] Believing that it had achieved majority status, the Union representative met that day with the Company and requested recognition. The Company president, when shown the cards,

[6] The card, in relevant part, stated (RII 512):

> Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours, or any other conditions of employment.

questioned one of the employees who had signed a card concerning his union membership, and thereafter responded "No Comment" to the Union representative's repeated requests for recognition. The Union obtained another authorization card the next day, giving it actual majority status; it immediately filed a petition for a representation election with the Board,[7] and two days later made another demand for recognition, which the Company refused (RII 426–428; 328–331, 333).

Meanwhile, the Company embarked on an extensive antiunion campaign. It coercively interrogated the employees about their union activities, offered them help in withdrawing from the Union, threatened them with reprisals if the Union's campaign were successful, offered and gave them better jobs for opposing the Union, and discharged the leading employee organizer (RII 428–433; 339, 365–366; 347–348, 352; 340–341).

The same pattern was repeated a year later in connection with the Company's Ashland, Kentucky store, where Food Store Employees Union, Local 347, Amalgamated Meat Cutters & Butchers Workmen of North America, AFL–CIO, obtained authorization cards from 21 of the 38 employees by October 5, 1965.[8] The next day the assistant store manager told an employee that he knew that the Union had acquired majority

[7] The election was not held because of the unfair labor practice charges which were subsequently filed.

[8] The card stated in relevant (RII 516):

> The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours and working conditions.

status. When the Union requested recognition on October 8, however, Company counsel questioned whether department heads were included in the unit. The Union representative replied that the Union represented a majority with or without the department heads and that he would leave it to the Company to determine whether to include them. By letter of October 11, the Union restated this position, and offered to submit the authorization cards to the Company for verification (RII 525–526, 538–539, 467–468, 473–474).

On October 13, Company counsel refused the request for recognition because of an alleged ambiguity in the definition of the unit, and because a "poll" taken by the Company showed that a majority of the store employees did not want union representation. The Union received no reply from the Company to another request for recognition, made on October 25 (RII 525–526, 513). Meanwhile, the Company told employees that an employee of another Company store had been "fired on the spot" for signing a card, warned employees that the Company knew which ones had signed cards, and polled employees about their desire for union representation without giving all of them assurances against reprisals (RII 526–533; 483, 499; 473–474, 490, 492).

3. GENERAL STEEL

The Upholsterers' International Union of North America, AFL–CIO, initiated an organizational campaign among the Company's employees in the early summer of 1964, and by August 13 had obtained authorization cards from 120 of the 207 employees in the

unit.[9] The Union wrote to the Company on that date requesting recognition, and the next day filed a representation petition with the Board. Company counsel responded to the Union's request on August 26, alleging doubt of the Union's majority status, and refusing to bargain "unless and until it is certified by proper authority" (RIII 573, 608).

Meanwhile, the Company began an extensive drive to undermine the Union's position in the plant. On several occasions, Company supervisors interrogated employees as to whether they had been solicited by the Union or signed a union card or whether they intended to vote for the Union in the impending election (RIII 565–567, 664–665, 681, 660–661, 683–684; 653–654). Further, employees were repeatedly warned that support for the Union, if discovered by the Company, would result in immediate discharge (RIII 565–567; 681–682; 683–684; 653–654). About midway through the union campaign, one of the supervisors, purporting to relay the words of Company President Hoffman, informed a group of four or five employees that, if the union did come in, "a nigger would be the head of it," and that, when the Company put on ten new machines, "the niggers would be the operators of them" (RIII 566; 626).

Shortly after this incident, the Company posted a large notice declaring its "firm belief" that a union victory would not benefit the employees but would

[9] The card, in relevant part, stated (RIII 621):

> I do hereby designate and authorize the Upholsterers' International Union of North America, AFL–CIO, and its representatives to act as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

"work to your serious harm" (RIII 569–570). A few weeks later, the nature of this "serious harm" was explained by a supervisor, who suggested to a group of employees that some of the Company's customers "wouldn't buy products on account of it was union made" and that "in case employees left * * * it might be hard for [them] to find a job because [they] had been working for a union outfit" (RIII 566–567; 643–644). Two days before the scheduled Board election, Vice President Hoffman detailed more of the dangers of unionization. He asserted that strikes were the Union's only weapon, but that, by virtue of North Carolina's right-to-work laws, strikes were of little value to the Union; for when employees "went out on strike, when [they] hit the door, [they] had no more job." Hoffman described the consequences of strikes at other plants where employees "lost their homes and their cars and everything they had," and concluded by declaring that while the "government said that [he] had to negotiate in good faith * * * he could negotiate and negotiate and negotiate, and he did not have to sign anything" (RIII 570–572; 639, 640–641, 642–643). The Union lost the election by a vote of 94–85 (RIII 563).[10]

B. THE BOARD'S CONCLUSIONS AND ORDERS

In each of the above cases, the Board found (1) that the Union had obtained valid authorization cards from a majority of the employes in the bargaining

[10] The Union filed objections to the election, and the Board subsequently set it aside because of the Company's unfair labor practices (RIII 563, 591).

unit at the time of its demand for recognition,[11] and hence was entitled to represent the employees for collective bargaining purposes; and (2) that the Company's refusal to bargain was motivated not by a good faith doubt of the Union's majority status, but by a desire to gain time in which to dissipate that status (RI 286–291; RII 448–454, 534–545; RIII 568–591). It thus held that the refusals to bargain violated Section 8(a)(5) and (1) of the Act.

In each case the Board based its conclusion that the Company did not have a good faith doubt as to the Union's majority status on the fact that the Company had committed substantial unfair labor practices during its antiunion campaign. Thus, in *Gissel* it found that the Company coercively interrogated employees concerning their union activities, threatened them with discharge and other economic harm, and promised them benefits—all in violation of Section 8(a)(1) of the Act; and that the Company discriminatorily discharged Mount and Frye, in violation of Section 8(a)(3) and (1) (RI 283–286, 292–248). In *Heck's*, the Board found that the Company coercively interrogated employees, threatened reprisals against them for supporting the Union, created the impression

[11] In *Gissel*, the Board adhered to the unit determination which it had made when the Union filed a representation petition in 1961. In directing an election on that petition, the Board had found appropriate a unit of "all production and maintenance employees * * * including truck drivers, truck driver salesmen and the janitors (with the usual exceptions)." The Union lost the 1961 election (RI 254–256). In *Heck's*, the Board found that the Charleston Union had acquired majority status at least by the time of its second request for recognition (RII 451–452).

of surveillance of their union activities, and offered them benefits in exchange for opposition to the Union—all in violation of Section 8(a)(1); and that the Company discriminatorily discharged the leading union adherent, in violation of Section 8(a)(3) and (1) (RII 428–433, 526–533). In *General Steel*, the Board found that the Company interrogated employees and threatened them with reprisals, including discharge, in violation of Section 8(a)(1) (RIII 565–572). In neither *Gissel* nor *Heck's* was there any evidence tending to cast doubt on the validity of the Union's authorization cards.[12]

The Board ordered the Companies to cease and desist from the unfair labor practices found; to offer reinstatement and back pay to the employees who had been discriminatorily discharged; to bargain with the Union upon request; and to post appropriate notices (RI 300–303; RII 460–462, 546–548; RIII 592–594).

C. THE DECISIONS OF THE COURT OF APPEALS

In each of the above cases, the court of appeals sustained the Board's findings that the Company had engaged in restraint and coercion in violation of Section 8(a)(1) of the Act, and, in *Gissel* and *Heck's*, the court also sustained the findings that the Company had discharged employees in violation of Section 8

[12] In *General Steel*, the trial examiner considered at length and rejected allegations of misrepresentation by the Union and misunderstanding by the employees of the purposes for which the cards were being solicited. The Board adopted his conclusions (RIII 577–588).

(a)(3) and (1) (RI 317; RII 554–555; RIII 894). In each case, however, the court refused to sustain the Board's finding that the Company's refusal to bargain violated Section 8(a)(5) and (1) (RI 317–318; RII 554–555; RIII 894). The court's reasoning, which was the same in all three cases, is illustrated by the following statement from its opinion in *Gissel* (RI 317–318):

> In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election.[3] The reasoning elaborated in those decisions applies with equal force here, and we decline enforcement of that portion of the Board's order requiring respondent to bargain with the union.

SUMMARY OF ARGUMENT

In each of these cases, the Board found that the union involved had attained majority status through solicitation of authorization cards from the employees, and that, after the unions had attained this status and had requested the respective employers to recognize and bargain with them, the employers had engaged in extensive unfair labor practices which foreclosed the possibility of an immediate fair election and justified an inference that their refusal to bargain with

[3] *Crawford Mfg. Co.* v. *NLRB*, 4 Cir., 386 F. 2d 367, cert. denied, 36 LW3403 * * *; *NLRB* v. *S.S. Logan Packing Co.*, 4 Cir., 386 F. 2d 562; *NLRB* v. *Sehon Stevenson Co., Inc.*, 4 Cir., 386 F. 2d 551; *NLRB* v. *Heck's, Inc.*, 4 Cir., * * * (decided this day).

the unions was not prompted in good faith by a doubt of their majority status.

Under the Act, the duty to bargain with a union representing the majority of employees can arise without the necessity of a Board election. Although an employer who in good faith doubts whether a union seeking recognition has acquired majority status may wish an election to resolve his doubt, another employer's insistence upon an election—particularly if coupled with extensive unfair labor practices—may be undertaken for the purpose of dissipating the union's strength rather than testing it. Indeed, such unfair practices may have the actual effect of dissipating a present union majority and rendering a fair election impossible.

In the latter-type of case, the Board has often ordered employers to bargain with unions which previously attained majority status as shown by valid authorization cards. Repeated serious unfair practices are relevant, both to demonstrate the employer's improper motivation and to identify cases in which more than a simple cease and desist order is required to restore the previous situation. Particularly in view of an employer's ability repeatedly to frustrate Board elections by unfair conduct, the bargaining order is an appropriate and necessary remedy. Moreover, as the facts of these cases show, authorization cards are not so unreliable that a bargaining order based upon them is inherently suspect. If an employer's unfair practices have made an immediate, fair election im-

possible, such cards may in fact be the most suitable tool for measuring employee sentiment. And, contrary to the Fourth Circuit's view, the legislative history of the labor act makes plain that the bargaining order remedy has not been foreclosed. An amendment to that effect was specifically rejected by the Taft-Hartley Conference Committee. Nor is the possibility that the union may no longer command a majority of the employees controlling, if the Board determines that it has lost its majority as a direct result of the employer's unfair practices.

Finally, these cases are proper occasions for use of the bargaining order remedy. In *Gissel* and both *Heck's* cases the employers never sought to show the Board any reason to believe that their employees had not meant to authorize the unions involved to represent them for all purposes, as the cards concerned stated on their face; and the employers engaged in extensive unfair labor practices, including discriminatory discharges, in their attempt to combat the union. In *General Steel,* the employer repeatedly made flagrantly coercive statements and threats to his employees, justifying the Board's finding that he acted, not out of good faith doubt of the union's status, but in an effort to destroy the union. Although in this case the employer did attempt to show that the cards, although clear on their face, had been obtained under misrepresentations as to their purpose, the Board properly rejected his contention.

ARGUMENT

In language unchanged since the Wagner Act, Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." Section 9(a), also unchanged, provides that "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate unit for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." There is a settled gloss upon the Act (see *infra*, pp. 20–21) that an employer confronted with a union demand to bargain may refuse if, in good faith, he doubts the union's majority status. In the present cases and others,[13] where a union's proof of representative status rested upon authorization cards signed by a majority of the employees rather than a Board election and certification under Section 9(c), the Fourth Circuit has ruled that an employer who refused to bargain must be deemed

[13] See also *National Labor Relations Board* v. *Logan Packing Co.*, 386 F. 2d 562 (C.A. 4); *National Labor Relations Board* v. *Sehon Stevenson & Co.*, 386 F. 2d 551 (C.A. 4); *Benson Veneer Co.* v. *National Labor Relations Board*, 398 F. 2d 998 (C.A. 4); *Breaker Confections, Inc.* v. *National Labor Relations Board*, No. 12,078 (C.A. 4), October 29, 1968, 69 LRRM 2559; *National Labor Relations Board* v. *Bratten Pontiac Corp.*, No. 12,356 (C.A. 4), January 15, 1969, 70 LRRM 2249.

to have had a good faith doubt as to the union's majority status if he claims such doubt, unless there is direct evidence to the contrary; the claim of doubt is not overcome by contemporaneous unfair labor practices, in violation of Section 8(a)(1) or other provisions of the Act, which the Board has found to be an effort to dissipate the union's strength. We show in Point I, *infra,* pp. 18–37, that under principles which the Board, this Court, and the courts of appeals have followed for over 30 years, an employer is obligated to bargain with a union which presents valid authorization cards signed by a majority of the employees absent a "good faith doubt" as to majority, and that the employer's other unfair labor practices are a relevant factor in determining whether he relied upon such a doubt in refusing to bargain. We further show, in Point II, *infra,* pp. 38–43, that, where the Board has found a refusal to bargain in violation of Section 8(a)(5), it may appropriately enter a bargaining order even though the union may subsequently have lost its majority status through the employer's unfair practices. Finally, we show, in Point III, *infra,* pp. 44–57, that, applying these principles here, the Board properly concluded that each employer violated Section 8(a)(5) by refusing to bargain with the union representing a majority of its employees, and thus its bargaining order should be enforced.

I. An Employer Is Obligated To Bargain With a Union Which Presents Valid Authorization Cards Signed by a Majority of the Employees Absent a "Good Faith Doubt" as to Majority; the Employer's Other Unfair Labor Practices Are a Relevant Factor in Determining Whether He Relied Upon Such a Doubt in Refusing To Bargain

A. Under Both the Wagner Act and the Present Act, a Union Is Not Limited to a Board Election and Certification as the Only Means To Establish Representative Status

Both Section 8(5) of the Wagner Act and Section 8(a)(5) of the present Act require an employer to bargain with the representative of his employees as defined in Section 9(a). In both, Section 9(a) refers to the representative as one "designated or selected" by a majority of the employees without specifying any particular method by which it is to be chosen.[14] Accordingly, early in the administration of the Wagner Act, it was recognized that a union need not have been certified as the winner of a Board election to invoke the Section 8(5) bargaining obligation; it could establish majority status and thus the bargaining obligation by other means, such as cards by which the employees authorized it to represent them for collective bargaining. See, *e.g.*, *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 339–340; *National Labor Relations Board* v. *Reming-*

[14] Similarly, Section 7 of the Wagner Act, which in this respect also remains the same in the present Act, gives employees the right "to bargain collectively through representatives of their own choosing," but leaves open the manner of choosing such representatives.

ton Rand, Inc., 94 F. 2d 862, 868 (C.A. 2), certiorari denied, 304 U.S. 576; *Lebanon Steel Foundry* v. *National Labor Relations Board*, 130 F. 2d 404, 407 (C.A. D.C.), certiorari denied, 317 U.S. 659. The existence of alternative routes to majority status, including authorization cards, has consistently been recognized under the present Act also by the courts of appeals [15] as well as this Court.

Thus, in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956)—a case decided nine years after the 1947 amendments—a union which had obtained signed authorization cards from a majority of the employees, but which had not filed certain data with the Secretary of Labor or non-Communist affidavits with the Board, as the Act then required, sought to obtain recognition by peaceful picketing. This Court held that the state court injunction of the picketing invaded the area preempted by the Act; although such non-filing would have precluded the union from being certified by the Board as the representative of the employees, that fact did not make the Act inapplicable. The Court pointed out that once the union filed the data and affidavits, "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated Section 8(a)(5) of the Act" (p. 69); that nothing in the Act forbade a union which did

[15] See, *e.g.*, *National Labor Relations Board* v. *Whitelight Products Div.*, 298 F. 2d 12, 14–15 (C.A. 1), certiorari denied, 369 U.S. 887; *National Labor Relations Board* v. *Trimfit of California*, 211 F. 2d 206, 209 (C.A. 9); *National Labor Relations Board* v. *Elliott Williams Co.*, 345 F. 2d 460, 464 (C.A. 7); and cases cited n. 24, *infra*.

not file such data and affidavits from representing "an appropriate unit of employees if a majority of those employees give it authority to do so" (p. 71); that Section 9(a), "which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen" (*ibid.*); and that "[a] Board election is not the only method by which an employer may satisfy itself as to the union's majority status" (p. 72, n. 8).[16]

B. ALTHOUGH AN EMPLOYER ACTING IN GOOD FAITH IS ENTITLED TO INSIST UPON AN ELECTION, SUBSTANTIAL EMPLOYER UNFAIR LABOR PRACTICES MAY CAST DOUBT BOTH UPON HIS GOOD FAITH AND UPON THE POSSIBILITY OF A FAIR ELECTION, AND THUS JUSTIFY A REMEDIAL ORDER TO BARGAIN WITH A UNION WHICH HAS OBTAINED AUTHORIZATION CARDS FROM A MAJORITY OF EMPLOYEES.

It was established at an early date that an employer could refuse to bargain with a union if in good faith he doubted its majority status, and could require it to demonstrate through a Board election that it represented a majority of the employees in an ap-

[16] See also *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 101 (although Congress amended the Act in 1947 so that "Board certification could only be granted as the result of an election [see pp. 33–34, *infra*] * * * an employer would presumably still be under a duty to bargain with an uncertified union that had a clear majority, see *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8 (C.A. 1.)"); *Garment Workers' Union* v. *National Labor Relations Board and Bernhard Altmann Corp.*, 366 U.S. 731, 739 ("If an employer takes reasonable steps to verify union claims * * * he can readily ascertain their validity and obviate a Board election.").

propriate unit.[17] His refusal to bargain would not violate the Act, even if in fact the union did enjoy majority status.[18] In so interpreting the Act, the Board has recognized that determination of a union's majority status on the basis of cards frequently raises complex factual issues, that the election procedures of the Act provide a quick and dependable means of resolving those issues, and that the employer may commit an independent violation of the Act should he recognize a minority union (see *Garment Workers' Union* v. *National Labor Relations Board and Bernhard-Altmann Corp.*, 366 U.S. 731).

On the other hand, it was at the same time held that, if the employer was not acting in good faith, his refusal to bargain with a union which in fact represented a majority of the employees would be unlawful. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862 (C.A. 2), certiorari denied, 304 U.S. 576; *Chicago Apparatus Co.*, 12 NLRB 1002, enforced, 116 F. 2d 753 (C.A. 7); *National Labor Relations Board* v. *Clarksburg Publishing Co.*, 120 F. 2d 976, 980 (C.A. 4). "Whether in a particular case an employer is acting in good or bad

[17] See *Abinante & Nola Packing Co.*, 26 NLRB 1288, 1322–1323; *National Labor Relations Board* v. *Remington Rand, Inc.* 94 F. 2d 862, 868 (C.A. 2), certiorari denied, 304 U.S. 576.

[18] However, since the appropriateness of a bargaining unit is generally a pure legal issue, an employer's erroneous, though good faith, doubt as to the propriety of the unit in which recognition is sought will not ordinarily afford a defense to a refusal to bargain charge. See *National Labor Relations Board* v. *Bardahl Oil Co.*, 399 F. 2d 365, 368–370 (C.A. 8), and cases cited therein.

faith, is * * * a question which of necessity must be determined in the light of all the relevant facts in the case." *Artcraft Hosiery Co.*, 78 NLRB 333, 334. Unless his other conduct indicates a lack of doubt as to the union's majority,[19] an employer will not be deemed to have acted in bad faith because he insists on an election.[19a] Nor will bad faith be found in every case where he also commits other acts constituting unfair labor practices.[20] But where the refusal to bargain is accompanied by unfair labor practices, the Board has uniformly regarded those acts as having an important

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[19] See, *e.g.*, *Snow & Sons* v. *National Labor Relations Board*, 308 F. 2d 687 (C.A. 9); *Retail Clerks Union, Local No. 1179 v. National Labor Relations* (*John P. Serpa, Inc.*), 376 F. 2d 186 (C.A. 9). But cf. *Wilder Mfg. Co.*, 173 NLRB No. 30, 69 LRRM 1322.

[19a] See *Aaron Bros.*, 158 N.L.R.B. 1077, 1078; *H & W Construction Co.*, 161 N.L.R.B. 852, 857; *A. L. Gilbert Co.*, 110 N.L.R.B. 2067, 2069; *Roanoke Public Warehouse*, 72 N.L.R.B. 1281, 1282.

[20] For example, orders to bargain were not issued in the following cases despite refusals to bargain in the context of unfair practices: *Marlene Industries Corp.*, 171 NLRB No. 118, 70 LRRM 1089; *Orchard Corp.*, 170 NLRB No. 141, 67 LRRM 1586; *Hercules Packing Corp.*, 163 NLRB No. 35, 64 LRRM 1331, affirmed, 386 F. 2d 790 (C.A. 2); *Clermont's Inc.*, 154 NLRB 1397; *Caldwell Packaging Co.*, 125 NLRB 495; *The Walmac Co.*, 106 NLRB 1355; *Artcraft Hosiery Co.*, 78 NLRB 333; *Roanoke Public Warehouse*, 72 NLRB 1281.

The Board has emphasized that not "any employer conduct found violative of Section 8(a)(1) of the Act, regardless of its nature or gravity, will necessarily support a refusal-to-bargain finding." *Aaron Brothers*, 158 NLRB 1077, 1079. The Board considers the character of the unfair labor practices, "the sequence of events, and the time lapsed between the refusal and the unlawful conduct." *Ibid. See also Hammond & Irving, Inc.*, 154 NLRB 1071, 1073; *A.L. Gilbert Co.*, 110 NLRB 2067, 2071, and nn.

bearing on whether the refusal was prompted by a "good faith doubt."[21]

The employer's other unfair labor practices are relevant in two respects:

First, where an employer responds to a union's demand for recognition with such serious unfair labor practices that they dissipate the union's majority or are likely to have that effect, it is reasonable to infer, as the Board does, "that employer insistence on an election was not motivated by a good faith doubt of the union's majority, but rather by a rejection of the collective-bargaining principle or by a desire to gain time within which to undermine the union." *Aaron Brothers,* 158 NLRB 1077, 1079. Such unfair labor practices tend to show that any doubt which the employer might have had about the union's majority was not the basic motive for his refusal to bargain—that he refused to bargain because he had no intention of ever bargaining with the union however clear its majority might be, and desired to gain time to undermine it by unlawful means.[22] A refusal so motivated

[21] See. *e.g., Chicago Apparatus Co.*, 12 NLRB 1002, 1011–1012, enforced, 116 F. 2d 753 (C.A. 7); *Acme-Evans Co.*, 24 NLRB 71, 113–114, enforced, 130 F. 2d 477 (C.A. 7); *Joy Silk Mills, Inc.*, 85 NLRB 1263, 1264–1265, enforced, 185 F. 2d 732 (C.A. D.C.), certiorari denied, 341 U.S. 914; *Trimfit of California, Inc.*, 101 NLRB 706, 708, enforced, 211 F. 2d 206 (C.A. 9); *Pyne Moulding Corp.*, 110 NLRB 1700, 1707–1708, enforced, 226 F. 2d 818 (C.A. 2); *Economy Food Center, Inc.*, 142 NLRB 901, enforced, 333 F. 2d 468 (C.A. 7).

[22] As Judge Friendly pointed out in *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 206–207 (C.A. 2), such practices may also be designed to prevent a union from obtaining a majority which the employer doubts it pos-

violates the employer's bargaining obligation. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C.A. 2), certiorari denied, 304 U.S. 576; *National Labor Relations Board* v. *Clarksburg Publishing Co.*, 120 F. 2d 976, 980 (C.A. 4); *National Labor Relations Board* v. *Groh*, 329 F. 2d 265, 267–268, 269 (C.A. 10).

Second, wholly apart from their bearing on the employer's subjective motivation, unfair labor practices sufficient to dissipate a union's majority also preclude the Board from conducting a fair election. They thus undermine the very basis for the "good faith doubt" defense. The Board's election procedures normally provide a better means of testing majority status than a check of authorization cards. However, where the employer has precluded a fair election by his unfair labor practices, he has acted to defeat the premise on which the "good faith doubt" defense rests, and ought not to be permitted to assert any doubt he may have had. If in fact the union com-

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sesses when he acts. But aside from the question whether such doubts need be considered "good faith doubts," text *infra*, he has subsequently conceded that "the Board may properly insist not only that there be a reasonable basis for doubt but that this be a substantial reason for the employer's refusal to recognize the union rather than simply an excuse later manufactured for a position he would have taken in any event, and that his commission of unfair labor practices has some bearing on these issues, particularly the latter." *National Labor Relations Board* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829, 838 (C.A. 2). His apparent concern is that the Board may have been relying on a *per se* rule, drawing the inference that good faith was lacking from *any* accompanying unfair labor practices. But as shown *supra*, n. 20, this has not been the case.

manded a majority when it made its demand, he may be ordered to bargain with it. As the Court of Appeals for the District of Columbia Circuit stated in *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 741, certiorari denied, 341 U.S. 914:

> The Act provides for election proceedings in order to provide a mechanism whereby an employer acting in good faith may secure a determination of whether or not the union does, in fact, have a majority * * *. Another purpose is to insure that the employees may freely register their individual choices concerning representation. Certainly it is not one of the purposes of the election procedure to supply the employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by a union * * *.

Accordingly, under both the Wagner Act [23] and the present Act,[24] the courts of appeals in every circuit,

[23] See, *e.g.*, *National Labor Relations Board* v. *Consolidated Machine Tool Corp.*, 163 F. 2d 376, 378–379 (C.A. 2), certiorari denied, 332 U.S. 824; *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. 2d 753, 756–757 (C.A. 7); *National Labor Relations Board* v. *Texas Mining & Smelting Co.*, 117 F. 2d 86, 88 (C.A. 5).

[24] See, *e.g.*, *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 741–742 (C.A. D.C.), certiorari denied, 341 U.S. 914; *International Union, United Automobile, A. & A. Imp. Wkrs.* v. *National Labor Relations Board*, 392 F. 2d 801, 808 (C.A. D.C.), certiorari denied *sub nom. Preston Products Co.* v. *National Labor Relations Board*, 392 U.S. 906; *National Labor Relations Board* v. *Sinclair Co.*, 397 F. 2d 157, 161 (C.A. 1), certiorari granted, December 16, 1968, No. 585, this Term; *National Labor Relations Board* v. *Quality Markets, Inc.*, 387 F. 2d 20, 25 (C.A. 3); *National Labor Relations Board* v. *Phil-*

including the Fourth Circuit prior to its recent departure,[25] have enforced Board orders to bargain where a union had obtained authorization cards from a majority of employees and the Board found that the employer's subsequent refusal to bargain was not prompted by a good faith doubt as to majority—as shown, at least in part, by contemporaneous employer unfair labor practices which tended to dissipate the union's majority and to preclude a fair Board election.

Modes, Inc., 396 F. 2d 131 (C.A. 5); *Atlas Engine Works, Inc.* v. *National Labor Relations Board*, 396 F. 2d 775, 775–776 (C.A. 6), petition for certiorari filed, No. 598, this Term; *National Labor Relations Board* v. *Clark Products, Inc.*, 385 F. 2d 396 (C.A. 7); *National Labor Relations Board* v. *Ralph Printing and Lithographing Co.*, 379 F. 2d 687, 693 (C.A. 8); *National Labor Relations Board* v. *Ozark Motor Lines*, 69 *LRRM* 2706 (C.A. 8); *National Labor Relations Board* v. *Luisi Truck Lines*, 384 F. 2d 842, 847 (C.A. 9); *Furr's, Inc.* v. *National Labor Relations Board*, 381 F. 2d 562, 567–568 (C.A. 10), certiorari denied, 389 U.S. 840.

The view of the Court of Appeals for the Second Circuit formerly fully comported with that of these other circuits. *E.g.*, *National Labor Relations Board* v. *Gotham Shoe Mfg. Co., Inc.*, 359 F. 2d 684, 686–687 (C.A. 2). However, recently the Second Circuit appears to have split in regard to the validity of the Board's reliance upon unfair labor practices as a basis for inferring bad faith. Compare *National Labor Relations Board* v. *Consolidated Rendering Co.*, 386 F. 2d 699, 704 (C.A. 2); *Bryant Chucking Grinder Co.* v. *National Labor Relations Board*, 389 F. 2d 565, 568 (C.A. 2), certiorari denied, 392 U.S. 908; *National Labor Relations Board* v. *Big Ben Dept. Stores, Inc.*, 396 F. 2d 78, 82–83 (C.A. 2), with *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 206–208 (C.A. 2); *National Labor Relations Board* v. *United Mineral and Chemical Corp.*, 391 F. 2d 829, 837–838 (C.A. 2). But see n. 22, *supra*.

[25] *Florence Printing Co.* v. *National Labor Relations Board*, 333 F. 2d 289 (C.A. 4); *National Labor Relations Board* v. *Overnite Transportation Co.*, 308 F. 2d 279 (C.A. 4).

C. The Considerations Relied on by the Court Below Do Not Warrant a Departure From These Principles

In departing from these well settled principles, the Fourth Circuit has held that "absent other affirmative evidence to show employer knowledge that its employees desire union representation,[26] an employer may properly have a good faith doubt as to the union's majority status and withhold recognition pending the result of a certification election." *National Labor Relations Board* v. *Bratten Pontiac Corp.*, No. 12,356, January 15, 1969, 70 LRRM 2249, 2252. Its position rests upon two premises: (1) that union authorization cards are inherently unreliable as an indication that the employees want the union to represent them; and (2) that Congress, in amending the Act in 1947, intended to make a Board election the only method for resolving questions about a union's majority status. See *National Labor Relations Board* v. *Logan Packing Co.*, 386 F. 2d 562, 568–570 (C.A. 4). Neither of these premises is valid.

1. Although there have been abuses in the use of authorization cards—primarily misrepresentations as to whether by signing the card the employees were designating the union as their representative or merely authorizing it to seek an election to determine that issue[27]—it does not follow that cards are so inherently unreliable that they may never be used to determine majority status. The Board views an election

[26] See *National Labor Relations Board* v. *Sehon Stevenson & Co.*, 386 F. 2d 551 (C.A. 4).

[27] See discussion at pp. 55–57, *infra*.

as ordinarily the most satisfactory and indeed the preferred, method of measuring employee sentiment.[28] But, if an employer has engaged in conduct tending to destroy the conditions necessary for a fair election, authorization cards may be the most effective method of assuring employee choice. If in a specific case union authorization cards have been misused, the proper remedy is to hold that the union did not represent a majority of the employees.[29] To give an employer's claim of doubt presumptive validity, as the Fourth Circuit does, is to enable employers to eliminate cards as a basis for representation in all cases, and is thus to permit them to delay or prevent unionization through interference with the election process.

Although the Fourth Circuit insists that coercion or misrepresentation in the solicitation of authorization cards is highly probable, there was not even an offer to prove such improprieties in three of the cam-

[28] "In fiscal year 1967 * * * the Board conducted 8,116 elections. Cases in which union majorities were determined by cards, apart from elections, numbered 157—about 1.9 percent of the number of elections conducted. Of the aforesaid 157 cases, all but 16 involved situations where a fair election was made impossible or was invalidated by employer unfair labor practices * * *." *Levi Strauss*, 172 NLRB No. 57, p. 6, n. 9, 68 LRRM 1338, 1342, n. 9. See also Supplemental Memorandum of the National Labor Relations Board to the Subcommittee on the Separation of Powers of the Committee on the Judiciary, United States Senate, 69 LRR 157, 164–165 (1968).

[29] See *e.g.*, *Englewood Lumber Co.*, 130 NLRB 394, 395; *Family Bargain Centers, Inc.*, 160 NLRB 816, 831–832; *Morris & Associates*, 138 NLRB 1160; *Tread Mills, Inc.*, 154 NLRB 143; *Dixie Cup, Div. of American Can Co.*, 157 NLRB 167; *Eagle-Picher Industries*, 171 NLRB No. 44, 64 LRRM 1570; *Romano Ford*, 171 NLRB No. 49, 69 LRRM 1292.

paigns involved herein (*Gissel, Heck's-Ashland,* and *Heck's-Charleston*), much less findings to that effect. Indeed, in *Heck's-Charleston,* the card signing was handled solely by the employees themselves, who contacted the union, obtained blank authorization cards, and solicited their fellow employees on that basis (R. II 426; 336–38, 350–351). When they returned the completed cards to the union agent, he expressly told them that he intended to use the cards to ask the Company for a contract. Only in *General Steel* did the Company challenge cards at the hearing on the basis of purported misrepresentations. But, after hearing testimony from over one hundred employee-signers, the Trial Examiner concluded that with a few nondeterminative exceptions "all of these employees not only intended, but were fully aware that they were designating the union as their representative" (RIII 582).

The court also asserted that the employees have no opportunity to hear the employer's counter argument when a bargaining agent is chosen on the basis of authorization cards. Again, the assertion is contradicted by the facts of these cases. In *General Steel,* the Company became aware of the Union's effort in June 1964, but did not receive a bargaining demand until August 13. In the interim, Company supervisors engaged in four separate incidents of coercive interrogation. In *Gissel,* the Union began its campaign in the summer of 1964, interrupted the organization effort for several months, resumed the campaign again in January 1965, and finally made a demand on January 22. The Company was well aware of these activities; in 1964, it had warned two employees—later discriminatorily

discharged—that involvement with the Union would lead to immediate termination. In *Heck's-Ashland* the first union card was solicited in February 1965, but no bargaining demand was made until October 8. By mid-May, the Company had delivered an anti-union speech to the assembled employees; shortly before the demand was made, the Company admitted knowing that the Union had a majority and the identity of the card signers. Compared to these, *Heck's-Charleston* was a quick campaign; the first demand for recognition was made only about a week after solicitation began. But at this time the Union did not represent a majority, and, before the Union was able to obtain the necessary cards and make a new demand, the Company president had delivered a speech informing the employees involved of his attitude toward the Union.

Finally, the court below contrasts the card check process with a secret ballot election, concluding that the lack of secrecy in the former creates an inherent unreliability. Specifically, the Court dwells upon the probable ill-effects of social pressure and group psychology when the choice of a bargaining representative takes place in public view. *National Labor Relations Board* v. *Logan Packing Co., supra,* 386 F. 2d at 566. But this argument assumes that employees who sign union authorization cards do so lightly and without any real intention of having the union represent them for collective bargaining purposes. In view of the substantial benefits of unionization (see *American Steel Foundries* v. *Tri-City Trades Council,* 257 U.S. 184, 209), there is no warrant for this assump-

tion. Moreover, social pressure exists in an election campaign, no less than in a card signing drive; if employees desire to sign cards only if their friends have, they will wish to vote as their friends do. The single moment of secrecy in the voting booth cannot totally eliminate all influences—from the employer, the union, and friends—that have been brought to bear during a campaign. And again, where the employer has warped the campaign by his unfair acts, the authorization cards may represent the most accurate view possible of employee sentiment.[30]

In sum, the Fourth Circuit has overstated the deficiencies of authorization cards; its rigid rule that authorization cards are *per se* unreliable certainly does not fit cases such as those here, where the supposed infirmities of cards are not in fact present and where the employer's unfair labor practices have effectively foreclosed the preferred election route.[31]

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[30] See generally Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851 (1967); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 46–53, 132–139 (1964); Comment, *Union Authorization Cards: A Reliable Basis For An NLRB Order To Bargain?*, 47 Texas L. Rev. 87 (1968).

[31] Contrary to that court's assertion, the Board has never stated that authorization cards are "inherently unreliable" in cases such as the present. Those words were used to describe authorization cards in *Sunbeam Corp.*, 99 NLRB 546, 550–551 (1952), but in a limited context not relevant here. The Board said that "authorization cards are a notoriously unreliable method of determining majority status *where competing unions are soliciting cards, because of the duplications which then oc-*

2. The 1947 amendments to the Act negate rather than support the Fourth Circuit's view. Although Congress amended the Act in many other respects, it made no changes in Sections 8(5) (apart from redesignating it 8(a)(5)) and 9(a). However, it considered and rejected a House bill which would have amended Section 8(5) so as to permit the Board to find a refusal to bargain violation only where an employer had failed to bargain with a union "currently recognized by the employer or certified as such under section 9."[32] As the House report reveals, this proposal was expressly intended to place recognition of an uncertified union wholly at the option of the employer.[33] Since certification could be obtained only

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cur." (See *Levi Strauss*, *supra*, 172 NLRB No. 57, p. 7, n. 10, 68 LRRM at 1342, n. 10.)

The remarks of Board Chairman McCulloch in the American Bar Association's *1962 Proceedings: Section of Labor Relations Law*, 14, 17–18, do not support the court's views. He stated that a study of "good faith bargaining" conducted by Professor Philip Ross indicated a close correlation between the union's showing of interest and the election results. (The Board requires that a representation petition filed by a union be backed by cards or other evidence showing that the union has the support of at least 30 percent of the employees in the bargaining unit.) Thus, unions which presented authorization cards from 30 to 50 percent of the employees won 19 percent of the elections; those having authorization cards from 50 to 70 percent of the employees, won 52 percent of the elections; and those having authorization cards from 70 percent of the employees, won 74 percent of the elections. Chairman McCulloch concluded that "by and large the Ross study indicated that authorization cards do have validity." *Id.* 18.

[32] Section 8(a)(5) of H.R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. of the LMRA (1947) 51.

[33] H. Rep. No. 245, 80th Cong., 1st Sess. 30, 1 Leg. Hist. (1947) 321.

through an election, the employer's obligation to bargain on the basis of cards would have been totally eliminated. The proposal was rejected in Conference,[34] and it remains an unfair labor practice for an employer to refuse to bargain with representatives "designated or selected" by a majority of the employees. Congress thus may be said to have reaffirmed and retained the statutory basis for bargaining orders based on cards by a deliberate and explicit choice. As Senator Taft reported to the Senate (93 Cong. Rec. 6600, 2 Leg. Hist. (1947) 1539):

> the Senate conference refused to yield to the House with respect to the provisions contained in the House bill amending the provisions in * * * subsection 8(5) relating to collective bargaining. This means that the five unfair labor practices contained in the present NLRA remain unchanged except for [a presently immaterial difference].

The Fourth Circuit nonetheless concluded that Congress accomplished precisely the change which it expressly rejected in regard to Section 8(5) by amendments to *other* sections of the Act. RII 554; *National Labor Relations Board* v. *Logan Packing Co.*, 386 F. 2d 562, 569 (C.A. 4). The court relied primarily on the amendment of Section 9(c), which prescribes the process by which a union may obtain a Board certification, to eliminate the phrase "any other suitable

[34] H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41, 1 Leg. Hist. (1947) 545.

method to ascertain such representatives."[35] But although this amendment makes election the sole basis for certification,[36] it is not inconsistent with a continued duty under Section 8(a)(5) to bargain with a union whose majority status is established by some other means, such as cards. Certification carries with it special privileges not accorded unions which have been recognized voluntarily or pursuant to a bargaining order: *e.g.*, protection for 12 months against the filing of new election petitions, either by rival unions or by employees seeking decertification (Section 9(c)(3)); protection for a reasonable period, usually one year, against any disruption of the bargaining relationship based upon claims that the union has lost its majority status;[37] protection against recognitional

[35] Section 9(c) of the Wagner Act provided:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify * * * the name or names of the representatives that have been designated or selected. In any such investigation, the Board * * * may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

[36] Under the Wagner Act, the Board had occasionally used authorization cards as a basis for certification. However, this practice was largely abandoned by 1939, when the Board concluded that the policies of the Act would be best served if contested certification issues were decided by secret ballot election. See *Cudahy Packing Co.*, 13 NLRB 526; *General Box Co.*, 82 NLRB 678, 683. The Board continued to rely upon cards for certification purposes when the parties consented to a card check procedure. See S. Min. Rep. No. 105, 80th Cong., 1st Sess. 34, 1 Leg. Hist. (1947) 496.

[37] This decisional "one year rule" has application wholly apart from the statutory ban on elections within 12 months of a certification (Section 9(c)(3)). See *Brooks* v. *National Labor Relations Board*, 348 U.S. 96.

picketing by rival unions (Section 8(b)(4)(C)); and freedom from the restrictions placed on work assignment disputes by Section 8(b)(4)(D), and on recognitional and organizational picketing by Section 8(b)(7). See *General Box Co.*, 82 NLRB 678, 682. In short, in restricting the certification process to an election while expressly leaving the Section 8(a)(5) bargaining obligation unchanged, Congress indicated only that the special benefits flowing from a Board certification should be reserved for unions whose status had been tested in a secret ballot election.

The Fourth Circuit also relied upon the addition of subparagraph (B) to Section 9(c), permitting an employer to petition for an election whenever one or more unions present demands for recognition.[38] But the legislative history of this amendment indicates only that Congress enacted subparagraph (B) for the purpose of affording an employer a reliable means by which to determine whether a union claiming to represent his employees actually is the choice of a

[38] In the absence of any Wagner Act guidance as to how and by whom election petitions could be filed (see n. 35, *supra*), the Board had developed the rule that an employer could petition for an election only when presented with conflicting recognitional demands by two or more unions. It was thought that, if an employer were given the same broad right to petition as was afforded a union, he could stifle an organizational campaign by demanding an election before the union had attained majority status. The 1947 amendments resolved this problem by allowing the employer to petition only after a recognitional demand had been made. See H. Rep. No. 245, 80th Cong., 1st Sess. 35, 1 Leg. Hist. (1947) 326; S. Rep. No. 105, 80th Cong., 1st Sess. 10–11, 1 Leg. Hist. (1947) 416–417.

majority." There is no suggestion that Congress intended thereby to relieve the employer of his bargaining obligation under Section 8(a)(5) where he had no good faith doubt of the union's majority status and had, indeed, engaged in unfair labor practices which disrupted the Board's election machinery. And, as has already been shown, the Board's administration of Section 8(a)(5) is fully in accord with the policy reflected in this section. In most cases an employer is able to insist upon a secret ballot test of the union's majority status; his refusal to recognize the union before the election will not be found to have violated Section 8(a)(5) unless he engaged in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election.

In sum, the 1947 amendments to the Act did not limit the duty to bargain imposed by Section 8(a)(5) to unions whose majority status is determined in a

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[9] Thus, the Senate report declared that "present Board rules * * * discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent the employees are really not the choice of the majority." S. Rep. No. 105, 80th Cong., 1st Sess. 10-11, 1 Leg. Hist. (1947) 416-417. The remarks of Senator Taft during the debate are even more illuminating:

> Today an employer is faced with this situation. A man comes into his office and says, "I represent your employees. Sign this agreement or we strike tomorrow." * * * The employer has no way in which to determine whether this man really does represent his employees or not. The bill gives him the right to go to the Board and say, "I want to know who is the bargaining agent for my employees." [93 Cong. Rec. 3954, 2 Leg. Hist. (1947) 1013.]

See also the remarks of Senator Ball, 93 Cong. Rec. 5146, 2 Leg. Hist. (1947) 1496.

Board election. "Cards have been used under the Act for thirty years; the Supreme Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley bill to amend section 8(a)(5) * * * was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drum-beating should be permitted to overcome, without legislation, this history." Lesnick, *Establishment of Bargaining Rights Without an Election*, 65 Mich. L. Rev. 857, 861–862 (1967). The Fourth Circuit's contrary view—specifically rejected by the six courts of appeal which subsequently have considered the issue[40]—is plainly incorrect.[41]

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[40] *National Labor Relations Board* v. *Sinclair Co.*, 397 F. 2d 157, 161–162 (C.A. 1), certiorari granted, December 16, 1968, No. 585, this Term; *National Labor Relations Board* v. *United Mineral and Chemical Corp.*, 391 F. 2d 829, n. 10 (C.A. 2); *National Labor Relations Board* v. *Goodyear Tire and Rubber Co.*, 394 F. 2d 711, 712 (C.A. 5); *National Labor Relations Board* v. *Southland Paint Co.*, 394 F. 2d 717, 724 (C.A. 5); *I.T.T. Semi-Conductors, Inc.* v. *National Labor Relations Board*, 395 F. 2d 257, 259 (C.A. 5); *National Labor Relations Board* v. *Atco Surgical-Supports*, 394 F. 2d 659, 660 (C.A. 6); *National Labor Relations Board* v. *Montgomery Ward*, 399 F. 2d 409, 412–413 (C.A. 7); *National Labor Relations Board* v. *Ozark Motor Lines*, 69 LRRM 2706 (C.A. 8).

[41] When Congress further amended the Act in 1959, it again refrained from qualifying the language of Section 8(a)(5) or otherwise limiting the bargaining obligation. Indeed, aware that the bargaining obligation under the Act was not dependent on a Board certification, Congress accorded protection against recognitional and organizational picketing not only to incumbent certified unions (cf. Section 8(b)(4)(C)), but whenever "the employer has lawfully recognized in accordance with this

II. Where the Board Has Found a Refusal to Bargain in Violation of Section 8(a)(5), It May Appropriately Enter a Bargaining Order Even Though Subsequently the Union May Have Lost Its Majority Status

Upon finding that an employer refused to bargain in violation of Section 8(a)(5) of the Act, the Board is not limited to a cease-and-desist remedy; it may properly order the employer to bargain with the union

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Act any other labor organization and a question concerning representation may not appropriately by raised under Section 9(c) of this Act" (Section 8(b)(7)(A)). See S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess., Minority Views, 77–78, I Leg. Hist. (1959) 473–474.

Since 1959, several bills have been introduced in Congress to amend the Act so as to eliminate or curtail the Board's authority to impose a bargaining obligation based on authorization cards, but none of these bills has been reported out of committee. Thus, in 1965 Senator Javits proposed a bill which would have amended Section 9(c) to provide for the holding of an expedited election upon the petition of an employer alleging that a union had demanded recognition based on cards. If the employer petitioned for an expedited election, the Board would be barred from finding a refusal to bargain prior to the election, except where the employer's unfair labor practices had (1) dissipated the union's previously valid majority status, or (2) eliminated the possibility of a fair election. As a corollary to this amendment, the Javits bill added a new Section 8(g), providing that an employer's refusal to bargain would violate Section 8(a)(5) only where the employer (1) was presented with evidence of the union's majority support, (2) had no good faith doubt of the union's majority, and (3) failed to file for an expedited election. S. 2393, 89th Cong., 1st Sess. (1965). The bill was reintroduced, without substantial change, the following year. S. 3452, 89th Cong., 2d Sess. (1966). See also S. 22, 90th Cong., 2d Sess. (1967); S. 426, 91st Cong., 1st Sess. (1969); Hearings Before the Subcommittee on Labor, Senate Committee on Labor and Public Welfare, on S. 256, 89th Cong., 1st Sess. 19–26.

without first requiring the union to show that it still represents a majority of the employees. *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U.S. 512; *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702; *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, n. 16; *National Labor Relations Board* v. *International Union, Progressive Mine Workers of America*, 375 U.S. 396. The appropriateness of the bargaining order remedy in such a case was fully set forth in *Franks Bros.*, on facts similar to those in the present cases.

In *Franks Bros.*, the union had demanded recognition on the basis of authorization cards obtained from a majority of the employees, the company rejected the demand, and the union filed an election petition. However, before the election could be held, the company engaged in a coercive anti-union campaign, including threats to close the plant if the union won the election. This prompted the union to withdraw its petition and file unfair labor practice charges. 321 U.S. at 702–703. The Board found that the company had refused to bargain in violation of Section 8(5), as well as committing other unfair labor practices. It issued a bargaining order as "the only means by which a refusal to bargain can be remedied," despite the fact that, in the interim between the filing of the charges and the issuance of a complaint, the union had lost its majority status. *Id.* at 703.

This Court sustained the bargaining order. The Court noted that "the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen repre-

sentatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." 321 U.S. at 704. It concluded that, for these reasons, it "seems too plain for anything but statement" that it was proper for the Board to adopt a form of remedy which

> requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were is not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. * * *[*Id.* at 705.]

Nor, in the Court's view, did the bargaining order "involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement." For, although "a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to

succeed," after "such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." 321 U.S. at 705–706.

Where there has been a refusal to bargain accompanied by serious unfair labor practices against a union which has obtained authorization cards from a majority of employees, it is likely that its majority status will be dissipated as a result of the unfair labor practices and the time required for the Board to issue its decision and remedial order.[42] Merely to issue a cease-and-desist order and to direct an election in this situation would both prejudice the employees' right freely to determine whether they desire a representative and profit the wrongdoing employer. The new test of the union's majority would most probably reflect an unlawfully altered picture of employee sentiment.[43]

[42] The Board's records show that, in the period January to June 1968, the median time between filing of an unfair labor practice charge and Board decision in a contested case was 388 days.

[43] The study referred to in *National Labor Relations Board* v. *Sehon Stevenson & Co.*, 386 F. 2d 551, 556 (C.A. 4) (Sobeloff, J., concurring), shows that, "in over two-thirds of the cases, the party who destroyed the election process in the first instance wins in the re-run." See also *Bernel Foam Products Co.*, 146 NLRB 1277, 1281.

The Fourth Circuit is mistaken in suggesting (*National Labor Relations Board* v. *Logan Packing Co.*, *supra*, 386 F. 2d at 570) that, "in the great majority of cases, a cease and desist order with the posting of appropriate notices will eliminate any undue influences upon employees voting in the security of anonymity." Moreover, the Board rather than the reviewing court is the appropriate agency to determine whether unfair labor practices preclude a fair election and require a bargain-

This would be precisely the result which the recalcitrant employer hoped to achieve by his refusal to bargain and his course of unlawful conduct. Further, such a limitation on remedy would encourage the employer to meet the new election with renewed coercion, aggravating the unlawful situation already existing. In any particular case, an effective remedy may require an order restoring the parties to the positions they occupied when the refusal to bargain took place by directing the employer to bargain with the union on the basis of its original showing of majority status."

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ing order; the court must accept the Board's judgment unless it is unreasonable. See *Franks Bros.*, *supra*, 321 U.S. at 704 *United Steelworkers* v. *National Labor Relations Board*, 376 F. 2d 770, 773 (C.A. D.C.), certiorari denied, 389 U.S. 932. As we show *infra*, the unfair labor practices here were of such a nature that the Board could reasonably conclude that they tended to destroy the union's majority and preclude a fair election.

" "When the preferred method of determining employee wishes has been tampered with, it totally begs the question to say that employee rights are sacrificed by a bargaining order. Employee rights are affected whatever the result: If an inadequate rerun remedy is routinely applied, the rights of those employees who desire collective bargaining, and whose desires were met with violations of the law, are not being protected; if a bargaining order is issued, the rights of those who oppose collective bargaining are being tramped on if * * * a poll conducted after the effects of the earlier coercion were satisfactorily dissipated would indicate a union loss. Thus it is impossible to defend a refusal to impose a bargaining order unless one is willing to defend the adequacy of the particular remedies in fact applied in connection with the decision to direct a second election * * *." Lesnick, *op. cit.*, *supra*, 65 Mich. L.Rev. at 862.

See, *e.g.*, *National Labor Relations Board* v. *Ralph Printing and Lithographing Co.*, 379 F. 2d 687, 693 (C.A. 8); *National Labor Relations Board* v. *Luisi Truck Lines*, 384 F. 2d 842, 847–848 (C.A. 9, 1967); *National Labor Relations Board* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 183 (C.A. 2), certiorari denied, 370 U.S. 919.[45]

[45] It has been argued that, even absent a showing that a union seeking recognition had acquired majority status, a bargaining order would be an appropriate remedy for unfair labor practices so coercive that they made a fair election impossible. Bok, *op. cit. supra* n. 30, 78 Harv. L. Rev. at 138; cf. *National Labor Relations Board* v. *Flomatic Corp.*, 347 F. 2d 74, 78–79 (C.A. 2). The Fourth Circuit has left the door open to applying the bargaining order remedy in such "extraordinary cases," "without need of answering the question whether the union ever obtained majority status." R II 554–555; *National Labor Relations Board* v. *Logan Packing Co.*, 386 F. 2d 562, 570–571. But it would appear within the *Board's* discretion to decide that the remedy was appropriate on a less dramatic showing of unfair labor practice if there were also a showing that majority status had been obtained. As already shown, it is not every unfair labor practice which leads the Board to conclude that a union refused recognition despite majority status as shown by authorization cards is entitled to the bargaining order remedy; on the other hand, bargaining orders have been entered and enforced in cases of substantial unfair labor practices against a majority union, even absent a refusal to bargain finding. See, *e.g.*, *Editorial "El Imparcial," Inc.* v. *National Labor Relations Board*, 278 F. 2d 184, 187 (C.A. 1); *J. C. Penney Co., Inc.* v. *National Labor Relations Board*, 384 F. 2d 479, 485–486 (C.A. 10); *Summit Mining Corp.* v. *National Labor Relations Board*, 260 F. 2d 894, 900 (C.A. 3).

III. The Board Correctly Concluded That the Employers Here Violated Section 8(a)(5) of the Act by Refusing to Bargain With the Representatives of a Majority of Their Employees; the Bargaining Orders Issued by the Board as a Remedy for These Violations Were Necessary and Proper to Effectuate the Policies of the Act

Applying the principles discussed in Points I and II, we now show that the Board correctly concluded that the employers have violated Section 8(a)(5) of the Act by refusing to bargain with the unions involved, and that a bargaining order was an appropriate remedy for those unfair labor practices.

A. Gissel

At the outset of the Union campaign, Company Vice-President Gissel informed employees Frye and Mount that if they were caught talking to union men "you God-damned things will go" (RI 265; 61). Subsequently, the Union presented oral and written demands for recognition, claiming to have obtained authorization cards from 31 of the 47 employees in the appropriate unit. The Company rejected the bargaining demand and promptly embarked upon a course of coercive conduct which, the Fourth Circuit agreed, violated Sections 8(a)(1) and (3) of the Act. Company officials, including Vice-President Gissel, interrogated employees as to their union involvement and as to the union activities of other specifically named employees (RI 265–270; 93–96, 60–61, 102–104); employees were alternately promised better benefits than

the Union could offer, and warned that, "if the union got in, [Gissel] would just take his money and let the union run the place" (RI 270; 141), that the Union was not going to "get in," that it would have to "fight" Gissel first (*ibid.*). Further, when the Company learned that a union meeting was to be held, it arranged to have an agent present to report the identity of the union adherents. The first work day following the meeting, Vice-President Gissel told Frye and Mount he knew they had gone to the meeting and added that their work hours were henceforth reduced to half a day. Three days later, the two employees were discharged; when they protested, Vice-President Gissel told them in vulgar term, "what they could do with the union" (RI 276; 67).

The total impact of this course of conduct is unmistakable. The Company surrounded the union campaign with an atmosphere of hostility, sought out the identity of the union adherents, and then punished them with discharge. Inevitably, this tended to chill the interest in organization which existed in the plant. It was not the conduct of an employer who seeks in good faith to resolve doubts regarding a union's majority—either regarding the number of cards it has actually obtained or the circumstances in which it did so. Moreover, the reasons which the Company advanced to justify its refusal to bargain do not withstand analysis. First, the Company claimed that it had been advised of improprieties in the Union's organization techniques, including instances of direct misrepresentation. Yet no evidence was introduced to

support this accusation at the Board hearing (RI 264, 288).[46] Second, the Company asserted that it did not understand the unit sought by the Union and that truckdrivers (expressly included in the demand) should not be part of any appropriate unit. The Board expressly found (RI 287, n. 39), however, that Company Vice-President Gissel fully understood that the Union was requesting bargaining rights in the same unit as had been established by the Board for the 1961 election—a unit which had included the truckdrivers.[47] Finally, the Company declared its belief that the Union's defeat in that election, four years before, cast doubt on the Union's current claim of employee support. But as the Fourth Circuit itself had recognized, "A union's [prior] unsuccessful attempts at organization * * * may not be relied upon by an employer to refuse * * * to recognize the union or at least to undertake some inquiry into the actual ex-

[46] The Company's only objection to the 31 cards involved a claim that the Trial Examiner erred by allowing into evidence certain cards that were not identified by the purported signer. However, the law is clear that authorization cards may be properly authenticated by alternative means, including comparison of signatures, testimony of witnessing employees, and, as here, testimony by the solicitor. *Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128, 134 (C.A. 8), certiorari denied, 382 U.S. 904; *National Labor Relations Board* v. *Luisi Truck Lines*, 384 F. 2d 842, 846, n. 3 (C.A. 9); *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 85–86 (C.A. 9), affirmed, 346 U.S. 482.

[47] The sole ambiguity in the Union's demand was whether its claim to represent the "truckdrivers" referred to a few production employees who occasionally drove trucks, or to the truckdriver salesmen. At the hearing, Vice-President Gissel conceded that he understood the Union's reference to truckdrivers to mean driver-salesmen (RI 287, n. 39; 215–217).

tent of the union's representation." *National Labor Relations Board* v. *Overnite Transportation Co.*, 308 F. 2d 279, 283 (C.A. 4).

A bargaining order was an appropriate remedy for these unfair labor practices. Unfair labor practices of the kind engaged in by the Company would tend to undermine the clear majority which the Union had originally attained, and warranted the inference that the Company's refusal to bargain was improperly motivated. In these circumstances, a Board election would not reflect a true picture of employee sentiment.[48] A remedy which merely imposed a cease-and-desist requirement, leaving the parties to agree or to petition for an election, would reward the Company with the fruits of its illegal conduct. Thus, the Board properly concluded that the *status quo ante* could be most nearly restored, and the policy of the statute best effectuated, by requiring the Company to bargain with the Union which, at the time of its refusal to bargain, had been the majority representative of its employees.

B. HECK'S

1. THE CHARLESTON WAREHOUSES

After an organizing drive initiated by the employees themselves, the Union first demanded recognition on the basis of thirteen authorization cards from the twenty-six employees of the Company's three Charleston warehouses. Company President Haddad immedi-

[48] Thus, the Union wrote the Company that "the coercion and intimidation and illegal interrogation and threats which occur between the time an election is petitioned and the actual election * * * is most difficult for us to combat" (RI 258).

ately assembled the employees and told them of his shock at their selection of the Union; he singled out one of the employees to ask if he had signed a union card (RII 428; 339). The next day, the Union obtained the additional card necessary to establish a majority. The same day, the leading union adherent (the employee who had established the initial contacts with the Union and solicited a large percentage of the cards) was discharged (RII 431–433), and another employee was interrogated as to his union involvement, encouraged to withdraw his authorization, and warned that a union victory could result in reduced hours, fewer raises, and withdrawal of bonuses (RII 429–430; 365–366). The second demand for recognition was made two days later, and in the ensuing two weeks, President Haddad summoned two known union adherents to his office and offered them new jobs at higher pay in return for their promise to use their influence "to break up the union." One of the employees accepted the offer. (RII 430; 347–348, 351.)

The Company never actually expressed doubt of the Union's majority, replying simply "no comment" to all demands for recognition; as in *Gissel*, however, it embarked on a coercive anti-union campaign immediately following the initial bargaining demand. On the basis of this coercive conduct, which again the court of appeals agreed violated Sections 8(a) (1) and (3), the Board reasonably inferred that the real reason for the refusal to bargain was, not doubt of the Union's majority status, but rather a desire to destroy the Union by illegal means and thereby avoid a bar-

gaining obligation altogether.[49] Thus, as in *Gissel*, a bargaining order was the only adequate remedy. Indeed, the necessity for such an order is readily apparent here, for the Company's coercive conduct (the discharge of one union adherent and the bribing of another) did in fact dissipate the Union's one card majority.

2. THE ASHLAND STORE

The Company's reaction to the Union's organization effort at its Ashland store was much the same as at Charleston. Early in the campaign, President Haddad addressed the assembled employees, and warned them that one of the employees at another Company store had been "fired on the spot" after admitting that she signed a union card (RII 526–527; 483, 499). Immediately following the demand for rec-

[49] In the proceeding below, the Company argued that it had been misled into believing that the Union was claiming to represent a majority of all the Company employees. This argument is negated by the Union agent's credited testimony that he had repeatedly requested recognition in a unit limited to the warehousemen and truckers in the three Charleston area stores (RII 427–428, 453; 329–332). The Company further argued that the Union varied its demand by suggesting that it would be willing to bargain for a separate contract at each warehouse. But, as the Board found, this was "no variance, but rather an alternative" (RII 453), which in no way implied abandonment of the original demand for a three warehouse unit. And, the Company urged that the Union's recognition demand was deficient because certain employees designated as "pricers," expressly included in the unit by the Board, were not specifically mentioned by the Union. However, since the unit status of the "pricers" was never an issue until the Board hearing began, it is clear that their placement played no part in the Company's negative response to the Union's demand.

ognition, the Company's operations manager polled the employees in regard to their desire for representation, but did not observe the safeguards which would have prevented the poll from becoming an instrument of intimidation and coercion (RII 528–532; 483, 490, 492). Such coercive conduct fully warranted the Board's conclusion that the Company's refusal to bargain was not prompted by any concern over the Union's majority status, but by a desire illegally to evade any bargaining obligation. Indeed, the assistant store manager told one of the employees that the Company knew that the Union had attained majority status and, further, that it knew which employees had signed cards (RII 532–533; 473–474).[50]

The Company's letter of October 13, setting forth its "good faith" reasons for refusing to bargain (RII 525; 513), serves only to strengthen the evidence of bad faith. The Company asserted that the demand for recognition was improper and confusing in that the Union had offered to bargain in a unit either with

[50] The Company made no attempt to dispute this evidence. The assistant store manager was not called as a witness and no higher Company officials appeared to deny knowledge of the Union's majority status (RII 542, n. 37).

By the date of its recognition demand, the Union had obtained cards from 21 of the 38 employees in the appropriate unit. The Company produced no evidence of misrepresentation or coercion in the solicitations. However, it did challenge 13 cards on the ground that, in the absence of identification by the purported signer, they were not properly authenticated. There is no merit to this contention (see n. 46, *supra*). Moreover, the Company contended that one card was procured through the influence of a supervisory employee. But the facts found by the Board show that the supervisor's statements, albeit favorable to the Union, were not actually instrumental in obtaining the card (RII 536).

or without department heads. However, the demand was wholly unambiguous; as the Board found, the Union had simply offered to leave the placement of department heads up to the Company, claiming representative status whichever way the Company decided the issue (RII 538–539). The Company further relied upon the results of its informal poll, pointing out that the Union had lost by an "overwhelming" margin. But a coercive poll, such as this was, is a transparent device, whose distorted results could not provide the basis for a good faith doubt. See *Madison Brass Works, Inc.* v. *National Labor Relations Board,* 381 F. 2d 854, 858 (C.A. 7).

Finally, in its brief to the Trial Examiner, the Company for the first time sought to justify its refusal to recognize the Union on the ground that it had received a letter from the Retail Clerks Union shortly before the Union's demand for recognition, asserting a continuing interest in the Company's employees and suggesting that any agreement with other labor organizations would lead to legal action.[51] While an employer confronted with rival unions' conflicting representation claims, need not and in fact may not recognize either one, there was no such conflict here. The Retail Clerks neither demanded recognition nor

[51] The Retail Clerks had commenced an organizing campaign at the Ashland store in early 1964. However, by the end of that year, the Company's coercive and discriminatory conduct had brought the campaign to an unsuccessful close. *Heck's, Inc.*, 150 NLRB 1565, enforced, 369 F. 2d 370 (C.A. 6). At the hearing in this case, employees testified, without contradiction, that no representative of the Retail Clerks had appeared at the store since late 1964 (RII 543; 498).

made any claims stronger than a vague assertion of "interest". Since the Company admittedly never replied to or sought clarification of this "rival claim," its professed concern was plainly an afterthought. It was not mentioned in the Company's October 13 letter which purported to detail its reasons for refusing to bargain, nor did the Company question its employees in regard to the Retail Clerks during its October 9 poll. The Board properly concluded (RII 543–545) that the Company's refusal to bargain was not in any degree motivated by the "interest" of the Retail Clerks.

C. GENERAL STEEL

Throughout the Union's six-month organizational campaign—both before and after its demand for recognition—the Company's foremen and supervisors engaged in extensive acts of coercion and intimidation. As detailed in the Statement (*supra*, pp. 8–10), the Company interrogated employees about their union involvement; threatened them with discharge for engaging in union activities or voting for the Union; suggested that unionization might hurt business and make new jobs more difficult to obtain; warned that strikes and other dire economic consequences would result if the Union were to come in; and asserted that, although it would have to negotiate with the Union, it could negotiate endlessly and would not have to sign anything. The Board found, and the court of appeals agreed, that this conduct restrained and coerced the Company's employees, in violation of Section 8(a)(1) of the Act. Moreover, in the light of these unfair labor practices, the Board could reasonably conclude that

the Company refused to bargain, not because it in good faith doubted the Union's majority, but because it was determined not to bargain with the Union under any circumstances and desired to gain time to undermine it by unlawful means.[52]

The Union did not waive its right to file the refusal-to-bargain charge by permitting the election it had requested to proceed despite the employer's unfair practices. Under a policy the Board readopted in *Bernel Foam Products Co.*, 146 NLRB 1277,[53] a union may test its representative status in a Board

[52] As in other cases, the Company's explanation of the reasons for its purported doubt is unconvincing. Although the Union did promise the employees in a letter of August 13 that their identities would be kept secret, it demanded recognition the next day, before the letter would have been received and acted upon. Thus any effect the letter might have had in misleading employees as to the purpose of the cards is irrelevant. And, if the Company's informal poll showed that only 30 percent of the employees favored the Union, it is nonetheless evident that, as in *Heck's*, that poll was infected by the Company's extensive unfair labor practice campaign (R III 589-591).

[53] The policy was first announced in *M.H. Davidson Co.*, 94 NLRB 142, and thereafter received consistent judicial approval. *E.g.*, *National Labor Relations Board* v. *Model Mill Co.*, 210 F. 2d 829 (C.A. 6); *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C.A. 9), affirmed, 346 U.S. 482. The Board departed from this view in *Aiello Dairy Farms*, 110 NLRB 1365, holding there that by proceeding to election the union had waived its right to consideration of its refusal to bargain charge. Ten years later, discouraged by its experience under *Aiello*, the Board returned to its earlier position in *Bernel Foam*. The *Bernel Foam* policy has been consistently approved since its readoption. *E.g.*, *Irving Air Chute Co.* v. *National Labor Relations Board*, 350 F. 2d 176, 182 (C.A. 2); *National Labor Relations Board* v. *Frank C. Varney Co.*, 359 F. 2d 774 (C.A. 3).

election without automatically waiving its right to charge thereafter that the election was invalid and that, prior to the election, the employer had unlawfully refused to bargain.

There is no fatal inconsistency in this approach. Although its filing of a representation petition implies recognition that a *question* of representation exists, the union never fully abandons its position (stated expressly in its prior demand for recognition) that it represents the employees and is entitled to bargaining rights. Filing of the petition simply acknowledges that the employer does not agree that the union is so entitled, as shown by his refusal to bargain; the union seeks an election as an expedient means of proving its status. As the Board explained in *Bernel Foam* (146 N.L.R.B. at 1280):

> Although an election is a relatively swift and inexpensive way for the union to put the force of law behind its majority status, the procedure is highly uncertain entailing the real possibility that because of conduct by the employer no fair election will be held * * *. On the other hand, although in pursuing an 8(a)(5) charge a union does not risk the effect upon its majority of later unlawful conduct on the part of the employer, such a proceeding is considerably more complicated, consumes more time during which employees are denied the representation they desire, and involves greater expense. Since this difficult and rather dubious "choice" is created by the employer's unlawful conduct, there is no warrant for imposing upon the union which represents the employees an irrevocable option as to the method it will pur-

> sue in seeking vindication of the employees' representation rights while permitting the offending party to enjoy at the expense of public policy the fruits of such unlawful conduct. * * *

It appears that the Company may also contend (Brief in Opp. pp. 6–9) that some or all of the authorization cards could not be counted in determining the Union's representative status because of misrepresentations regarding the purpose for which they would be used. It is the only respondent in these cases which challenged the validity of authorization cards on this ground before the Board. On the record, however, the Board concluded that, with a few exceptions not sufficient to deprive the Union of a majority, the alleged misrepresentations[54] did not vitiate the sign-

[54] Six employees, by affirmative responses to leading questions, testified that they were told that the only purpose of the card was an election. However, after examining the whole record, including the conflicting testimony of the solicitors, the Trial Examiner concluded that no invalidating misrepresentation had actually been made (RIII 584–588). There is no occasion to disturb his credibility determinations. See *National Labor Relations Board* v. *Cumberland Shoe Corp.*, 351 F. 2d 917, 919 (C.A. 6). Nor was the union solicitors' assurance to the employees that their cards would be kept "secret" or "confidential" tantamount to a representation that recognition would not be sought on the basis of cards or that their sole purpose was to obtain an election. A union may make a valid card-bargaining demand without tendering cards to the employer or requesting a card check. *National Labor Relations Board* v. *Security Plating Co.*, 356 F. 2d 725, 726–727 (C.A. 9); *National Labor Relations Board* v. *Trimfit of California, Inc.*, 211 F. 2d 206, 210 (C.A. 9). Further, even when a card check is made, the judge or umpire is generally a neutral third party who would not necessarily communicate the identity of the signers to the employer. Finally, the Company is hardly in a position to com-

er's unqualified designation of the Union as bargaining representative. In reaching this conclusion, it applied its standard, recently explained at length in *Levi Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1338, that where, as here, a card is unambiguous and unequivocal in designating the union as representative for all collective bargaining purposes (including demands for recognition), misrepresentation will be found only if employees are told, in any form of words,[55] that the card's only purpose is to qualify for a Board election. See also *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F. 2d 917 (C.A. 6).

Although the Fourth Circuit has rejected this rule, sometimes known as the *Cumberland Shoe* doctrine, this Court has declined to review the issue.[56] The court

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plain of the Union's assurances of secrecy when its own highly coercive conduct made such assurances essential. See *National Labor Relations Board* v. *Consolidated Rendering Co.*, 386 F. 2d 699, 702 (C.A. 2); *National Labor Relations Board* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851, 856 (C.A. 1).

[55] Several courts have criticized the Board's treatment of solicitation misrepresentations as tending to rely upon the presence or absence of "magic words." *E.g.*, *National Labor Relations Board* v. *S. E. Nichols Co.*, 380 F. 2d 438, 442–445 (C.A. 2); *National Labor Relations Board* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609, 617–618 (C.A. 6); *National Labor Relations Board* v. *Dan Howard Mfg. Co.*, 390 F. 2d 304, 308–309 (C.A. 7). If there ever was any basis for this criticism, the restatement in *Levi Strauss & Co.*, *supra*, removes it.

[56] The issue was raised in three cases in which petitions for certiorari were denied last Term. *National Labor Relations Board* v. *Crawford Mfg. Co.*, No. 1050, 390 U.S. 1028; *Preston Products Co.* v. *National Labor Relations Board*, No. 1367, 392 U.S. 906; *Bryant Chucking Grinder Co.* v. *National Labor Relations Board*, No. 1324, 392 U.S. 908. See also *Atlas Engine*

of appeals in this case did not pass upon the validity of the cards. Since that issue turns largely upon the facts surrounding the solicitations, this Court's normal practice would be to remand the case to that court if it agrees with us on the other issues. In addition to *Levi Strauss & Co., supra,* however, the reasons why we believe that the *Cumberland Shoe* doctrine is an appropriate gloss upon the statutory requirement of bargaining are set forth in considerable detail in our petition for certiorari last Term in *Crawford Manufacturing,* n. 56, *supra.* The kind of inquiry which the court of appeals called for in that case would lead to an endless and inherently unreliable examination of the beliefs and motivations of each employee who signed the cards.[57] Thus, should this Court deem it appropriate itself to dispose of the point in order to terminate this litigation, the rationale of the Board's rule is readily available and, we believe, thoroughly sound.

Finally, as the Board further found (RIII 591), in this case the bargaining order would have been appropriate as a remedy for the Company's ex-

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Works v. *National Labor Relations Board*, No. 598, this Term (Memorandum for the Respondent, pp. 3–4); *Thrift Drug Co.* v. *National Labor Relations Board*, No. 906, this Term (Memorandum for the Respondent, p. 3).

[57] *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 185 F. 2d 732, 742–743 (C.A. D.C.), certiorari denied, 341 U.S. 914; *International Union United A. A. & A. Imp. Wkrs.* v. *National Labor Relations Board*, 392 F. 2d 801, 807 (C.A. D.C.), certiorari denied, *sub nom. Preston Products Co.* v. *National Labor Relations Board*, 392 U.S. 906; *National Labor Relations Board* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851, 855 (C.A. 1).

tensive violations of Section 8(a)(1), without regard to its refusal to bargain.[58]

CONCLUSION

The judgments of the court of appeals should be reversed insofar as they deny enforcement of the Board's bargaining orders, and the cases should be remanded to that court with directions to enforce those orders.

Respectfully submitted.

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National Labor Relations Board.

FEBRUARY 1969.

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[58] The court below concluded (RIII 894, n. 3) that the Section 8(a)(1) violations were not so pervasive as to preclude a fair election. For the reasons given in n. 43, *supra*, the court's conclusion rests on an erroneous standard and does not accord proper deference to the Board's judgment respecting the feasibility of holding a fair election.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

SEC. 8(a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for

the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that there employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

SEC. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1959

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (A. 205-213) is reported at 397 F.2d 157. The finding of fact, conclusions of law and orders of the National Labor Relations Board (A. 166-204) are reported at 164 NLRB No. 49.

JURISDICTION

The decree of the Court of Appeals was entered on July 3, 1968 (A. 213). The petition for certiorari was filed on September 28, 1968, and was granted on December 16, 1968 (A. 214; ___ U.S. ___, 21 L.Ed.2d 462). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act as amended, 29 U.S.C. § 160(e).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provisions

The First Amendment to the Constitution provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech . . . "

Statutory Provisions

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136; 72 Stat. 544; 73 Stat. 544; 29 U.S.C. § 141, *et seq.*) are as follows

Section 8(c):

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 9(c):

> "(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board
>
> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> "(B) by an employer, alleging that one or more individuals or labor organizations have presented

to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Section 10(e):

" . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

QUESTIONS PRESENTED

(1) Whether the National Labor Relations Board has authority, under the provisions of the National Labor Relations Act, to order petitioner to bargain with a labor organization that has lost a Board-conducted secret ballot election.

(2) In the alternative, if the Board has such authority under the Act, whether petitioner was lawfully entitled to refuse to recognize the Union and to insist upon an election upon the ground that authorization cards are unreliable, and without a requirement that petitioner conduct an investigation into the authenticity of such cards *or* be rele-

gated to a mere check of the names appearing on the cards against the names on its payroll.

(3) Whether a combination of lawful statements made by petitioner to its employees can amount to unlawful threats and coercion as a "totality", and thereby lose their protection under the First Amendment to the Constitution and under Section 8(c) of the Act, and whether such findings by the Board can be sustained by reference to Board "expertise" and the test of substantial evidence under Section 10(e) of the Act.

STATEMENT OF THE CASE

A. Relevant Background Facts

(1) *Brief Background*

The Petitioner, The Sinclair Company, was founded in 1925 by the father of David H. Sinclair, its President (A. 92).[1] The building was acquired in 1933, together with the weaving business, when Buchanan & Holt went bankrupt (A. 94). At that time Buchanan & Holt had a collective bargaining unit of journeymen and apprentice wire weavers represented by the American Wire Weavers Protective Association or AWWPA (A. 36, 75, 92, 93). AWWPA remained the bargaining representative of the journeymen and apprentice wire weavers until 1952 (A. 82).

In about June of 1952, the AWWPA closed Petitioner's plant by a strike which continued for twelve (12) or thirteen (13) weeks (A. 93, 170). The strike was called because of unreasonable and excessive Union demands, which the Company could not meet (A. 75, 76). In order to prevent the business from failing, the plant was reopened in September, 1952, on the basis of the Company's last offer to AWWPA, and the strike was subsequently terminated (A.

[1] References to the Appendix will be designated as A. . References to portions of the Record which have not been printed in the appendix will be designated as R. . All emphasis shown is supplied unless otherwise indicated.

35, 93, 76).[2] Some, but not all, of the wire weavers returned to work without a Union contract (A. 82, 83).[3] AWWPA did not thereafter represent any of the Company's employees, and the Company had no further dealings with it (A. 82, 93).

AWWPA had always engaged in industry-wide negotiations with all twelve (12) of the companies in the industry which were held at Cleveland or at New York City (A. 92, 93). David Sinclair had been Petitioner's representative in the negotiations from 1947 until prior to 1952, when he was called into the service (A. 75, 76, 92, 93). No consideration was given to Petitioner's special problems in these industry-wide negotiations (A. 75, 76, 92, 93).

During the period from the termination of the strike in 1952 until July, 1965, when the Teamsters began its organizing efforts, no Union represented Petitioner's employees (A. 170).[4] During the period from 1952 to 1965, AWWPA merged or affiliated with the Teamsters Union (A. 36, 75, 82, 206).

(c) *Petitioner's Equipment Was Automated Between 1952 and 1965, Reducing the Skills Utilized by Weavers.*

During this same period, changes were made in weaving industry equipment. The Company's looms were automated to the point where they could be run without an operator (A. 84, 93, 94). Electric clutches and "fingers"

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[2] At that time, David H. Sinclair was in military service. He returned to the Company in January, 1954 (A. 94).

[3] The record shows that only seven (7) of the card signers were employed in 1952: St. Germain (A. 16); Neill (A. 17); Geissler (A. 29); Sikorski (A. 20); Cleland (A. 23); Dean (A. 24); Brunault (A. 27). It is undisputed, however, that a majority of the weavers had been members of AWWPA in 1952 (A. 75, 76).

[4] The only Union that had ever represented employees of Petitioner was the AWWPA. No union ever represented any other employees (A. 106).

were added, which made it much easier to operate, and some skills formerly needed were eliminated (A. 93, 94, 104, 105, R. 250). Although it was not unusual to have apprentices in 1952, the situation changed in the industry after that time because of automation (A. 82, 93, 94). The Company had had no apprentices since 1952 (A. 32, 33 81, 82).

(3) *President Sinclair Was Forced To Sell the Company in 1964.*

During the relevant period, Petitioner's parent Company was the Lindsay Wire Weaving Company of Cleveland, Ohio (A. 171). In 1952 Lindsay was one of the Company's eleven (11) competitors (A. 94). In 1963, Sinclair opened a weaving plant in Florence, Mississippi, known as the Sinclair Wire Works (A. 45). The fortunes of the Company had been at a low ebb ever since the 1952 strike, when it almost went bankrupt. The opening of the Mississippi plant failed to prevent the deterioration of the Company's position in the industry (A. 94).

In 1964, Petitioner reached the point where President David H. Sinclair was forced to sell the business that had been started by his father, and which had been owned by his family for nearly forty (40) years (A. 92, 94). It had become necessary to either sell the business or to join with another Company, if the business was to be successful in the future (A. 94).

Thereafter, Lindsay acquired 100% of the stock in The Sinclair Company, which became a Division of Lindsay (A. 45). The Florence, Mississippi, plant became a part of the Lindsay operation (A. 171). Lindsay, therefore, had one (1) plant in Florence, Mississippi; one (1) in Cleveland, Ohio; and one (1) in Mentor, Ohio (A. 171). David H. Sinclair continued as President of the Sinclair subsidiary (A. 171). At the time of its acquisition of the stock of Sin-Clair, Lindsay officers made it clear to David Sinclair that

they were looking for a profit and not for a "hole to pour money down" (A. 69).[5]

B. The Union's Organizing Drive and Its Several and Different Recognition Demands and Unit Positions.

(1) *The Commencement of the Union's Organizing Campaign.*

On or about July 3, 1965,[6] the International Brotherhood of Teamsters commenced a campaign to organize Petitioner's production and maintenance employees. A letter dated July 3, signed by Robert Williams, "President, Wire Weavers Trade Division, International Brotherhood of Teamsters," was sent to all or substantially all of Respondent's Appleton Street employees (G.C. Ex. 3; A. 6, 108; A. 31, 73).[7]

No reference to the Charging Party, Local 404, was made in the letter (G.C. Ex. 3; A. 6, 108). The writer inaccurately stated that "*We* have a collective bargaining agreement" with the parent company, "*Lindsay Wire Works* of *Lindsay*, Ohio" "which owns your employer". He mentioned other companies with which "the *Teamster Union* has contracts" and referred to negotiations "presently in process . . . at the Appleton Wire Works". He boasted:

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[5]Subsequent to the Board's order herein, The Lindsay Wire Weaving Company sold the shares of Petitioner, and since that time has not had any interest in Petitioner.

[6]All dates hereafter mentioned will refer to the year 1965, unless otherwise noted.

[7]Petitioner has two (2) plant buildings at Holyoke, one at 60 Appleton Street, which houses Petitioner's Wire Division, and the other at 115 Park Street, where its Foundry Division is located (A. 95; Resp. Ex. 2; A. 86, 147; G.C. Ex. 6; A. 8, 110). No attempt was made to organize foundry employees until after the filing, in October, 1965, of the representation petition in Case No. 1-RC-8664 (G.C. Ex. 6; A. 8, 110). Employees who were not weavers received the letter (G.C. Ex. 3; A. 6, 108) and offered copies to President Sinclair (A. 73).

> "In this last round of collective bargaining which was the first experience in the *Teamster Union*, we succeeded in getting a collective bargaining package which was better than 62½¢ over the three year period." (A. 108).

The writer then detailed some of the benefits allegedly obtained, such as:

1. Pensions of $150 per month above Social Security;
2. Hospitalization and medical services plan;
3. Life insurance of at least $3,000.00;
4. Improvements in holidays;
5. Improvements in vacations;
6. Improvements in other benefits. (A. 108)

The writer stated that he was very gratified with the results, "speaking as President of the Wire Weavers *Teamsters Union*" (G.C. Ex. 3; A. 6, 108).[8]

An "Authorization For Representation" card was enclosed with the letter (G.C. Ex. 4; A. 6, 109). In small print, almost lost in the verbiage, was the signation, "Teamsters Local Union No. 404" (A. 109).

(a) *President Sinclair Was Informed of the Teamsters Organizing Attempt*

An employee told President Sinclair about the Union's letter and authorization card and handed them to him (A. 29, 30). About ten (10) to twelve (12) other employees, some of whom were not weavers, offered copies to President Sinclair, but he informed them that he already had a copy (A. 31, 73).

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[8]The letter also states: "It is our primary hope that we can carry the benefits of our organization to all unorganized members of our trade . . ." (A. 108). It was obvious to President Sinclair that the Company would not be able to meet the unreasonable demands upon it that would result from such previous settlements (A. 51, 52).

Within a day or two after July 3, President Sinclair gave talks to all of the employees in the plant concerning the Union's organizational drive (A. 31, 34, 42). He talked to employees of the machine shop, the roll department, the cylinder department (A. 172; R. 250, 251) and to the employees of the weaving department (A. 34, 42, 172). The weaving department consisted of weavers, helpers, mechanics, finishers and seamers, but no apprentices, inasmuch as Petitioner had not had apprentices for many years (A. 74, 81). There were fourteen (14) journeymen weavers during the period from July 6 through December 9 (A. 7, 33). However, in July there were twelve (12) additional employees in the weaving department (a total of 26) who were employed as helpers, mechanics, finishers and seamers (A. 74).

Inasmuch as the Williams' letter (G.C. Ex. 3; A. 6, 108) referred to wire weaving "industry," the wire weaving "trade" and the "Wire Weavers Teamster's Union", President Sinclair assumed that organizational efforts had commenced in the Weaving Department (A. 34, 90). He told the weaving employees that he would be blunt for that reason (A. 34, 90). He talked to them for about ten (10) to twelve (12) minutes (A. 34, 172). He had no written speech or notes (A. 47, 172).

(b) *President Sinclair Talked to the Weavers in July, Long Before There Was Any Demand for Recognition.*

Mr. Sinclair siad that he was disappointed that employees, who had had a prior bad experience under a former Union, should at this time be considering the possibility of getting into a Union situation again (A. 35, 90). Mr. Sinclair reviewed the Company's considerable financial problems covering many years (A. 43, 90).[9] He said that the

[9]The financial problems had become so serious that President Sinclair had been forced to sell the family-founded and owned business and had been ordered by the new owners to produce a profit (A. 69).

long strike in 1952 had almost put the Company out of business (A. 35). President Sinclair referred to the Lindsay organization and the fact that the Company was now a part of that organization (A. 34, 90).

President Sinclair stated that he did not feel that Lindsay needed the production equipment in the Company's weaving department to meet the total needs of the entire organization, so far as production of wire cloth was concerned. He said that he did not think that the threat of a strike, if it occurred at the Company's plant, was going to worry Lindsay as far as the entire organization was concerned (A. 48, 49, 90). He said there was nothing to prevent Lindsay from having the work done in Ohio or Mississippi (A. 46, 49).[10]

President Sinclair stated, however, that it did concern *him* (A. 90). He said that he had spent his entire working life with the Company and that he continued to have high hopes for it as he had in the past (A. 90, 91).[11] He referred to the opportunity that the Company had to obtain capital funds if it could provide Lindsay with evidence that the Company could make money (A. 90). He said that such funds would be used to renew the Company's equipment, which, although it was functional and made a good product, was not the most efficient equipment available (A. 91). He stated that the Company was being by-passed in the industry and that he hoped to do something about it, which would benefit the entire Company. Mr. Sinclair said that he felt in his own mind that he would be able to do nothing about the equipment problem if the Company couldn't make money (A. 91).

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[10] As shown above, the Lindsay organization had plants in Cleveland and Mentor, Ohio, and at Florence, Mississippi.

[11] David Sinclair had worked part-time for the Company prior to 1947 and worked full-time for the Company thereafter, except for his period of service (A. 92, 93). He had been a resident of Holyoke all of his life except while away at school or in the service (A. 78). Lindsay has no such ties to Massachusetts (A. 145).

Mr. Sinclair reviewed with the employees that negotiations were a two-way street. He stated that the Company could not be forced to accept a Union proposal any more than the Union could be forced to accept anything that he proposed (A. 91). He stated that there was a situation relating to pay in the plant which was not correct, as far as he was concerned, and that he would make this a matter of negotiations, if he entered into them (A. 35, 91, 173).[12] Mr. Sinclair discussed the method under which employees were being paid on a piece work basis and pointed out that employees with equivalent skills earned different amounts of money (A. 35, 91). He stated that in many cases the Company's employees earned more money than wire weavers at Lindsay Plants (A. 91). He said that he would prefer to see a level of pay for equivalent skills and that this would mean negotiating down in some instances and up in others (A. 35, 91, 92).

President Sinclair stated that he did not have a great deal of respect for the Teamsters; that he had read a great deal about their leadership; and that this was not the kind of organization that he would like to deal with (A. 92, 173). He stated that the last strike had nearly made the Company bankrupt and that since then the plant had been on thin ice (A. 35, 46, 172); that Lindsay had made it clear that it wanted a profit and would not pour money into the Company if there was no return (A. 35, 46); that the Company had a second chance to grow through the merger with Lindsay, but it had to earn its way (A. 36, 173); that he hoped it could reach the point of obtaining new and modern equipment, but that Lindsay wouldn't pour money into the business if there was no profit (A. 35, 173). He stated there had been a sad Union experience that they knew of and

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[12] In 1952, when Petitioner reopened its plant during the strike, employees were told that they would be compensated on the basis of Petitioner's last offer to the AWWPA (A. 91). This is how the piece work system, which was criticized by Mr. Sinclair came into being (A. 91).

that he didn't want to be in the position where, if the Union made unreasonable demands upon the Company which it could not meet the Union would strike and put the Company back in the same situation as in 1952 and with which it had been struggling ever since (A. 36, 90). Mr. Sinclair said that their craft was a small one; that it would be difficult to find jobs, as it was not like finding a job as a machinists; that younger and better educated people were available; and that several of them were over 60, which was a difficult time to start again (A. 35, 49).

President Sinclair told the Weaving Department that he had never heard of a Company that closed a plant; that he did not intend to close; that he had never heard of a Company that had called a strike; that strikes were initiated by Unions (A. 43, 172). He stated that strikes could be caused by a Company's inability to accede to Union demands; and that, if a Company and Union could not agree, that the Union's only answer was to strike or to accede to a settlement (A. 43, 51). Mr. Sinclair told the employees that there was a possibility that a strike could lead to closing the plant (A. 43, 60, 172).[13] Mr. Sinclair said that the last thing he wanted was a plant that was closed down, because "this was my life, too" (A. 58). He said that Petitioner could not accede to unreasonable demands (A. 46). He also stated that Petitioner was subject to foreign competition and that it was conceivable that, if the plant was closed, under any circumstances, some of the work would go to foreign companies, and that the Company had to handle foreign wires in the past (A. 50). Mr. Sinclair told employees that all they had to do was to look around Holyoke to see a lot of plants that were out of business (A. 65).

We proceed now to the discussion of the several different positions as to bargaining unit taken by the Union.

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[13]This had almost happened in 1952 when the Company nearly went bankrupt (A. 35, 44). Because of this history, Mr. Sinclair was very much concerned about strikes and made a point to inform his employees in both talks of his concern over the possibility of the plant closing because of a strike (A. 60).

(2) *The First Recognition Demand by the Teamsters Was in August for a One Plant Production and Maintenance Unit.*

As shown above, the initial letter (G.C. Ex. 3; A. 6, 108) was sent to all of the Company's Appleton Street employees by the International Union. The "authorization" card was for the benefit of the International and of such local as the International might "designate or charter" (G.C. Ex. 4; A. 6, 109).

On August 17 the International Brotherhood of Teamsters, through its Cleveland Attorney, Calvin L. McCoy, made an oral demand for recognition on behalf of the International upon Cleveland Attorney V. Jay Einhart (G.C. Ex. 7; A. 8, 112; G.C. Ex. 8; A. 9, 114; A. 30).[14] Mr. Einhart was counsel for Lindsay (G.C. Ex. 8; A. 9, 114; A. 30). A majority was claimed in a unit "comprised of about eighty-seven (87)" employees at the Appleton plant only (G.C. Ex. 7; A. 8, 112; G.C. Ex. 8; A. 9, 114).[15]

At that time Mr. Einhart did not represent the Petitioner (A. 30). President Sinclair learned of the request on or about August 17 (A. 95). He thought it was strange (1) that he had not received any request from anyone in the Holyoke area (A. 30) and (2) that a production and maintenance unit of eighty-seven (87) employees was being requested (G.C. Ex. 8; A. 9, 114; A. 31, 32). That figure included everyone working for the Company, except very top management (A. 31, 80). In August the Company's total em-

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[14]It was stipulated that Attorney Calvin L. McCoy represented the International Brotherhood of Teamsters (A. 8, 9).

[15]At that time the Company's Foundry Division employees had not been contacted by the Union. This was not done until after the petition had been filed by the Union in Case No. 1-RC-8664. In this regard see General Counsel's Exhibit 6 (A. 8, 110) which refers to an election petition having been filed for Appleton employees and which invites the foundry employees to participate. It was stipulated that this Exhibit was sent to employees between October 29 and November 2 (A. 8).

ployment, including the President, was 93 or 94 (A. 81). At that time, there were approximately sixty-five (65) production and maintenance employees (A. 81).[16]

Because of the discrepancy of at least twenty-two (22) employees, or one-third (1/3) more than were actually employed, President Sinclair had doubts about the validity of the bargaining request (A. 31, 81, 95; R. 230). After consultation with officers of Lindsay, Mr. Sinclair decided to refuse recognition (A. 31). Because of the large discrepancy in numbers among such a small group of employees, he did not believe that the Union represented the employees. "I didn't even feel that they could know a great deal of my Company, never mind representing them" (A. 31). As a result, Mr. Einhart wrote the letter of August 20 (G.C. Ex. 7; A. 8, 112) and denied the recognition demand. Following the July talk and through the approximate six (6) week period ending on August 20, Petitioner did not communicate with its employees concerning Union matters.

No further steps were taken to pursue this request for recognition. Obviously, the demand was abandoned and withdrawn. No attempt was made at the hearing to establish that the August 17 claim of majority was a truthful one or that the unit requested was appropriate, nor was any charge ever filed with respect to Petitioner's refusal.

(3) *The Union Reversed Its Course in a Second, Ambiguous Recognition Request.*

On September 20, Teamsters Local 404 demanded recognition in a unit of "Journeymen-Wireweavers and *Apprentices*" (G.C. Ex. 9; A. 10, 115; A. 31, 32). The Company had not employed an apprentice since 1952, a period of thirteen (13) years (A. 7, 32, 73, 81, 82)! This was the Company's first contact with Teamsters Local 404.

[16]The Company's operations are conducted in two (2) buildings, one located at 60 Appleton Street and the other at 115 Park Street (A. 95). There is a non-ferrous foundry at Park Street, and the Company builds shipping boxes there. The weaving operations and all other operations are conducted at Appleton Street (A. 95).

President Sinclair did not know whether the Union had reference to helpers or whether the Union was referring to seamers, finishers and mechanics in addition to helpers (A. 32, 33, 81, 96). Many people are employed in connection with wire cloth (A. 32, 33) and helpers assist weavers, not apprentices (A. 74). He assumed that the Union was talking about the other classifications of the Weaving Department (A. 32, 33, 96).[17]

Accordingly, President Sinclair replied to the Union by his letter dated September 28 (G.C. Ex. 11; A. 10, 118). In his letter, he denied recognition, among other reasons, because of the Company's good faith doubt that Local 404 of the International Brotherhood of Teamsters:

> "represents an uncoerced majority of its *weaving department* employees." (G.C. Ex. 11; A. 10, 119)

The Union failed to clarify its recognition demand in any way after receipt of General Counsel's Exhibit 11. The Company was, therefore, justified in considering that the Union's demand related to all of the Weaving Department employees and not to journeymen only, as the General Counsel contended.[18]

During the period from the August 17 demand through September 28, Petitioner did not communicate with its employees concerning Union matters.

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[17]There is no record evidence to establish the Trial Examiner's statement (A. 193) that "Sinclair very well knew what an apprentice wire weaver was" or his conclusion that the alleged "argument" was specious. Sinclair testified that he knew who his wireweavers were (A. 33). He also testified that he "did not know who the . . . *Union* might be referring to when they specified wireweavers and apprentices" (A. 33).

[18]In a notice posted on employee bulletin boards on October 21 (Resp. Ex. 15; A. 97, 158), the Company stated: "Local 404 originally requested recognition for employees in our '*Weaving Department Only*'. We denied this request because we felt then, as now, that all of our employees should have something to say about whether or not our plant becomes unionized" (A. 159).

(4) *The Third Recognition Demand and the Filing of the First Representation Petition Constituted an Abandonment and Withdrawal of the Second Request of September 20.*

Having reversed course in its second recognition demand, the Union reversed course again. It did not follow up the Company's letter of September 28, or clarify its position in any way. Instead, on or about October 11, the Union mailed a third (3d) recognition demand to Petitioner (G.C. Ex. 12; A. 11, 119).

In its third demand, the Union stated that it was "supplementing" its letter of September 20, which was limited to a "special group" of employees at the Appleton Street plant (G.C. Ex. 12; A. 11, 119, 120). This time the union specified classifications and departments of employees, which it claimed to represent at the "Appleton Street plant", as follows:

weave shop	finishing room
maintenance	dandyroll
machine shop	cylinder
shipping room	water mark (A. 120)

The foundry division, which is plainly noted on the Company's stationery (G.C. Ex. 14; A. 11, 123) and of which the Union must have had knowledge, was not mentioned!

Its October 11 letter (G.C. Ex. 12; A. 11, 119) states:

> "We therefore request recognition as the exclusive bargaining representative of the Employees identified in paragraph three (3)." (A. 120)

President Sinclair replied to the Union's letter on October 21, denied recognition (G.C. Ex. 13; A. 11, 122) and stated:

> " . . . We are pleased to note that Local 404 has followed the election procedures established by the Board as evidenced by its petition which has been docketed Case No. 1-RC-8664." (A. 122)

The Union's representation petition was filed on October 13 and was assigned by the Regional Director to Field Examiner Francis V. Paone (Resp. Ex. 1; A. 86).[19]

The Company rejected the demand for recognition because of the exclusion of the foundry employees and because President Sinclair believed that all production and maintenance employees should be included in the unit (A. 96). Simultaneously with sending the letter of October 21 (G.C. Ex. 13; A. 11, 122), President Sinclair prepared the first written Notice to Employees (Resp. Ex. 15; A. 97, 158).[20]

In the notice, President Sinclair referred to the Union's election petition and to the bargaining unit sought by the Union. The notice continued:

> "Local 404 would apparently exclude our foundry employees. We firmly believe that if any election is held it should include *all* of our production and maintenance employees and we have made our position clear to the NLRB." (A. 158)

During the period from the second recognition demand of September 20 to October 21, Petitioner's only communication with its employees concerning Union matters was the above-mentioned notice (Resp. Ex. 15; A. 97, 158). *This was Petitioner's first communication with its employees concerning Union matters since the July talk, a period of more than three and one-half (3½) months.*

Subsequent to the filing of the representation petition on October 13 (Resp. Ex. 1; A. 86), an "organizing Committee", composed of employees Brunault and Bougie, sent

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[19]Respondent's Exhibit 1 has not been printed in the Appendix.

[20]This notice and others which were received in evidence were posted at both the Appleton and Park plants and were seen by all employees (A. 96, 97). The notices, including this one, were posted from three (3) to four (4) days (A. 96, 97).

a letter to foundry employees urging them to sign authorization cards which were enclosed (G.C. Ex. 6; A. 8, 110).[21] The letter included a "brief summary" of benefits which the Union would negotiate for. Some of the expected contract demands were: Jury duty benefits; minimum hiring rate of $2.10; funeral benefits; seniority benefits; and a pension plan providing $150.00 per month after three (3) years' service (A. 110, 111).

Significantly, the employees were asked to mail the authorization card; were told that the card "will *not* be seen" by the Company and that:

> "We expect the *voting* to take place within the next two weeks. *This will be a secret ballot*" (A. 222).

On October 21 a list of the Company's production and maintenance employees, which included nine (9) foundry employees who were indicated by an asterisk, was mailed to the Board (Resp. Ex. 8; A. 87). That list included sixty-two (62) employees.[22]

Subsequently, on November 2, a meeting was held between Board Representative Paone; Mr. Napoli, the Union's President and Business Representative; President Sinclair and and the Company's counsel, Mr. V. Jay Einhart (A. 37, 97, 98). The Union agreed that its recognition request and petition were for an inappropriate unit. A Stipulation For Certification Upon Consent Election was signed by the parties for a production and maintenance unit, *which included the foundry employees* (Resp. Ex. 2; A. 86, 147). It was also signed by and recommended by Board Field Examiner Frances V. Paone (Resp. Ex. 2; A. 86, 147). This represented the *fourth (4th)* position taken by the Union with

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[21] It was stipulated that the Organizing Committee's letter was sent to employees between October 29 and November 2 (A. 8). Petitioner was notified of the Committee's existence by letter of September 24 (G.C. Ex. 10; A. 10, 117).

[22] The list of names has not been printed in the appendix.

respect to its representative interest and the appropriate unit.

Also on November 2, President Sinclair posted a notice to employees announcing the election details and the voting hours at both the Appleton Street and the Park Street plants (Resp. Ex. 16; A. 98, 159). The agreed election date was November 19 (Resp. Ex. 2; A. 86, 147; Resp. Ex. 16; A. 98, 159).

On November 2, Petitioner sent to its employees its first letter notifying them of the election and discussing certain questions in connection therewith (G.C. Ex. 14; A. 11, 123). On November 5, a *second* letter was sent by petitioner to its employees (G.C. Ex. 15, A. 121, 127). Petitioner's financial condition was the principal subject discussed in this letter.

(5) *The Union Again Reversed Course and Abandoned and Withdrew Its First Petition and Its Recognition Requests.*

On Friday, November 5, the Company received a telegram advising that the Union had requested permission to withdraw the petition in Case No. 1-RC-8664 (Resp. Ex. 4; A. 86, 151). A telegram was sent by the Union to the Board's Regional Director on the same date, requesting such withdrawal *without prejudice* (Resp. Ex. 3; A. 86, 150); but this was not communicated to the Company (Resp. Ex. 4; A. 86, 151).

On Monday, November 8, Petitioner's counsel telephoned the Regional Director and objected to the withdrawal of the petition in Case No. 1-RC-8664 without prejudice (A. 107). He was informed merely that the withdrawal request was received prior to the Regional Director's approval of the proposed Stipulation (A. 107). No contention was raised that the unit was in any inappropriate or that in any respect the Stipulation failed to accord to employees the full measure of their rights under the Act. The only thing before the Regional Director was a naked request for with-

drawal, together with a statement that a "new petition in a smaller unit" would be filed, obviously based upon the Union's supposed extent of organization (Resp. Ex. 3; A. 86, 150).

On the same date, November 8, the Regional Director granted the telegraphic request to withdraw without prejudice by a letter, which stated it was Board policy to allow such withdrawal inasmuch as the Stipulation had not been approved by him prior to receipt of the Union's request (Resp. Ex. 5; A. 87, 152). Six (6) days had elapsed from the signing of the Stipulation! *No explanation for the delay was offered by the Regional Director, the Board or its General Counsel.* On November 9, the Regional Director sent a *second letter* in which he advised that the petition in Case No. 1-RC-8664 had, with his approval, been withdrawn without prejudice (Resp. Ex. 7; A. 87, 154). No reason for the second letter had been advanced.[23]

On November 8, Petitioner posted a Notice to its employees informing them that the Teamsters were "backing out" of the written election agreement. It further stated:

> "This is about the fourth time that the Teamsters Union has changed position concerning which of you it would like to represent. We don't know what the Union's next move will be, but when it occurs, we will keep you fully advised." (Resp. Ex. 17; A. 99, 160)

No attempt was made by the Board to establish that the October 11 claim of majority representation was a truthful one or that the unit requested on October 11 was appropriate, nor was any charge ever filed with respect to Petitioner's refusal.

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[23]In this regard, the Court should note that General Counsel contended that there was "nothing pending" after the Union withdrew its petition in Case No. 1-RC-8664 (A. 56, 83).

(6) *The Union Made No Further Demand for Recognition But Instead Filed a Second Representation Petition.*

On November 8, concurrently with its approval of the Union's action in backing-out of its prior agreement, the First Regional Office of the Board received and permitted the filing of the petition in Case No. 1-RC-8713 (G.C. Ex. 1(a); A. 4).

The Union *made no demand upon the Company for recognition* prior to filing its *second* petition. Even though the ambiguity of such a request had been called to the Union's attention, the Union requested a unit of "*Apprentice* and Journeymen Wire Weavers" but specifically requested the exclusion of all other employees at both the Appleton and Park Street plants (G.C. Ex. 1(a); A. 4). The petition alleged that fourteen (14) employees were involved. Respondent's journeymen numbered fourteen (14) (A. 161; G.C. Ex. 5; A. 7). This was the *sixth* position taken by the Union with respect to representation of the Company's employees.[24]

President Sinclair believed, in view of the automation that had occurred with respect to the looms which were operated by wire weavers, as set forth *supra*, p. 5, that the appropriate unit should include all production and maintenance employees (A. 106). Petitioner's counsel reported that the Board's Regional office now advised that a unit limited to journeymen only would be considered appropriate by the Board (A. 100, 101, 106).[25] In view of that development, Petitioner did not demand a hearing or make

[24] On November 9, Petitioner posted a notice to its employees advising them of the filing of the Union's *second* petition. It stated; "The Union has now come 'full circle' in their efforts for recognition" (Resp. Ex. 18; A. 100, 161).

[25] There was no occasion to discuss this issue with the Board in connection with the September 20 demand, since it was not pursued by the Union, and the first petition was filed for an entirely different unit.

any attempt to delay. Instead, it reluctantly agreed to a unit consisting of journeymen weavers only (A. 106). In this regard Mr. Sinclair testified "so there seemed to be no sense in arguing about it" (A. 101), and "there was nothing I could do about this" (A. 106).

No conference was held. A proposed Stipulation for a unit of journeymen only was mailed to both parties on November 22 after telephone calls (Resp. Ex. 11; A. 88, 155). Mr. Sinclair was absent when the Stipulation was received; and he authorized Fred Greene, Production Manager, to sign it on behalf of the Company, so that there would be no delay (A. 101). The Stipulation was executed by the Union on November 23; by the Company on November 24; and was approved by the Acting Regional Director on November 26 (G.C. Ex. 1(b); A. 4), this time within two (2) days after the Company had executed and mailed it.

The Union's agreement to this (second) Stipulation constituted the *seventh* position taken by it with respect to the Company's employees.

The unit which was agreed upon in the Stipulation (G.C. Ex. 1(b); A. 4) is a unit for which *the Union never made a demand for recognition.*

On November 29, the Company posted a notice to employees (Resp. Ex. 19; A. 100, 161), which stated the following, among other things:

> "Although we still feel strongly that all of our production and maintenance employees should have the right to vote in any Labor Board election, we were advised by the Board that an election could properly be held among our wire weavers." (A. 161)

It was also stated that, even though the election might have a serious effect upon their future at Sinclair, employees, other than weavers, would have no right to vote (Resp. Ex. 19; A. 100, 161). This was the last bulletin board notice posted by Petitioner.

C. Petitioner's Communications With Its Employees Subsequent to July.

Following the July talk, the Company engaged in no communications with its employees until the posting of its notice on October 21 (Resp. Ex. 15; A. 97, 158). The only possible exception to the above statement were conversations between President Sinclair and individual employees. In that regard, the Trial Examiner found that President Sinclair talked to ten (10) of the fourteen (14) weavers individually on unspecified dates between July and December 9 at their work stations (A. 65, 182). The specific content of these discussions was not litigated, except for one with Richard Bougie, a member of the Union's Organizing Committee (A. 182, 183). The "discussion" consisted of President Sinclair's statement of a willingness to answer questions concerning the Company's position (A. 66). Only "some" of the employees asked questions (A. 66, 79). The Trial Examiner found it was "unnecessary to consider and to pass upon" the contention that the individual discussions violated the Act (A. 184).[26]

Subsequent to the October Notice (Resp. Ex. 15; A. 97, 158), Petitioner posted Notices on November 2 (Resp. Ex. 16; A. 98, 159); on November 8 (Resp. Ex. 17; A. 99, 160); on November 9 (Resp. Ex. 18; A. 100, 161) and on November 29 (Resp. Ex. 19; A. 100, 161).

As shown above, Petitioner's first letter to its employees was sent on November 2 (G.C. Ex. 14; A. 11, 123). It referred to the then scheduled election of November 19 (A. 123). The letter raised and answered a number of questions concerning voting procedures, union shop, job security and Teamster promises (A. 123). It stated that *Petitioner would bargain in good faith*, if the Teamsters won an election, but because of its precarious financial position, "we will not

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[26]Nevertheless, the Court of Appeals appears to have relied upon the individual discussions as a basis for affirming the Board's order of violation of Section 8(a)(1) (A. 209).

agree to any increase in costs which can put us out of business" . . . "it just doesn't make sense for us *to meet unreasonable* Union demands *which will result in further losses* and eventually the necessity of closing the plant" (A. 126). It stated that the Teamsters Union could not increase job security (A. 124, 125). It further stated that Lindsay would not "continue to subsidize a losing operation"; that it had a right to expect profits; that true job security depended upon "our ability to operate this plant at a profit"; and that if Lindsay had not purchased the plant "it is entirely possible that we would no longer be in business" (A. 125).

Petitioner's second letter was dated November 5 (G.C. Ex. 15; A. 12, 127). President Sinclair reviewed Petitioner's history, including the 1952 strike, which led to its accumulations of debts, which, in turn, forced it to sell control to Lindsay. Its relationship with Lindsay was discussed, inter alia, that Lindsay "made it clear that Sinclair must make a profit" (A. 128); that Lindsay had no ties to Holyoke (A. 128); that a strike threat would not cause Lindsay "any loss of sleep" (A. 129). President Sinclair stated that the Teamsters promised a lot "but what can they deliver except pressure—the threat of a strike" (A. 128). The letter continued that a "long strike" would be bad for President Sinclair because he wanted to "continue to live in Holyoke", had pride in the Sinclair name, "and would like to see the plant modernized, expanded and prosper" (A. 129). He emphasized the right of employees to make their decision individually. "No one has a right to threaten you, or coerce you to make you vote their way" (A. 129). Employees were urged to vote (A. 120).

A third letter on November 22 (G.C. Ex. 16a; A. 12, 129) merely stated that a copy of Senator Robert Kennedy's book entitled, "The Enemy Within" (G.C. Ex. 16b; A. 12), was enclosed and suggested that employees read it (A. 129, 130).[27]

[27]In November the Teamsters distributed a book to employees entitled, "Hoffa, Ten Angels Swearing", by Jim Clay (G.C. Ex. 22; A. 15).

An undated handbill captioned, "Who Would Buy The Groceries . . . While You Walk The Teamsters Picket Line" was distributed between November 18 and November 25 (G.C. Ex. 21; A. 14, 143). President Sinclair discussed Petitioner's policy of treating all employees alike and stated that it was prohibited, during a Union organizing campaign, from making any changes in wages or other benefits (A. 144). He discussed the 1952 strike, stated that he had no hopes that the Teamsters, a strike-happy outfit, would not call a strike (A. 144). He quoted Teamsters President James R. Hoffa, who had stated that the Teamsters "would expect all (telephone) installers to be ready to wage (a six- or nine-months' strike) with the employers, or not come into the Teamsters" (A. 144). Also discussed were employees' rights in voting in an NLRB election and their rights in the event of a strike (A. 145). The first page shows a Teamster picket in front of the plant (A. 143) and two other cartoons appear on the final page (A. 145).

On November 30 a fifth letter was sent (G.C. Ex. 17; A. 13, 130). The sale of Petitioner to Lindsay was laid to the 1952 strike and the ensuing financial difficulties (A. 130). The differences between the 1952 situation, when Petitioner was family owned, and the present situation were pointed out (A. 130, 131). The letter continued by pointing out that the Teamsters Union could not solve the problems facing the Company; that the Teamsters could make "big" demands that the Company could not meet; and that the Union's only weapon to "enforce its 'big' demands" was a strike (A. 131). The following was also stated:

> "This Company is *not anti-union.* We would not close the plant *in retaliation for employees voting for a Union.* But this Company must show a profit, *regardless* of whether or not you select the Teamsters Union as your spokesman." (A. 132)

The letter continued by stating that real job security depended upon profits and not upon Teamster Union pressure or promises. Employees were encouraged to make their own decision and to "vote without fear" (A. 132).

A sixth letter, on December 1, suggested that every organization mirrored and reflected the character of its leaders and top officers (G.C. Ex. 18; A. 13, 133). The criminal convictions of Teamster "Top Officers" David Beck and James R. Hoffa were discussed (A. 133). Also referred to were Senator Robert Kennedy's book, "The Enemy Within", newspaper and magazine articles by Senator McClelland, Chairman of the Senate Labor Racketeering Committee and testimony before that committee (A. 143). It was stated that it would be difficult to get another election to vote the Teamsters out (A. 135). Also discussed was the use of dues by Teamster President Hoffa and by lesser Union officials to finance their defenses in criminal court (A. 135). Employees were reminded that only they could decide whether they wanted to become Teamster members (A. 135, 136).

On December 7, a seventh letter was sent to the employees (G.C. Ex. 19; A. 13, 137). It included a graveyard cartoon with the Teamsters about to bury the Company (A. 137). It refers to the Holyoke-Springfield industrial graveyard of Companies that had died under Union pressure (A. 137). Twelve (12) companies that had gone out of business in the area were listed, together with the number of jobs that were lost (A. 138). The letter stated that these companies had needed higher production and better quality, but that the "Union Doctors" gave them "bloodletting strikes, restricted production and higher labor costs" (A. 138). It was pointed out that everyone in the area had been hurt as a result; that Unions had done nothing to promote sound industrial growth in the area; and that "real job opportunity is based upon the profit and loss picture of the employer" and not on "hot air" union promises (A. 138). There was a review of Petitioner's history: the bankruptcy of Buchanan and Holt, the 1952 thirteen week strike disaster from which the Company never recovered and which compelled the sale of the Company (A. 139). Against this background, President Sinclair stated, "dreams of 'Union miracles' can be dangerous to your real job security" (A.

139). He stated that he did not "know what the future holds for any of us", urged employees to drive past a few of the vacant area plants and urged them to vote and to make their decision. The final page carried photographs of closed plants with the caption, "Unions Furnished No Job Security Here" (A. 140).

The December 8 handbill severely criticized the Teamsters for using Union funds to defend James Hoffa in criminal proceedings and for paying a pension and furnishing a home for former President David Beck (G.C. Ex. 20; A. 14, 141). It refers to the Teamsters expulsion from the AFL-CIO because of "racketeer" domination. Advantages of voting "NO" in the election were stressed (A. 141).

Petitioner's final communication with its employees was a talk by President Sinclair on December 8, which he read from notes using connecting words (Resp. Ex. 20; A. 102, 162; 84, 102-105). At the outset, Sinclair emphasized that the decision was that of the employees and that no one could threaten or coerce them (A. 162). He reviewed labor racketeering charges against the Teamsters and said that there were a "lot more important things" than who represented the employees; that he promised nothing; that the Company would not have been sold if it had been making a lot of money (A. 162).

President Sinclair again emphasized the necessity of profits so that everyone; including himself, would have a job; the "Teamsters Union has nothing to do with it" (A. 163). He reiterated that the Teamsters could do nothing about the Company problems, could make demands that could lead to larger losses; could call a strike and that the new owners would not be concerned (A. 163). He expressed his belief that the Teamsters also would not be concerned about whether Petitioner stayed in business or not (A. 163).

President Sinclair said it made "a hell of a lot of difference to you and to me"; that he would not blacklist anyone if the plant was "closed by a strike" but that it would be difficult to find other jobs (A. 164). He stated:

> "I can't promise you anything except that I'll do my level best to keep Sinclair Co. in business and growing. That's important to Dave Sinclair because its his job too . . . I'm not concerned with beating a union–I'm concerned with our future." (A. 165)

D. The Election and Subsequent Proceedings

The election was held on December 9, and the employees voted against the Teamsters by a vote of 7 to 6 (A. 166, 169, 188).

The Teamsters filed Objections to the Election on December 14 (G.C. Ex. 1(c); A. 4). The Regional Director issued his Report on Objections on January 20, 1966, recommended that the Objections be overruled and that a Certification of Results be issued (G.C. Ex. 1(d); A. 4). With respect to the December 8 talk, the Regional Director found that Petitioner:

> "'set forth its economic and competitive position in the industry and presented this information in a non-coercive manner'. *Freeman Manufacturing Company*, 148 NLRB 577 at 581, 582." (G.C. Ex. 1(d); A. 4)

With respect to Petitioner's letters, the Regional Director found:

> "There is no evidence, however, that these statements were other than factual in character and such matters certainly were relevant to the election issues before the employees. The entire 'literature' could, as already pointed out with respect to the Employer's speech . . . clearly be evaluated by the employees as campaign propaganda." (G.C. Ex. 1(d); A. 4)

The Union filed exceptions with the Board and on March 8, 1966, the Board directed a hearing with respect to the objections to the election (G.C. Ex. 1(e); A. 4).

Concurrently with the filing of the Objections on December 14, the Teamsters filed a Charge alleging violations of Sections 8(a)(1), 8(a)(3) and 8(a)(5) (G.C. Ex. 1(f); A. 4).

On January 20, 1966, the Regional Director refused to issue a Complaint (G.C. Exs. 1(d) and 1(h); A. 4). The Union requested review (G.C. Ex. 1(i); A. 4); and on June 21, 1966, the Regional Director notified the parties that he would issue a Complaint only with respect to the 8(a)(1) allegations of the Charge (G.C. Ex. 1(j); A. 4). On July 5, 1966, the Board's Office of Appeals ordered that a Complaint also be issued with respect to the alleged Section 8(a)(5) violations (G.C. Ex. 1(k); A. 4). On July 22, 1966, an order consolidating cases, Complaint and notice of hearing was issued (G.C. Ex. 1(1); A. 4) [28] and subsequently a hearing was held (A. 2).

After the hearing, the Trial Examiner found that Petitioner had not engaged in the conduct specifically alleged in Complaint paragraphs 14(a)—alleged threat; 14(b)—alleged interrogations; and 14(c)—alleged interference with a Union meeting. The remaining allegations of the Complaint claimed that Petitioner had "threatened its employees" with nine (9) generally alleged "misrepresentations" and that the effect of Petitioner's "total acts and conduct . . . was to create a coercive atmosphere" (G.C. Ex. 1(1); A. 4). Although he did not find any specific "misrepresentations", nor did he specifically find a "coercive atmosphere", the Trial Examiner nevertheless ordered the election set aside and recommended a bargaining order.

E. The Board's Decision and Order

Except for two (2) modifications in the breadth of the Order (A. 203), the Board adopted the findings, conclusions and recommendations of the Trial Examiner (A. 203). Although it had approved a Stipulation that a question of representation existed and had conducted an election, it now ruled that the election should never have been held and ordered Petitioner to recognize and bargain with the Union

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[28] The dismissal order with respect to the alleged violation of Section 8(a)(3) of the Act was not disturbed.

(A. 199, 203).[29] It made no finding that any one of Petitioner's communications to its employees was unlawful. Notwithstanding the First Amendment to the Constitution and Section 8(c) of the Act, it used Petitioner's communications with its employees in their totality as evidence of a violation of the Act and as the basis for the bargaining order. Although it found no threats of force or reprisal or promises of benefit, it ordered Petitioner to cease and desist from threatening its employees with possible plant closure, transfer of weaving production with attendant loss of employment or "with any other economic *reprisals*" if they *selected* the Union as their bargaining representative (A. 199, 203).

(1) *The Board's Ruling With Respect to Petitioner's Communications.*

With respect to Petitioner's communications with its employees, the Board made two (2) inconsistent findings. The *first* was that Petitioner's communications:

> "*Taken together and considered as a whole,* reasonably *tended* to convey to the employees the belief or impression that *selection of the Union* in the forthcoming election *could* lead Respondent to close its plant, or to the transfer of the weaving production, with resultant loss of jobs to the wireweavers. . . ." (A. 183)

The foregoing finding relates to a "possibility" of disadvantageous consequences as a result of selection of the Union. In its *second* finding, the Board piled inference upon inference in an attempt to convert the "possibility" into a "certainty", but it no longer depended upon "selection" of the Union:

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[29] Contrary to the Trial Examiner who recommended only that the election be set aside (A. 200), the Board dismissed the election petition in Case No. 1-RC-8713 and ordered that all proceedings held thereunder be vacated (A. 203).

> "But the message which the foregoing *preelection campaign* . . . reasonably *tended* to convey to the employees was that if they *selected this Union* as their bargaining representative, a strike *would* be inevitable because the Union *would* make excessive demands which Respondent *would* refuse to meet, that a strike *could* lead to the closing of the plant or the transfer of the weaving production to Lindsay's other facilities, and that the wire weavers *would* then lose their jobs and find it difficult to get other jobs because of their age and limited craft skills." (A. 184)

The Board in no way explicated the basis for its findings, contenting itself with basing them upon the alleged "totality" of Petitioner's communications (A. 183, 184, 204). The findings made by the Board largely consist of statements which must be conceded, even by the Board, to be protected under the First Amendment to the Constitution and by Section 8(c) of the Act. Such findings include, in their "totality", the finding that on November 22, Petitioner furnished each of its employees with a copy of Senator Robert Kennedy's Book, "The Enemy Within" (A. 176).

The Board relied only upon the *first* finding, set forth above, as the basis for setting aside the results of the election (A. 188). The Trial Examiner, doubtful of his conclusion that Petitioner's communications were violative of Section 8(a)(1) of the Act, assumed the contrary, *arguendo*, and nevertheless recommended setting aside the election, but *only* because Petitioner's pre-election campaign:

> " . . . *tended* to foreclose the possibility that the election issues will be decided on the basis of the employees' judgment as to whether the Union will be able to represent them effectively in light of existing economic conditions." (A. 189)

On June 16, 1967, more than a month after it issued its Decision and Order herein, the Board, without any request by Petitioner or any other party, voluntarily issued its Order Supplementing Decision and Order, which added a footnote

to its original Order and disclaimed any reliance upon Petitioner's distribution of "The Enemy Within" as "part of the *totality* of . . . conduct in violation of Section 8(a)(1) of the Act" (A. 204).[30]

(2) *The Board Ruled That There Had Been an Unlawful Refusal To Bargain.*

With respect to the allegations of refusal to bargain, the Board ignored all demands for recognition, except the *second* demand of September 20 and ignored the proceedings in connection with the representation petition filed in October (A. 191-193). It ruled upon the matter as though the September 20 demand and the representation petition of November 8 were the only facts in the case.

The Board found that Petitioner's unfair labor practices made "impossible the holding of a free election" (A. 191) and that there was, therefore,

> "*no alternative* but to look to the signed authorization cards as the only available proof of the choice employees would have absent the employer's unfair labor practices" (A. 191).

The only finding made by the Board to support the above conclusions was:

> "To the extent that the election revealed a loss of Union support, such loss *must* be found attributable to the (Petitioner's) unfair labor practices" (A. 191).

The Board then leaped to the conclusion that Petitioner's refusal to bargain on and after September 20:

> "was not motivated by any good-faith doubt as to the Union's majority status in an appropriate bargaining unit but was instead motivated by a desire

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[30]The Board did not rule upon Petitioner's contentions that its communications with its employees were protected by the First Amendment to the Constitution and by Section 8(c) of the Act.

to gain time within which to dissipate that majority status." (A. 195)

The Board did not rule upon Petitioner's contention that, by reason of the changes made in Section 9(c) of the Act by the Taft-Hartley Amendments (61 Stat. 143), among other things, deleting the Board's authority to "utilize any other suitable method" to determine a bargaining representative, that the Board did not have statutory authority to order bargaining based upon a card check, after it had resolved the question of representation by means of a secret ballot election.

F. The Decision of the Court of Appeals

The Court of Appeals enforced the Board's order. It stated that the Board's order was based upon findings that Petitioner *threatened* its employees "that *unionization would* cause them to lose their jobs" (A. 205), and that there was a refusal to bargain in violation of the Act.[31] It held that the "basic question" was whether these findings were supported by substantial evidence on the record as a whole (A. 205).

(1) *The Court's Decision With Respect to Petitioner's Communications.*

With respect to Petitioner's communications, the Court relied upon findings which are substantially curtailed in scope from those relied upon by the Board. The Court impliedly sustained Petitioner's contentions that it made no untrue statements and that its statements, considered separately, were lawful (A. 209).[32]

[31] The Board made no finding that Petitioner threatened that unionization "*would*" cause employees to lose their jobs.

[32] The Court inaccurately held that the Board's findings "were based on the company's activities during the period from November 8, when the instant representation petition was filed, and December 9, the date the election was held" (Footnote 7 to the Court's Decision, A. 207).

Although the Court mentioned the tests set forth in Section 8(c) of the Act relating to promises of benefits or threats of force or reprisal (A. 209), it made no findings under those standards. Instead it turned to the language of Section 8(a)(1), which prohibits conduct by an employer:

> "to interfere with, restrain *or coerce* employees . . . "

The Court held that the test in considering "coercive effect" was the "totality of the circumstances" (A. 209). It held that:

> "Whether an employer has used language that is *coercive in its effect* is a question essentially for the *specialized experience* of the Board (A. 210).
>
> * * *
>
> "On the record before us we think there is *substantial evidence* to support these findings." (A. 211)

The Court, therefore, as did the Board, applied the standards pertaining to a violation of Section 8(a)(1) of the Act and not the standards set forth in Section 8(c) thereof. Further, the Court, likewise, did not rule upon Petitioner's contention that its communications were protected by the First Amendment to the Constitution, nor did the Court review the factual findings for the Board's order as required with respect to an order restraining freedom of speech.

(2) *The Court's Decision With Respect to the Refusal To Bargain.*

With respect to the refusal to bargain issue, the Court found that the Board's finding of a violation of Sections 8(a)(5) and (1) of the Act was supported by substantial evidence (A. 211). It ruled that a good faith doubt was not established by assertion and that it must have some reasonable or rational basis in fact (A. 212):

> "Here the company made no attempt to discover what the card situation was when the union re-

> quested recognition for the wire workers unit. We therefore conclude that *the company* made no real showing of good faith doubt either as to the union's majority status or as to the appropriateness of the bargaining unit." (A. 212)

The Court found that instead of recognizing the Union on the basis of its "admitted" card majority, that Petitioner sought to gain time to dissipate the Union's majority (A. 212). The Court gave no recognition to the fact that such majority was not known to Petitioner until the hearing on October 4 and 5, 1966, and that no letters were sent to employees until November 2. It gave no consideration to the Union's false claim of majority representation in August, and it did not consider the abandonment by the Union of its September claim by the October demand and petition, and by its execution, in November, of a Stipulation for an Election in an entirely different bargaining unit.

The Court ruled that it had rejected the proposition, in the First Circuit, that authorization cards were so unreliable that an employer has a right to reject a request for recognition based upon them (A. 212); and that it was reasonable to conclude that the Union's majority had been dissipated by Petitioner's unlawful interference (A. 212, 213). The court did not discuss the effect of the Union's delays and its frequent changes of position nor did it rule upon Petitioner's contention that the change made in Section 9(c) of the Act by the Taft-Hartley Amendments (61 Stat. 143) prohibited the issuance of the Board's bargaining order.

These detailed facts raise the following ultimate questions:

(1) Did Petitioner's communications to its employees exceed the bounds of the First Amendment to the Constitution and the bounds of Section 8(c) of the Act so that the Board properly could use them not only as evidence of other unfair labor practices, but as an unfair labor practice in and of themselves, and as grounds for setting aside the results of the election? and,

(2) Was it *impossible* to conduct a fair election so that notwithstanding the provisions of Section 9(c) of the Act, as amended, the Board could exercise remedial authority, to impose upon employees a bargaining representative which they had rejected in a secret ballot election?

We will now argue the facts and law which show that both of such ultimate questions should be answered in the negative by this Court.

SUMMARY OF ARGUMENT

I

The Board's Order With Respect to Petitioner's Communications Is Not Supported by Specific, Reasoned Findings and Such Order Is Vague, Ambiguous and Non-Specific. Petitioner's Communications Are Within the Protection of the First Amendment and Section 8(c) of The Act, Whether Considered Separately or in "Totality". Such Communications Could Not Properly Have Been Found Unlawful Nor Used as Evidence of Another Unfair Labor Practice Nor as Grounds for Setting Aside the Election.

Petitioner was found guilty of no "conduct" in violation of the Act, other than the "totality" of its communications to its employees. Its "words" alone constitute the basis for the Board's findings of violation of Section 8(a)(1), and also constitute the "evidence" upon which the Board's order, directing Petitioner to bargain with the Union, is based. Petitioner's "words" also constitute the "evidence" upon which the Board set aside the results of the December 9 election which the Union lost.

The Board made a finding covering the period (1) from July through December 8 and other finding covering the period (2) only from November 8 through December 8, and in both cases found that the "totality" of Petitioner's com-

munications during each respective period violated Section 8(a)(1) of the Act. The Board made no finding that any *specific* statement made by Petitioner violated the Act. Petitioner's statements were not considered by the Board or the Court below under the standards set forth in Section 8(c) of the Act or under the constitutional standards enunciated by this Court. Rather, the Board's findings are based upon the alleged "totality" of Petitioner's "series of letters, pahphlets, leaflets and speeches . . . taken together and considered as a whole" (A. 83). In this situation, we make the following points:

(a) The Board's decision contravenes constitutional standards for specificity of findings with respect to orders which restrain freedom of expression. Whenever it is claimed that such liberties have been abridged, this Court has always closely examined the evidence to determine whether there is a forbidden intrusion on the field of free expression by improper characterization. *Wood v. Georgia*, 370 U.S. 375 (1962); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Further, this Court has held that ambiguous lines may not be drawn by decrees which restrict freedom of expression and that "precision of regulation must be the touchstone" in an area closely touching upon the precious liberty of freedom of speech. *NAACP v. Button*, 371 U.S. 415 (1963). The Board's order here, unsupported as it is by detailed and reasoned findings, is vague, imprecise and ambiguous and unlawfully restrains Petitioner's constitutional right of free expression.

(b) The Court of Appeals erred in failing to determine whether constitutional standards had been met, in failing to make a close examination of the evidence, and in enforcing the Board's order upon the standard of "substantiality of the evidence". Statutory presumptions must give way when the statute being enforced approaches the limit of constitutional power. *NLRB v. Golub Corporation*, 388 F.2d 921 (CA-2, 1967) 66 L.R.R.M. 2769; *Wood v. Georgia*, 370 U.S. 375 (1962); *Speiser v. Randall*, 357 U.S. 513 (1958). This

is not a case for application of the "substantial evidence" rule which relates to statutes, rather it is a case requiring the application of the free speech provisions of the Constitution. The Board's findings, which are based upon its *characterization* of admitted facts, were sustained by the Court of Appeals without any reference to constitutional standards.

(c) The Court of Appeals also erred in sustaining the Board on the basis of its so-called "expertise", even though the Board failed to set forth precise, relevant and reasoned findings which support its conclusion with respect to the Section 8(a)(1) violation found by it. The Court of Appeals did not uphold the order only "on the same basis articulated in the order by the agency itself" (371 U.S. at 169). Rather, it misstated the Board's findings and chose to make findings of its own, upon which it upheld the Board's order. The opinion of the Court below presents a startling example of the "monster" of "expertise", which was turned loose by the Court of Appeals to rule "with no practical limits on its discretion", *Burlington Truck Lines v. United States lines,* 371 U.S. 156 (1962). Such deference to "expertise" opened the door to a purely arbitrary exercise of administrative power in which the Board has made no specific findings, the burden of proof was not carried by the General Counsel, and all *ipse dixit* pronouncements by the Board went unchallenged. The Court of Appeals considered that the Board's "expertise" was so great that the controversy was at an end because the Board *said* there was a violation of the Act and because the Board *said* that a bargaining order remedy was required.

(d) Petitioner's specific statements dealt with its financial condition, with the 1952 strike, with its new association with Lindsay, with the possibility that the Teamsters might make unreasonable demands and force another strike, and with Teamster corruption. Petitioner's statements with respect to strikes to enforce unreasonable demands and the possible consequences thereof constituted a reasoned discus-

sion of Petitioner's financial position, its inability to meet unreasonable demands and the further fact that the Teamsters (not Petitioner) would have the option of insisting on such demands and that the Teamsters (not Petitioner) would have the option of striking to enforce such demands, with a resultant possibility of adverse consequences to all concerned. The Board failed to make any finding to show *how* these statements could possibly lose the protection of either Section 8(c) of the Act or the First Amendment, either standing alone or when combined with other statements.

(e) Petitioner's statements, therefore, considered alone, or as part of any totality in which the whole could conceivably be greater than the sum of all its parts, were protected by the First Amendment and by Section 8(c) of the Act. *Thornhill, v. Alabama,* 310 U.S. 229 (1963); *Linn v. United Plant Guard Workers of America,* 383 U.S. 53 (1966); *NLRB v. Exchange Parts Co.,* 375 U.S. 405 (1964).

(f) The Board's finding that Petitioner's communications were violative of Section 8(a)(1) of the Act and that such communications, therefore, also constituted *evidence* of a violation of Section 8(a)(5) of the Act and were also grounds for setting aside the results of the election of December 9 were contrary to law. In that particular respect, the Board's order is without legal foundation and should be set aside.[33]

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[33]The Board's further use of Petitioner's words as *evidence* (1) of Petitioner's lack of good faith doubt of the Teamsters' majority; (2) its lack of good faith doubt regarding the appropriate unit; (3) its intent to gain time to dissipate the Teamsters majority; (4) that such *words* caused the Teamsters to lose employee support; and (5) that such *words* also made it *impossible* to conduct a second election, thereby justifying a bargaining order, will be dealt with under Point II.

II

The Board's Order Requiring Petitioner To Bargain With the Union Is Unsupported in Fact and in Law and Should Not Have Been Enforced by the Court Below.

The Board's Order requiring Petitioner to bargain with the Teamsters should not have been enforced by the Court below.[34]

Petitioner's communications were used by the Board as the basis for its finding of a Section 8(a)(1) violation. This finding was then, in turn, *also* used by the Board:

(1) To prove a *past* state of mine, namely, that Petitioner did not have a good faith doubt regarding (a) the Union's majority status on September 20 or (b) the appropriateness of the unit; and

(2) To prove another *past state* of mind, *namely*, that on September 20 and thereafter Petitioner desired to gain time in which to dissipate the Union's majority; and

(3) To prove that *concurrently* with their issuance, Petitioner's communications caused the Teamsters to lose support among the employees; and

(4) To prove that *in the future*, it would be *impossible* to hold a fair election, thus justifying the Board's reliance upon authorization cards and its issuance of a bargaining order.

While deference ordinarily must be accorded to the Board's function with respect to fact finding, the Court below should not have accepted these *conclusions* by the

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[34] Consideration of this point by the Court would not be necessary if the Court sustains Petitioner's position that its communications were protected by the First Amendment and by Section 8(c). In that event, the Board's finding of violation of Section 8(a)(1) would fall, together with its finding of violation of Section 8(a)(5) and its ruling with respect to the election. However, we will assume that the Court will nevertheless want to consider Point II.

Board without the support of reasoned, precise findings to support them. The discussion *supra* with respect to the Board's "expertise" is applicable here. However, with respect to the issue concerning the bargaining order, we make the following points:

(a) Secret ballot elections are the method adopted by Congress for resolving questions of representation. The Taft-Hartley Amendments not only rescinded the Board's authority to certify a labor organization by "any other suitable method," but *also* rescinded the Board's authority to resolve such questions "either in conjunction with a proceeding under Section 10 or otherwise", as formerly provided under the Wagner Act (49 Stat. 453). Congress was concerned with "assuring complete freedom of choice to employees who do *not* wish to be represented collectively" (1 Leg. Hist. 409) and to do away with practices whereby employees who had "voted *against* the unions in the Board's elections" were still being subjected to union control (1 Leg. Hist. 298). The emphasis throughout the debates was upon "elections" and upon "certification" of representatives and even Senate opponents of the amendments concurred in the right of employers to demand "certification. . . whenever an *unrecognized* union claims the right to represent employees (2 Leg. Hist. 1452, 1453). The Board's decision here is contrary to Congressional intent.

(b) The Board's decision attempts to give binding effect to authorization cards signed by employees. It ignores the overwhelming evidence shown by its own decisions in bargaining order cases that employees, not aware of the "technicalities" followed by the Board with respect to cards, are substantially misled by Union organizers during an organizing campaign. For example, employees have been told that the card will be "secret," but it is offered in evidence; they have been told that the card is needed for an election, but it is used instead to support a bargaining order. A wide range of social pressures is used to coerce the signing of cards, yet the Board considers the card valid. And at times,

overt threats have been known. When an employee believes an election is forthcoming, he may avoid the pressures, secure in the belief that he will be able to vote his conviction. "Laboratory conditions" are totally lacking in this atmosphere. An employer faced with a demand for a card check has no assurance. A mere check of cards against payroll not only does nothing to allay these suspicions, but brushes them aside as irrelevant and would require the counting even of forged cards. To conduct an investigation means to run a substantial risk of violation of Section 8(a)(1). Finally, the Board's own representation case records affirmatively show that even when a substantial majority of employees have signed cards, this does not represent the true wishes of employees. It is against this background that Petitioner rejected the demand for a mere check of the Teamsters cards against its payroll.

(c) The Board found that Petitioner did not have a "good faith doubt" on September 20 regarding the Teamsters' majority status or the appropriate unit. The Union twice entered into Stipulations that a question of representation had arisen. The Board approved the second such Stipulation on November 26 and an election was held December 9 to resolve the question. At least when an election has been held, the question of the employer's good faith doubt or lack thereof is irrelevant. The proper inquiry should have been whether facts had occurred, after the execution and approval of the second Stipulation, to justify relieving the Union from its second Stipulation to resolve the question of representation by the election. No such inquiry was made by the Board; but after concluding that Petitioner did not have a "good faith doubt" on September 20, it found that such issue was irrelevant. The Court of Appeals, nevertheless, enforced the Board's order with respect to "good faith doubt" and erroneously placed the burden of proof regarding this issue upon Petitioner.

(d) Assuming, *arguendo*, its relevance to the bargaining order issue, the only evidence supporting the Board's con-

clusion that Petitioner had no good faith doubt on September 20 is the Board's finding that Petitioner's communications violated Section 8(a)(1) of the Act. The Board ignored large parts of the record and failed to show by reasoned findings how the alleged Section 8(a)(1) violation *also* supported its conclusions with respect to Petitioner's lack of good faith doubt.

(e) Based upon its finding of a violation of Section 8(a)(1), the Board held that such finding also supported the conclusions (1) that Petitioner's communications caused the Union to lose support among the employees; and (2) that Petitioner sought to gain time in which to dissipate the Union's majority; and (3) that it was "impossible" to conduct a fair second election. Regardless of the Boards so-called "expertise" and its "discretion" in selecting remedies, that discretion must be based upon analysis of evidence and reasoned findings which support the conclusions reached. Both are absent here. The Court of Appeals erred in accepting the Board's *ipse dixit* with respect to the above three (3) conclusions.

(f) The Board's bargaining order is without support in law and should, in any event, be set aside.

ARGUMENT

I.

The Board's Order With Respect to Petitioner's Communications Is Not Supported by Specific, Reasoned Findings and Such Order Is Vague, Ambiguous and Non-Specific. Petitioner's Communications Are Within the Protection of the First Amendment and Section 8(c) of The Act, Whether Considered Separately or in "Totality". Such Communications Could Not Properly Have Been Found Unlawful Nor Used as Evidence of Another Unfair Labor Practice Nor as Grounds for Setting Aside the Election.

A. Introduction

As shown above, Petitioner was found guilty of no "conduct" in violation of the Act other than its communications to its employees, that is, its "words" alone constituted the basis of the Board's order.[35] The Board made no distinction between any of the statements set forth in its findings of fact, which constitute merely a recitation and characterization of certain statements and phrases carefully excised from their background and context. The Board did not even attempt to show that any individual statement or expression made by Petitioner was unlawful. The Board concluded that the entire "series of letters, pamphlets, leaflets, and speeches . . . taken together and considered as a whole . . . violated Section 8(a)(1) of the Act" (A. 183). The Board made one finding which covered Petitioner's com-

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[35] Manifestly, this Court's "totality" holding in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1949), would have no application here. There this Court enunciated its "totality of conduct" rule and held that the Board "could properly consider . . . what the Company said *in conjunction with what it did*" (314 U.S. at 478). Compare *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), where this Court placed no reliance upon the Employer's statements "dissociated from its conduct" (375 U.S. 410).

munications during the entire period from July through December 8. It made another finding that Section 8(a)(1) was violated by only those communications which were issued by Petitioner during the period from November 8 through December 8 (A. 183).[36]

Obviously, in the Board's view, no separate or individual statement made by Petitioner was unlawful. In any event, the Board made no such finding. The Court of Appeals agreed, impliedly at least, that when Petitioner's letters, leaflets and speeches were considered separately, they were lawful and protected.[37] The Board's conclusion, therefore, is that the whole is greater than its parts and that lawful individual statements may be added up to an unlawful totality meriting proscription. The Board's order, therefore, directed as it is toward the "totality" (A. 204), must necessarily prohibit the free expression of utterances which are, in themselves, lawful and protected.

The lengths to which the Board has gone in the instant case is shown by the action of the Trial Examiner in including, within the unlawful "totality", the distribution of Senator Robert Kennedy's book, "The Enemy Within" (A. 176), even though this book is available to the public generally. The Board adopted the Trial Examiner's finding and, only after adverse newspaper publicity, did the Board, some six (6) weeks later, finally remove the distribution of that book from consideration as part of the "totality" of unlawful conduct (A. 204).[38]

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[36]The Court of Appeals erroneously held that the Board's findings were based only upon the communications issued during the period from November 8 through December 8. It sustained the Board's order upon that erroneous assumption (A. 207, Footnote 7).

[37]The Court of Appeals stated that Petitioner had contended "that these statements considered separately are lawful and this being so, the combination of them would not result in illegal conduct. *The problem is not so simple as that.*" (A. 209)

[38]See editorials in the Wall Street Journal, May 25, 1967 and July 6, 1967.

The Board's concluded findings fail to indicate in any way the evidence upon which they are allegedly based, other than the "totality" doctrine. The Board did *not* find that Petitioner had made any threat of reprisal to its employees. Still, its order forbids Petitioner from:

> "*Threatening* the employees with *possible* closing of the plant . . . or with any other economic reprisals. . . ." (A. 199)

Regardless of the merits of the "totality" doctrine, and even if the doctrine may be accorded limited acceptance in some circumstances, the Board's order must still be supported by evidence and by reasoned and specific findings. This is especially so when constitutionally protected liberties are involved. And, in such cases, the Board's order must be precise and specific, not broad, vague and ambiguous. We will now turn to the constitutional and statutory standards which must be applied when an order curtails free expression.

B. The Board's Order Does Not Comply With Constitutional Standards With Respect to an Order Restricting Freedom of Speech.

The "totality" doctrine, as applied here by the Board, amounts to almost a complete prohibition of speech by Petitioner. The Board's order is supported by no specific findings regarding those statements within the "totality" which resulted in its finding of illegality. Assuredly, the Board, by the mere "label" of "totality", cannot be allowed to restrain a most fundamental and precious liberty. A clear example of arbitrary exercise of administrative power is presented. Surely the constitutional right of free expression would have little value if it could be curtailed by the mere labeling of speech as unlawful as a "totality" without adequate findings to support the ultimate finding of illegality. This court on numerous occasions has protected speech which was restrained by characterizing it with a label though sufficient to sustain proscription. In *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), this Court held that constitu-

tional rights could not be foreclosed "by mere labels" (371 U.S. at 429) and that characterizing the activities of the petitioner there as "solicitation" could not serve to justify a restraint.[39]

But the vice of the "totality" doctrine, as applied by the Board, is not only the fact that on this record it is a mere label. The Board's order, unsupported as it is by precise findings, seeks to prohibit a wide range of speech and leaves Petitioner to act at its peril in exercising a fundamental liberty. The Board ordered Petitioner to cease and desist from "*threatening* the employees with the possible closing of the plant . . . or with any other economic reprisals, if they were to *select* the" Teamsters as their bargaining agent (A. 199). This order is completely devoid of factual findings to support it other than the "totality" label and in no way defines the line between speech which will hereafter be permitted and that which is proscribed.

In *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), this Court stated:

> "If the line drawn by the decree *between the permitted and prohibited activities* . . . is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness *are strict in the area of free expression.*" (371 U.S. at 432)

This Court held that the decree entered there might be invalid if it prohibited the exercise of First Amendment rights whether or not the Petitioner there had engaged in priveleged conduct. This Court emphasized the danger of

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[39] See also *Herndon v. Lowry*, 301 U.S. 242 (1937), insurrection; *Bridges v. California*, 314 U.S. 252 (1941), contempt; *DeJonge v. Oregon*, 299 U.S. 353 (1937), advocacy of unlawful acts; *Edwards v. South Carolina*, 372 U.S. 229 (1963), breach of the peace; *Roth v. United States*, 354 U.S. 471 (1957), obscenity; and *New Times Co. v. Sullivan*, 376 U.S. 254 (1964), libel.

tolerating a statute susceptible to improper application to First Amendment freedoms:

> "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The *threat of sanctions may deter their exercise* almost as potently as the actual application of sanctions . . . Because First Amendment freedoms need breathing space to survive, *government may regulate in the area only with narrow specificity.*" (371 U.S. at 433)
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> ". . . Broad prophylactic rules in the area of free expression are suspect. . . . *Precision of regulation must be the touchstone* in an area so closely touching our most precious freedoms." (371 U.S. at 438)

Here, the findings with respect to "totality" are broad, ambiguous, non-specific, vague and unprecise. No line was drawn by the Board between activites which were permitted and those which were being proscribed.

In *Wood v. Georgia*, 370 U.S. 375 (1962), this Court emphasized that the record was barren of findings which showed "*how* the publications interfered with the grand jury's investigation, or with the administration of justice." (370 U.S. at 387). The same is true here. There are no findings to show that Petitioner's statements constituted threats of reprisal by Petitioner nor are there any findings to show *how* the "totality" of Petitioner's statements constituted violations of Section 8(a)(1) of the Act and particularly, *how* such statements supported the Board's order to Petitioner to cease and desist from:

> "Threatening the employees with the possible closing of the plant . . . if they were *to select* the" (Teamsters) (A. 199).

We now turn to the opinion of the Court below wherein that Court *failed* to apply *constitutional standards* and *enforced* the Board's order upon the ground that it was supported by *substantial evidence.*

C. The Statutory Standard of Substantial Evidence To Support a Board Order Cannot Be Lawfully Applied To Restrict the Exercise of Constitutional Freedoms.

Petitioner's "letters, pamphlets (and) leaflets" (A. 183) were in writing, and the Board's findings with respect to speeches were based entirely upon the testimony of President Sinclair and Respondent's Exhibit No. 20 (A. 182).[40] Under such circumstances, the standard of substantiality of the evidence as to the "words" used is not involved. The Court below stated:

> "The basic question is whether on the record as a whole these findings are supported by substantial evidence" (A. 205).

Although the Board's findings involved only "interpretation" of Petitioner's statements, it also involved an order restraining speech. The Court of Appeals failed to make the required independent review of the entire record to determine whether the Board's order constituted an invasion of constitutional freedoms. In this the Court of Appeals erred.

To the extent that the "substantial evidence" standard of Section 10(e) of the Act establishes a presumption of the validity of the Board's findings and conclusions, it cannot stand, at least insofar as the Board's order may trench upon constitutionally guaranteed freedoms. On many occasions this Court has held that presumptions of validity regarding the exercise of governmental power cannot constitute a means to deter speech which the Constitution makes free. In *Wood v. Georgia*, 370 U.S. 375 (1962), this Court held, with respect to freedom of speech:

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[40] President Sinclair was found to be a "forthright and candid witness" (A. 171), and his testimony was not discredited in any respect by the Trial Examiner. The Trial Examiner, did, however, discredit the testimony of Messrs. Brunault (A. 171) and Bougie (A. 174), who were members of the Teamsters Organizing Committee (A. 110-112, 117).

> ". . . When it is claimed that such liberties have been abridged, we cannot allow a presumption of validity of the exercise of state power to interfere with our close examination of the substantive claim." (370 U.S. at 386)

Similarly, in *Speiser v. Randall*, 357 U.S. 513 (1958), the Court pointed out the danger that legitimate utterances would be penalized by the generality of standards applied. This Court held that deterrence of speech, which the Constitution makes free cannot be accomplished:

> ". . . indirectly by the creation of a statutory presumption any more than . . . by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions" (357 U.S. at 526).

This Court has long held that in any cases involving the definition of the ultimate limits of governmental power to restrict freedom of speech that this Court would:

> "examine 'the evidence to see whether it furnishes a rational basis for the characterizations put on it'. . ." (370 U.S. at 386)

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court stated:

> "We must make an independent examination of the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expresson." (376 U.S. at 285)[41]

In short, when free speech is involved, a characterization must be shown to be supported by adequate, precise findings; and the standard of "substantial evidence" cannot foreclose a close examination of the evidence to make certain, in both circumstances, that the judgment does not abridge constitutional freedoms. Many of the Courts of Appeal have correctly applied these principles.

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[41] See also, *Cox v. Louisiana*, 379 U.S. 536, 544 (1964), Footnote 8, and *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

In *NLRB v. Golub Corporation*, 388 F.2d 921 (CA-1, 1967), the Court of Appeals overturned the findings of the Board with respect to the Employer's communications. As here, the Board's findings with respect to Section 8(a)(1) of the Act, consisted solely of writings and a speech addressed to the employees as a group . . . (and) sharply raises the issue how far the Board may go in curbing speech consistently with §8 (c) and the First Amendment" (388 F2d at 924). The Court stated:

> "Whatever vitality decisions . . . giving weight to an agency's construction of statutory language may have generally . . . such considerations have little weight when the statute being enforced approaches the limits of constitutional power. In such a case we encounter the overriding principle of construction requiring that statutes be read so as to avoid serious constitutional doubt, for which it here sufficies to cite *Int'. Ass'n of Machinists v. Streit*, 367 U.S. 740, 749-50 (1961)." (388 F.2d at 928)[42]

The Court of Appeals for the Sixth Circuit in *NLRB v. Hobart Bros. Co.*, 372 F.2d 203 (CA-6, 1967), refused to accept the Board's construction of a writing and stated:

> ". . . Our holding simply is that the Board's construction of a writing is not sacrosanct and that we have the right, if not the duty, to correct an impermissible and unfounded inference drawn therefrom" (372 F.2d at 206).[43]

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[42] Judge Hays dissented contending that such questions should be left to Board "expertise" (388 F.2d at 930).

[43] And see also *NLRB v. Rockwell Manufacturing Company*, 271 F.2d 109, 117 (CA-3, 1959), "An analysis of the verbal exchanges referred to . . . negates the Board's determination"; *NLRB v. Wilson Lumber Co.*, 355 F.2d 426, 432 (CA-8, 1966), the Employer's statements "were improperly interpreted by . . . The Board as a basis for authorizing an unfavorable inference"; *NLRB v. TRW, Semiconductors, Inc.*, 385 F.2d 753, 760 (CA-9, 1967), "Read as a whole, the statement cannot, we think, be fairly construed as a threat by the employer"; *NLRB v. Laars Engineers, Inc.*, 332 F.2d 664, 667 (CA-9, 1964), "The letter as a whole does not justify the narrow and strained

We next consider whether the Board's "expertise" constitutes an adequate ground for its order herein.

D. Regardless of Its Applicability in Other Contexts, the Board's So-Called "Expertise" Cannot Serve as the Basis for Restricting Constitutional Freedoms, Particularly When the Board Fails To Set Forth Precise, Relevant and Reasoned Findings To Support Its Order.

The instant case is a startling example of the "monster" of expertise" turned loose to rule "with no practical limits on its discretion". *Burlington Truck Lines v. United States Lines*, 371 U.S. 156, at 167 (1962).[44] In *Burlington* this Court set aside the agency decision because there were "no findings and no analysis . . . to justify the choice made" (371 U.S. at 167). This Court further pointed out that Courts could not substitute either *their own* discretion or that of appellate counsel for that of the agency, and that an agency's order was to be "upheld, if at all, on the same basis articulated in the order by the agency itself" (371 U.S. at 169).[45]

These principles were recently reaffirmed in *The Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, ___

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construction given to it by the Board"; and *NLRB v. Colvert Dairy Products Co.*, 317 F.2d 44, 46, 47 (CA-10, 1963), "The right of agement to freely express its views in opposition to unionization cannot be burdened by indirection and thus destroyed through technical rationalization."

[44]This Court cited the provisions of Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 557(c), then § 1007(b)), which provides in relevant part: "The record shall show the ruling on each finding, conclusion or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—(A) findings and conclusions *and the reasons or basis therefor*, on all the material issues of fact, law or discretion presented in the record . . ."

[45]"The Courts may not accept appellate counsel's post hoc rationalizations for agency action." (371 U.S. at 168)

U.S.___, 21 L.Ed. 2d 219 (1968). There the District Court set aside an order of the Interstate Commerce Commission with respect to the division of joint rates because "precise and relevant findings", supported by substantial evidence, were lacking. This Court stated that to affirm the Commission's finding, "would, in effect, be saying that the expertise of the Commission is so great that when it *says* . . . (something) the controversy is at an end" (21 L.Ed. 2d at 224). This Court further stated:

> "The requirement for administrative decisions based on substantial evidence *and reasoned findings—which alone make judicial review possible*—would become lost in the *haze of so-called expertise* . . . That is impermissible under the Administrative Procedure Act." (21 L. Ed. 2d at 224)[46]

The vice in the instant case is readily apparent. The Board referred to and attempted to characterize carefully chosen excerpts from Petitioner's admitted communications, which were taken out of context (A. 172-183). However, no specific, reasoned findings were made by the Board to support its Order requiring Petitioner to cease and desist from threatening its employees.

The Board's Order proscribes *threats* by Petitioner of "possible closing of the plant" (A. 199). The Board's Concluded Findings, however, fail to support that order. The Board found that the "totality" of Petitioner's expressions from *July through December 8:*

> ". . . reasonably *tended* to convey to the employees the *belief* or *impression* that *selection of the Union* . . . could lead Respondent to close its plant . . ." (A. 183)[47]

[46]Compare *Wood v. Georgia*, 370 U.S. 375 (1962), where this Court stated, in part: "The court did not indicate in any manner *how* the publications interfered with the grand jury's investigation, or with the administration of justice" (370 U.S. at 387, emphasis in original).

[47]The Board apparently considers that a "tendency" to convey a thought is the legal equivalent of having conveyed it. In other words, a "tendency" to convey a threat is equivalent to having made the threat.

This same finding is made "based only on the 'totality'" of the communications which occurred between *November 8 and December 9* (A. 183). In neither case did the Board specify, other than its reference to "totality", the specific expressions which *tended* to engender this belief or impression. We are left, therefore, with findings which are meaningless and virtually unreviewable. We have searched the excerpts quoted by the Board (A. 172-182) in vain for any statement by Petitioner that "selection of the Union . . . could lead Respondent to close its plant". There is no such statement! The Concluded Finding to that effect must, therefore, be based solely upon Board "expertise" in considering the "totality". We have not yet been shown the evidence, if any there be, that allegedly supports such Concluded Finding.

Obviously, recognizing the weakness of its initial concluded finding in this regard, which related only to the "possibility" of a plant closure if the Union was selected, the Board attempted to buttress that Concluded Finding. It did so by another Concluded Finding that Petitioner's communications, even after November 8:

> ". . . reasonably *tended* to convey to employees (the message that if they *selected* this Union . . . a strike would be inevitable because *the Union* would *make excessive demands* which (Petitioner) would refuse to meet (and) that *a strike could* lead to the closing of the plant. . ." (A. 184)[48]

The above finding is in direct conflict with the initial finding. No longer will the plant be closed because of a "selection of the Union." However, the plant might be closed if *the Union* (not Petitioner) makes excessive demands which Petitioner rejects *and* if *the Union* (not Petitioner) calls a strike to enforce such unreasonable demands.

In its *second* Concluded Finding, therefore, the Board *absolved Petitioner of any threat* to close its plant *because*

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[48]The Board nowhere indicates the specific evidence that supports either of the Concluded Findings.

of "selection of the Union." However, it nevertheless ordered Petitioner to cease and desist from

> "Threatening the employees with the possible closing of the plant . . . *if they* were *to select* the" (Teamsters) (A. 199).

Surely, here, "expertise" has truly run amuck!

The Court of Appeals, however, floundered in the mire of "totality", "expertise" and "substantial evidence." It erred in attempting to substitute its own discretion for that of the Board. Although it upheld the Board's order, it did not do so "on the same basis articulated *in the order* by the agency itself" (371 U.S. at 169). The Court of Appeals cited only some of the communications recited by the Board. It stated that the Board's order was "based on findings that the company interfered with the organizational rights of its employees by threatening that unionization *would* cause them to lose their jobs" (A. 205). *The Board made no such finding!*[49] The Court incorrectly stated that the Board's findings were based only on Petitioner's communications between November 8 and December 9 (A. 207).

Unable to determine the basis for the Board's order, the Court of Appeals made *four (4) findings* of its own in which it attempted to set forth grounds to justify the Board's order (A. 210). The first two (2) such findings by the Court related to Petitioner's statements that it was in financial difficulty and that the Teamsters were "strike happy." There is no indication that the Board relied upon either of these grounds and, in any event, they do not support the Board's order.

The Court's third (3rd) and fourth (4th) findings, that another strike could, and in President Sinclair's opinion,[50]

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[49] The Court below made no reference to the Board's *second* Concluded Finding which absolved Petitioner of having made such a threat.

[50] An *opinion* that the Teamsters *would* cause a long strike as in 1952 to enforce unreasonable demands and would bankrupt Petitioner cannot be characterized as a threat of reprisal *by Petitioner.*

would close the plant and that it would be difficult for weavers to obtain other jobs, relate to the Board's *second* Concluded Finding under which Petitioner was absolved of the threat set forth in the Board's order. The Court's finding is not supported by the evidence or even by the Board's second Concluded Finding, which relates to "excessive demands" (A. 184) and a strike to enforce such excessive demands. Even the Board did not charge that Petitioner contended that such a strike "*would*" close the plant (A. 183, 184).

After substituting its discretion for that of the Board and after making its own inaccurate findings which, in any event, do not support the Board's order, the Court of Appeals deferred to the Board's "expertise"[51] and to the standard of "substantial evidence" and enforced the Board's order not only with respect to the alleged violation of Section 8(a)(1) of the Act, but also with respect to the objections to the election (A. 210, 211).

The Court below also held that Petitioner had "made threats of economic consequences to its business in case of unionization" and that, therefore, Petitioner had the "burden of proving justification" which is had not met (A. 211). We submit that this holding does not comply with constitutional requirements and it was *not a basis for the order which was articulated by the Board.*

We refer first to the rule, cited above, that the evidence must be constitutionally sufficient to support the order. Second, the burden of proof was upon the Board's General Counsel to establish a violation of the Act. Third, this Court has frequently held that such a burden cannot, consistently with constitutional guarantees, be placed upon a speaker. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court stated:

[51] Compare *NLRB v. Hobart Bros. Co.*, 372 F.2d 203, 206 (CA-6, 1967), where the Court stated: "Further, the construction of a writing is *not* the special expertis of the Board. Rather, it is for the Courts which have more experience and competence in construing and interpreting written instruments . . ."

> "Authoritative interpretation of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, *or administrative officials* —and *especially one that puts the burden of proving truth on the speaker*. . . . The Constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and belief which are offered'." (376 U.S. at 271).

This Court further stated:

> "That erroneous statement is inevitable in free debate, *and that it must be protected* if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . " (376 U.S. at 271, 272).

With respect to the burden of proof, in *Speiser v. Randall*, 357 U.S. 513 (1958), this Court discussed at length the dangers inherent to speech by placing the burden of proof upon the speaker:

> "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct *necessarily* must steer far wider of the unlawful zone. . . It can only result in a deterrence of speech which the Constitution makes free." (357 U.S. at 526).

We, therefore, submit that the Board's order here should not have been enforced on the basis of the Board's expertise nor should it have been enforced by the Court below upon grounds determined by it but not articulated in the Board's order. We now turn to a consideration of statements made in Petitioner's communications.

E. Petitioner's Statements Were Factual and Relevant to the Issues. The Board Made No Findings To Show How Such Statements Were Converted into an Alleged Threat and Thereby Lost Their Protection Under Section 8(c) of the Act And the First Amendment, Especially in View of Petitioner's Statements of Good Faith.

We herein discuss the various subject matters included in Petitioner's communications, to show that none of such statements support the Board's Order.

(1) Statements With Respect to Petitioner's Financial Condition Were Privileged.

A large portion of Petitioner's communications were devoted to a discussion of its financial condition dating back to 1952. This included statements that Petitioner almost went bankrupt in 1952 as a result of that strike; that it never recovered from the strike; that it had been and still was on "thin ice" financially; and that as a result, President Sinclair had been compelled to sell the family-owned business.[52] The Board never explained how these truthful statements contributed to an allegedly unlawful "totality" of speech.

(2) Statements With Regard to the 1952 Strike

On a number of occasions President Sinclair referred to the twelve or thirteen week strike which occurred in 1952 and to the termination of that strike without the execution of a new collective bargaining agreement. The Board did not even attempt to show that any of these statements were not factual. Notwithstanding this Court's ruling in

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[52]One of the Board's specific findings was that President Sinclair admitted having "made a *small* profit in 1965" (A. 184). Petitioner being on a calendar year basis (A. 69) could not have known this *until 1966.* What effect this finding had with respect to the "totality" was never explained by the Board.

Thornhill v. Alabama, 310 U.S. 88 (1940), that the dissemination of information concerning the facts of a labor dispute could not lawfully be enjoined, the Board included findings concerning the above statements as part of the unlawful "totality" and as a basis for its order herein.

(3) Statements Regarding the New Association With Lindsay

Petitioner's statements with respect to Lindsay included the *facts* that Lindsay had other plants; that, because of this fact, Lindsay would not be affected by a strike in the same way as Petitioner was in 1952; that Lindsay would not be concerned with a strike threat or a strike; and that Lindsay insisted that Petitioner must stand on its own feet and must earn its own way. The Board did not even attempt to show that these statements were not factual. Such statements certainly were relevant to the question "as to whether the Union will be able to represent (the employees) effectively in light of existing economic conditions" (A. 189). There is no explanation in the record how such statements, in view of the First Amendment and Section 8(c), could be considered unlawful either in themselves or to contribute to an unlawful "totality."

(4) Comments Regarding Unreasonable Demands

Petitioner's communications frequently referred to the Teamsters' "big" promises and to unreasonable demands that it expected would be made upon it. Petitioner's characterization of the Teamsters' promises, set forth in two (2) letters to employees (G.C. Ex. 3; A. 6, 108; G.C. Ex. 6; A. 8, 110) could not, by any stretch of the imagination, constitute a threat of force or reprisal by petitioner or contribute to an unlawful "totality."[53]

[53] Another specific finding was that "the charging Union in this case, Local No. 404, had never made any demands *at all* upon . . ." Petitioner (A. 184). This finding ignores the Union's demands for recognition and bargaining. If it be construed to relate only to formal contract demands, only the most strained interpretation and ig-

(5) Comments Regarding Teamster Corruption

The propensity of the Board to curtail free expression and to shield employees from information the Board believes they should not have is clearly shown with respect to comments concerning Teamster misconduct. Again, the Board did not even attempt to show that any statement made by Petitioner was not factual. Petitioner's statements were based upon Court decisions, newspaper articles, proceedings of a Senate investigating committee, magazine articles by Senator McClellan and Senator Kennedy's book "The Enemy Within".[54] Although this information is available to the public generally and could not possibly provide the basis for a threat of reprisal by Petitioner, the Board relied extensively upon comments concerning Teamster corruption (A. 173, 176, 177, 178, 180). It is difficult to conceive of a more outright attempt by administrative fiat to prohibit the exercise of constitutionally protected rights of freedom of expression.[55]

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norance of realities (not expertise) could support it. It would take incredible naivete to believe that the 62½¢ package allegedly won by the Teamsters from other employers would not be considered a bargaining goal with Petitioner (G.C. Ex. 3; A. 6, 108).

[54]For example, see *Hoffa v. Gray*, 323 F.2d 178 (CA-6, cert. den., 357 U.S. 907 (1963); *Hoffa v. United States*, 385 U.S. 293 (1966); *Hoffa v. United States*, 387 U.S. 231 (1967); *Hoffa v. United States*, 382 F.2d 856 (CA-6), cert. den., 390 U.S. 924 (1968); *Hoffa v. United States*, 376 F.2d 1020 (CA-6), cert. den., 389 U.S. 859 (1967); and Hearings Before the Select Committee on Improper Activities in the Labor or Management Field, Eighty-Fifth Congress, First Session (1957). See also *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Hoffa*, 242 F. Supp. 246 (U.S.D.C., D.C., 1965), an action to enjoin expenditure of Union funds in defense of criminal proceedings against General President of Union; and *Highway Truckdrivers and Helpers Local 107, I.B.T. v. Cohen*, 284 F.2d 162 (CA-3, 1960), an action to enjoin use of funds of Local by officers to defend civil and criminal proceedings (cert. den., 365 U.S. 833, 1961).

[55]A third specific finding was that Petitioner "has no basis for concluding that this local or its leaders were *in any way connected* with racketeering or hoodlums or picket line violence" (A. 184). Of

(6) Petitioner's References To Strikes To Enforce Unreasonable Demands and the Possible Consequences Thereof

Another category of statements which were included in the "totality" were those dealing with strikes, strikes to enforce unreasonable demands and the possible consequences of such a strike. The Board's findings in this regard require a more detailed analysis than was given by the Board or by the Court below.

There is no record support for the Board's *first* Concluded Finding that *selection* of the Union *could* lead Petitioner to close its plant (A. 183). As shown above, the Board immediately abandoned that finding and substituted its *second* Concluded Finding (A. 184).

All of Petitioner's statements dealt with the impact of *negotiations* with a Union that made *excessive demands*, beyond the financial ability of the companies involved to pay and to a strike then called by the Union *to enforce such demands.*[56]

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course, constitutional protection is not limited only to statements with respect to which the speaker can prove an objective basis. However, the Board's finding was reached only by incredible straining and twisting of evidentiary facts. First, there is *no evidence* that President Sinclair charged Local 404 with corruption; and second, he testified that the Local was "connected with the International" (A. 48, 52, 64). The Regional Director's findings on the *same evidence* should be compared: "The Employer . . . made reference to . . . alleged corruption and misconduct in the . . . (Union's) *International leadership*" (Report on Objections, G.C. Ex. 1(d); A. 4).

[56]Emphasis was placed by the Board and by the Court below upon the phrase "the union's only weapon is a strike" (A. 172, 181, 210). The record shows the following context: that strikes "could be caused by the Company's inability to accede to Union demands (A. 43); and if "a Company cannot economically meet the demands of the Union then the only answer that the Union has is to strike or to accede to a settlement" (A. 51).

In his July talk, President Sinclair stated that he did not want to be in the position where a Union would strike to enforce unreasonable demands which Petitioner could not meet and which would put the Company back in the same situation as in 1952 (A. 36, 90). He further stated that, "this could lead to the closing of the plant" (A. 43), "there was a possibility *through a strike* that the plant would close" (A. 60), but that he "did not intend to close" (A. 43, 172) because "this was my life too" (A. 58).[57]

A reference to plant closing is included in only *one (1)* of Petitioner's written communications, namely, the November 2 letter (G.C. Ex. 14; A. 11, 123). It was pointed out that petitioner might already have been out of business if Lindsay had not purchased it, and that "real job security" depended upon operating the plant at a profit "because no Company can remain in business unless it can make money" (A. 125). Petitioner further stated in this connection:

> "If the Teamsters win the election, the Company has an obligation to bargain . . . in good faith . . . *We will meet this obligation,* but we will not agree to any *increase in costs* which *can* put us out of business.
>
> ". . . We are still on 'thin ice', and it just doesn't *make sense* for us to *meet unreasonable* Union demand which will *result in further losses* and *eventually* the *necessity* of closing the plant" (A. 126).

Petitioner discussed strikes and its connection with Lindsay in its November 30 letter (G. C. Ex. 17, A. 13, 130). It also stated:

> "This Company is *not anti-union.* We would *not close* the plant *in retaliation* for employees *voting for a Union.* But this Company must show a profit,

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[57]These statements were made in the background of the fact that Lindsay had incorporated the Mississippi plant into its own operations, but continued Petitioner's operations as a separate division, with instructions to make a profit. The "or else" in Lindsay's decision not to subsidize Petitioner was plainly apparent.

regardless of whether or not you select the Teamsters Union as your spokesman." (A. 132)

In his December 8 talk, President Sinclair emphasized that the decision was up to the employees alone; that no one could threaten or coerce them (A. 162); that there were a lot more important things than who would represent them (A. 162); that he would do his "level best *to keep* Sinclair Co. *in business and growing;* and "I'm not concerned with beating a union—I'm concerned with our future" (A. 165).

These communications can be summarized as follows: If selected, the Teamsters may make unreasonable demands; the Company is financially unable to grant excessive or unreasonable demands; Lindsay has demanded that we make a profit; if the Union wins the election, we will negotiate in good faith;[58] there will be no reprisals by the Company if the Teamsters are selected; however, if the Teamsters choose the alternative of a strike to enforce the unreasonable demands, as it did in 1952, instead of acceding to a settlement, there is a *possibility* that such a strike could lead to the closing of the plant.[59]

Nothing in this evidence can be characterized as a threat by Petitioner to close its plant if the employees "selected" the Union, as the Board itself recognized when it made its second Concluded Finding (A. 184).

(7) Cartoons Used by Petitioner To Dramatize Its Arguments Were Protected by Section 8(c) and Were Also Constitutionally Protected.

It is impossible to determine what weight, if any, was given by the Board to Petitioner's cartoons in the "totality

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[58] In fulfilling its duty to bargain, Petitioner would have been required to furnish information substantiating its plea of inability to pay. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956).

[59] The AWWPA, which had insisted on industry-wide contracts and which had struck to enforce unreasonable demands in 1952, was now the "Wire Weavers Trade Division" of the Teamsters (A. 82, 108, 206).

of . . . (Petitioner's) conduct in violation of Section 8(a)(1) of the Act" (A. 204). Obviously, they were not found unlawful in themselves. It remains unexplained on this record in what way they attained an impact of a threat of reprisal by Petitioner, if this is what the Board contends.

It will suffice here to say that the cartoon, "Who Would Buy The Groceries . . ." (A. 143) is the same, identical cartoon that was used in *American Greetings Corporation*, 146 NLRB 1440 (1964), except for a change in names. There the Board found no violation, stating that the "statements and cartoons . . . concerned the qualifications of the . . . (Union) to represent the interests of the employees and could readily be evaluated by employees" (146 NLRB at 1444).

The "graveyard" cartoon (A. 137), the "closed shop worker" and "closedest closed shop in town" cartoons (A. 145) had also been before the Board in *I. F. Manufacturing Co.*, Case No. 8-RC-3374 (January 1, 1959, not reported). The Regional Director's ruling overruling objections as follows, *was affirmed by the Board:*

> "These leaflets contain nothing more than propaganda statements *and cartoons* such as are often resorted to in election campaigns, and which the Board does not undertake to police or censor. They are therefore *privileged pursuant to the provisions of Section 8(c)* of the National Labor Relations Act."

Notwithstanding these prior rulings, the Board included the publication of the cartoons in the "totality" of conduct which it found to be violative of Section 8(a)(1), without reversing such prior rulings.

The Board's "totality" ruling was based upon Section 8 (a)(1) of the Act, and it completely ignored the strictures of the First Amendment and of Section 8(c) of the Act. Its ruling was based upon improper standards and should be denied enforcement for that reason alone. In addition, Petitioner's utterances were improperly characterized by the Board, and there is no evidence or findings to support the

Board's order that Petitioner threatened its employees with reprisals if they "selected" the Teamsters as their bargaining agent.[60]

It is axiomatic that words alone cannot constitute a Section 8(a)(1) violation, if they are entitled to the protection of the First Amendment and Section 8(c) of the Act.

We now discuss the Board's ruling, in which it dismissed the representation petition.

F. The Board's Ruling With Respect to the Objections to the Election Was in Violation of Section 8(c) and the First Amendment.

With respect to the Objections to the election, the Board ruled that its findings that Petitioner violated Section 8(a)(1) also constituted grounds for a finding that Petitioner interfered with a "free and untrammeled choice in the election" (A. 188). Recognizing the weakness of its finding of a violation of Section 8(a)(1), the Board also assumed, *arguendo*, that Petitioner's statements were not violative of that Section. It nevertheless set the election aside because of its alternative finding that Petitioner's communications "generated an atmosphere of fear of economic loss" (A. 189), which foreclosed the possibility of employees exer-

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[60] An experienced Regional Director had the same evidence before him with respect to the period from November 8 through December 8 (Report on Objections, G.C. Ex. 1(d); A. 4). He found the election to have been conducted in accordance with the Board's "laboratory conditions" rule and recommended that the Objections be overruled and the election results certified:

> "There is no evidence, however, that these statements were other than factual in character and such matters certainly were relevant to the election issues before the employees.. The entire 'literature' could, as already pointed out with respect to the Employer's speech delivered the day before the election, clearly be evaluated by the employees as campaign propaganda." (G.C. Ex. 1(d); A. 4)

In this regard, we will have further comments, *infra*, with respect to the Board's finding that it would have been "*impossible*" to conduct a second election.

cising judgment to determine "whether the Union will be able to represent them effectively in light of existing economic conditions" (A. 189). Having made this finding, the Board dismissed the election petition and vacated all proceedings held thereunder (A. 203).[61]

In *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782 (1962), the Board reaffirmed its decision in *General Shoe Corporation*, 77 NLRB 124 (1948), holding that Section 8(c) of the Act had no application to representation cases and overruled all of its decisions to the contrary. The Board stated:

> "The strictures of the First Amendment, to be sure, must be considered in all cases." (137 NLRB at 1787, Footnote 11)

The Board, however, honors the above statement primarily in its breach, as shown by the facts in the instant case. The Board improperly characterized Petitioner's statements as generating "an atmosphere of economic loss" and ignored constitutional strictures.

We submit that Petitioner's statements were protected not only by the First Amendment, but also, by Section 8 (c) of the Act, and could not constitute a basis for setting aside the election. The results of that election should now be certified by the Board.

We turn now to the legislative history of Section 8(c) of the Act.

G. The Legislative History of Section 8(c) of The Act Shows That Congress Intended to Prevent the Board From Restraining Employer Speech in the Circumstances Involved in this Case.

We will not burden this brief with a lengthy dissertation with respect to the legislative history of Section 8(c). Bills were introduced in 1947 both in the House and in the Sen-

[61] Compare the ruling of the Regional Director on the same facts (G.C. Ex. 1(d) A. 4).

ate and both included provisions intended to prevent the Board from curtailing employers in their exercise of rights of free expression. A Conference Committee eventually considered the bills passed by the respective branches of Congress.

In reporting back to the Senate, Senator Taft offered a detailed summary of the differences between the Conference agreement and the Senate bill (2 Leg. Hist. 1535).[62] It is therein stated that Section 8(c), as finally agreed, "conforms substantially" with the House Bill and that the phrase "under all the circumstances" which was included in the Senate bill (2 Leg. Hist. 1540, 1541) was deleted because it:

> ". . . Was ambiguous and might be susceptible of being construed as approving certain Board decisions, which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices." (2 Leg. Hist. 1541)

The Senate conferees had acceded, it was explained, since this "certainly was contrary to the intent of the Senate" (2 Leg. Hist. 1541). With respect to the use of speech as evidence, it was explained that utterances were not to be used by the Board, if they contained no threat or promise of benefit "as either an unfair practice alone or as making some other act which could not otherwise be an unfair labor practice" (2 Leg. Hist. 1541).

This interpretation was supplemented by another analysis which indicated that speech "inocuous in itself" was *not* to be found unlawful by the Board because the "employer has at some time committed an unfair labor practice" (2 Leg. Hist. 1624). And in a further explanation after President Truman's veto, Senator Taft stated:

> "The bill simply provides that views, argument or opinion *shall not be evidence* of an unfair labor

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[62]The Legislative History of The Labor Management Relations Act, 1947, published by the National Labor Relations Board, 1948, in two volumes will be herein referred to as "___ Leg. Hist. ___".

practice unless they contain *in themselves* a threat of coercion or a promise of benefit". (2 Leg. Hist. 1627).

The Board itself interpreted Section 8(c) as requiring the statement *in itself* to include a prohibited threat or promise in its two subsequent annual reports:

> "Employer utterances on employees' organizational activities which *contain* 'threat of reprisal or force or promise of benefit' are unlawful . . ." (Thirteenth Annual Report of the National Labor Relations Board, 1948, pp. 49, 50).
>
> "On the other hand, expressions of opinion which *contain no* such threats or promises have been held protected by section 8(c), even though they may be strongly anti-union" (Fourteenth Annual Report of the National Labor Relations Board, 1949, p. 54).

We submit that Congress intended to protect expressions, such as those here involved, which in themselves contain no threat by Petitioner of force or reprisal or promise of benefit. We now consider this Court's decisions with respect to Section 8(c) of the Act.

H. This Court Has Established a Wide Scope for Free Expression Under Section 8(c) of the Act.

This Court has had limited occasion in the past to consider Section 8(c) of the Act. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), involved the bestowal by the Employer of economic benefits prior to a representation election. In a letter to employees before the election, the employer stated, "The Union can't put any of those . . . (benefits) in your envelope—*only the Company can do that*". This Court quoted the provisons of Section 8(c) of the Act in Footnote 3 and stated:

> "We place no reliance, however, on these or other words of the respondent dissociated from its conduct" (375 U.S. at 410).

More recently, however, in *Linn v. United Plant Guard Workers of America,* 383 U.S. 53 (1966), this Court again had occasion to comment upon Section 8(c) of the Act. There the plaintiff sought damages for alleged defamation by the Union occurring during the course of a union organizational campaign. This Court stated:

> "We acknowledge that the enactment of Section 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'" (383 U.S. at 62)

In the same case, supra, this Court also stated:

> "Labor disputes are ordinarily heated affairs . . . Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often *speak bluntly* and recklessly, embellishing their respective positions with imprecatory language." (383 U.S. at 58)

Petitioner's speech here, while it may have been vehement and caustic and may have included sharp attacks upon the Teamsters, was well within the privilege set forth in Section 8(c).

We now turn to decisions of this Court with respect to the Constitutional protection accorded to speech.

I. Controlling Decisions of this Court Establish that Petitioner's Communications Were Protected by the First Amendment.

This Court, as the tribunal with the ultimate responsibility for protecting and defining the limits and extent of freedom

of speech and expression, has time and again stricken down attempts to limit or encroach upon such constitutional rights.

In the context of labor relations this Court stated in *Thornhill v. Alabama*, 310 U.S. 88 (1940)

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." (310 U.S. at 102)

In *American Federation of Labor v. Swing*, 312 U.S. 321 (1940), this Court held that effort to make known one side of a labor controversy by peaceful means could not be enjoined. In *Thomas v. Collins*, 323 U.S. 516 (1944), this Court stated:

> "The right thus to discuss, and inform people concerning, the advantages *and disadvantages* of unions and joining them is protected not only as part of free speech, but as part of free assembly." (323 U.S. at 532)

Thomas v. Collins, supra, involved a speech given, as here, in connection with a Union organizing drive and an impending NLRB election. This Court referred to its decision in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941) stating:

> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." (323 U.S. at 537)

In other contexts this Court has unfailingly protected the right of free expression. In *Edwards v. South Carolina*, 372 U.S. 229 (1963), this Court stated:

> "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. '(A) function of free speech under our system of government is to invite dispute. It may indeed best serve its purpose *when it induces a condition of unrest, creates dissatisfaction with*

> *conditions as they are, or even stirs people to anger.* Speech is often provocative and challenging'." (372 U.S. at 237)

This Court's decision in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), is relevant. There this Court stated, in answer to the contention that the State was regulating "solicitation" by attorneys:

> ". . . discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, *certainly of lawful ends*, against governmental intrusion." (371 U.S. at 429)

Petitioner's communications here were protected not only by Section 8(c), but also by the First Amendment. The Board's finding, therefore, that such communications not only violated Section 8(a)(1) of the Act, but also constituted evidence of a violation of Section 8(a)(5) of the Act and were grounds for setting aside the results of the election of December 9, were contrary to law. In this respect, the Board's Order is without legal foundation and should be set aside.

II.

The Board's Order Requiring Petitioner to Bargain with the Union Is Unsupported in Fact and in Law and Should Not Have Been Enforced by the Court Below.

A. Introduction[63]

The Court below accepted the Board's *ipse dixit* pronouncements on this branch of the case without any ana-

[63]This section of Petitioner's brief need not be considered by the Court if Petitioner's position with respect to its communications is sustained by this Court. The Board's bargaining order is based entirely upon its finding that Section 8(a)(1) of the Act was violated. In the event this Court finds that such communications were protected by the Constitution and Section 8(c), the Board's finding of a Section 8(a)(5) violation would also fall, together with its ruling with respect to the election.

lysis thereof in its opinion. In doing so it approved the conduct of the Board in using Petitoner's communications as evidence supporting at least five (5) different findings which are widely divergent with respect to the time of their occurence and their effect. The Board's finding of violation of Section 8(a)(1) was also used by the Board, by a "bootstrapping" technique, as follows:

(1) To prove a *past* state of mind, namely, that Petitioner did not have a good faith doubt regarding the Union's majority status on September 20; and,

(2) To prove a *past* state of mind, namely that the Petitioner did not have a good faith doubt as to the appropriateness of the unit of journeymen and apprentices which the Union had requested; and,

(3) To prove another *past* state of mind, namely, that on September 20 and thereafter Petitioner desired to gain time in which to dissipate the Union's majority; and

(4) To prove that *concurrently* with their issuance Petitioner's communications caused the Union to lose support among the employees; and

(5) To prove that *in the future* it would be *impossible* to hold a fair election.

It was through the above technique that the Board justified its reliance upon authorization cards and its issuance of a bargaining order against Petitioner. In none of the instances mentioned above did the Board engage in any analysis of the evidence or make any findings to show that its *conclusions* in that regard were supported by the record. On the contrary, the Board studiously ignored substantial evidence on the record which showed the invalidity of each of the above conclusions, as we will hereinafter show. The discussion *supra*, p. 52, with respect to the Board's "expertise" is applicable here. With regard to the bargaining order issued by the Board we will first show that the method preferred by Congress was a secret ballot election.

B. In Resolving Questions of Representation, Congress Adopted the Method of Secret Ballot Elections and Deleted From the Statute Provisions Which Permitted Other Procedures.

The leading decision by the Courts below with respect to this question is *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562 (CA-4, 1967). The Court of Appeals for the Fourth Circuit rejected the procedure followed by the Board here. The Court pointed out that "card checks" or "card counts" were utilized by the Board under the Wagner Act, but that the Taft-Hartley Amendments of 1947 "provide for a secret election under Board supervision as the *exclusive method* of resolving a question of representation" (386 F.2d at 569). It held that a bargaining order remedy might be permissible in exceptional cases where the employer's conduct was particularly outrageous and pervasive, but found no such conduct in the case before it.

The Court set forth the legislative history which supported its decision. We will not delve extensively into that history. Section 9(c) of the Wagner Act (49 Stat. 453) provided that the Board "may" investigate whenever "a question affecting commerce arises concerning the representation of employees." It further provided:

> "In any such investigation, the Board shall provide for an appropriate hearing upon due notice, *either in conjunction with a proceeding under Section 10* or otherwise, and *may* take a secret ballot of employees *or utilize any other suitable method* to ascertain such representatives." (49 Stat. 453)

House Report No. 245[64] sets forth Congress' recognition of the problem that is now before the Court. Comment was made that the American workingman had "been forced into

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[64] House Report No. 245, 80th Congress, 1st Session on H.R. 3020, submitted by Mr. Hartley from the Committee on Education and Labor (1 Leg. Hist. 292-406).

labor organizations against his will" (1 Leg. Hist. 295) and that:

> "The bill prescribes rules *for the new Board to follow* in setting up units for collective bargaining *and in holding elections* to determine whether or not employees wish labor unions to bargain for them. These rules *do away* with practices of the old Board *by which it has subjected* literally millions of workers to control by labor unions *notwithstanding* that the employees did not wish the unions to represent them *and voted against the unions in the Board's elections.*" (1 Leg. Hist. 298)

The House had so little faith in the validity of authorization cards that the Bill passed by the House would have prohibited a run-off election unless the Union seeking a run-off presented authorization cards from "more than 50 per centum of the employees in the bargaining unit in question" (1 Leg. Hist. 189, 190). That the terms "designate" and "select," as retained in Section 9(a) had no particular significance and were not used as words of art is shown by other provisions of the Bill. Section 9(f)(5) of the House Bill used the phrase "in all elections held to *select* representatives . . ." (1 Leg. Hist. 189), but Section 204(b) provided for a "secret ballot" on the employer's last offer *and* "what person or persons, if any, they desire to *designate* as their representative. . . ." (1 Leg. Hist. 216).

Senate Report No. 105[65] stated that the Bill "*requires* the Board to enlarge the rights to petition in representation cases," in the interest of "assuring complete freedom of choice to employees who do *not* wish to be represented collectively" . . . " (1 Leg. Hist. 409). Section 8(b)(4)(B) of the Senate Bill prohibited strikes or boycotts to force another employer to recognize or bargain with a Union that "has *not* been *certified*", thus denying such protection to a

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[65] Senate Report No. 105, 80th Congress, 1st Session on S. 1126 submitted by Mr. Taft from the Committee on Labor and Public Welfare (1 Leg. Hist. 407-504).

"recognized" union. It also proscribed strikes or boycotts for the purpose of forçing an employer to disregard his obligation to bargain with a *certified* ùnion (1 Leg. Hist. 428).

The minority views of Senators Thomas, Murray and Pepper (1 Leg. Hist. 463-504) made no objection to this emphasis on certification. There was an objection, however, to the elimination of the provision with respect to card checks (1 Leg. Hist. 496). The debates also show that it was understood that elections would be the only means for a Union to obtain representative status. Senator Murray proposed a substitute bill but stated during the discussion of such substitute:

> "We also concur in so much of the proposed amendment contained in Section 9(c)(1) which would permit employers to request *certification* of bargaining representatives *whenever an unrecognized* union claims the *right to represent employees* . . . " (2 Leg. Hist. 1439, 1452, 1453).

Senator Murray, however, objected to allowing "the employer to challenge the representation of *certified* unions at any time" arguing that this would impair stability. With respect to "*recertification* of organizations already certified", the substitute would have left that to the rules of the Board "provided that there is *a bona fide doubt* as to representation and the request is made at least 30 days before the contract expires" (2 Leg. Hist. 1453).[66]

It is apparent that there was no misunderstanding that certification through a Board election would be the only procedure to be followed when an unrecognized union claimed that it represented employees. The employer was to have a right to an election even if the Union struck for recognition.[67]

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[66]No requirement of having doubt, *bona fide* or otherwise, was suggested except where the Union had already been certified.

[67]"But where only one union is in the picture, the Board denies him this right (to have an election). Consequently, even though a union which has the right to petition and be certified as the major-

Congress not only deleted from Section 9(c) the Board's former authority to *"utilize any other suitable method"*, other than an election, to ascertain the representative, it also withdrew the Board's authority to conduct an investigation with regard to a question of representation:

> "either in conjunction with a proceeding under Section 10 or otherwise."

Notwithstanding rescission of its authority to conduct card checks and to determine a representative in proceedings under Section 10 of the Act, the Board continues to exercise that authority and continues to conduct card checks upon the theory, which is nowhere expressed in the Act, that an employer must show a good faith doubt regarding the Union's representative status before it may refuse to bargain with an unrecognized and uncertified Union.

C. The Board Attempts to Give Ultimate Binding Effect To Authorization Cards Even Though The Board And Many Courts Have Found Them To Be Notoriously Unreliable. A Mere Check Of Authorization Cards Does Not Establish That They Were Freely Executed And A Certification Proceeding, Not An Investigation By An Employer, Was Intended By Congress As The Method For Resolving Such Questions.

The Board itself characterized authorization cards as "a notoriously unreliable method of determining majority status of a union". *Sunbeam Corporation*, 99 NLRB 546

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ity representative, if it is really such, *may strike for recognition*, an employer has no recourse to the Board for settlement of such disputes by the peaceful procedures provided for by the Act" (1 Leg. Hist. 417). However, the primary strike for recognition was not made unlawful (1 Leg. Hist. 428). The Board now considers evidence of a strike for recognition as evidence of lack of good faith doubt requiring a bargaining order. *World Carpets of N.Y., Inc.*, 163 NLRB No. 74 (1967); *Independent, Inc.*, 165 NLRB No. 53 (1967); *Maxville Stone Co.*, 166 NLRB No. 105 (1967); and *Holland Custard & Ice Cream, Inc.*, 158 NLRB No. 116 (1966).

(1952) at 550. The characterization of cards as "notoriously unreliable" has been adopted by several Courts of Appeal. *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562, 565 (C.A. 4, 1967); *NLRB v. River Togs, Inc.*, 382 F.2d 198, 206 (C.A. 2, 1967); *NLRB v. Fashion Fair, Inc.*, 399, F.2d 764, 768 (C.A. 6, 1968).

Also, as stated by the Court of Appeals for the Second Circuit in *NLRB v. River Togs, Inc.*, 382 F.2d 198 (C.A. 2, 1962):

> "Some indication of the degree of unreliability is afforded by the statistics in Chairman McCullochs' oft-cited address, A Tale of Two Cities: or Law In Action, printed in Proceedings, Section of Labor Relations Law, American Bar Ass'n, pp. 14, 17-18 (1962)." (382 F.2d at 206)

The "notoriously unreliable" nature of signed Authorization cards is graphically illustrated by the Board's own monthly Election Reports.[68] For the purpose of this portion of our brief, we have examined the monthly NLRB Election Report for cases closed during January, 1968 through October, 1968 (the latest issued as of the date of the preparation of this brief).

In order to emphasize the point here made by the Petitioner, we have checked the figures as to:

(1) Cases in which the Teamsters Union was the only union on the ballot (i.e., a "Yes" or "No" choice);

(2) Where the voting unit was in the range of 10 through 19 employees;[69]

We have *excluded* so-called RM or RD cases (in which either the employees or the Employer filed a petition to "decertify" the Teamsters as the incumbent union).

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[68] Issued monthly by its Division of Administration under "(ER __)".

[69] Code 2 in the NLRB Election Reports through June, 1968; thereafter uncoded, but identifiable by the number shown as being in the voting unit.

This analysis, therefore, equates the situations analyzed to that here present, to wit, a situation under which

(a) A unit of 10 to 19 employees is involved;

(b) A "Yes" or "No" single-union ballot was presented;

(c) The Teamsters Union filed the petition and was required, by NLRB Rules, to support the petition by a showing of signed Authorization Cards *from a MINIMUM of 30% of the employees in the unit.*[70]

Note the results:

	Total Elections	Percentage of "Yes" Votes (i.e., *for* the Union)[71]					
		NONE	1% through 10%	11% through 20%	21% through 29%	30% through 40%	41% through 50%
January	13	1	0	0	2	3	7
February	15	1	0	5	2	4	3
March	17	2	0	3	3	2	7
April	23	0	1	2	6	6	8
May	18	1	0	1	2	4	10
June	19	1	0	1	2	8	7
July	24	1	1	3	8	6	5
August	19	2	0	2	1	6	8
September	23	3	0	4	5	6	5
October	22	2	0	2	3	10	5
	190	14	2	23	34	55	65

Thus, in 190 elections in units of 10 to 19 employees for which the Teamsters Union petitioned during the 10-month period, it secured *less than 30% votes* in 73 (39.5%) of the elections, and in 14 of those elections (7.3%), *it did not secure a single vote.*[72]

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[70] See Statements of Procedure, Series 8, as Amended–Part 101, Sec. 101.18.

[71] Percentage figures to the closest full percent.

[72] Even though the NLRB Rules (See Sec. 102.69 of NLRB Rules & Regulations) permit, and the Union undoubtedly had, an employee observer at the polling place.

It is apparent that in over 39% of such elections, the authorization cards did not reflect the true desires of the employees involved. Undoubtedly, the percentage is much higher, but it cannot be demonstrated by statistical analysis, inasmuch as the Board does not report the number of authorization cards which were filed to support the petition. While speculation by scholars, law students and social scientists may have its place, it cannot overcome the telling effect of the Board's own records!

We submit that it is clear that authorization cards, collected as they are in the heat of organizing campaigns, with the use of subtle social pressures and at times even overt threats, have nothing to commend them. We will not here repeat the comparison made by the Fourth Circuit in *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562 (CA-4, 1967), between the "laboratory conditions" which the Board imposes with respect to a secret ballot election and the complete unreliability of a mere check of cards against an employer's payroll (386 F.2d at 565).[73]

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[73]The Board's decisions show the tactics and misrepresentations used to obtain signatures: *I.T.T. Semi Conductors*, 165 NLRB No. 98 (1967), employees told that a majority had already signed; *Sperti Sunlamp Div.*, 162 NLRB No. 109 (1967), threats; *Pembek Oil*, 165 NLRB No. 51 (1967), that cards would authorize Union to talk to employer; *Yazoo Valley Electric Power Assn.*, 163 NLRB No. 106 (1967), employees told purpose of cards was to get an election; *Hercules Packing Corp.*, 163 NLRB No. 35 (1967), employees told cards were needed to obtain election; *Atlas Engine Works*, 163 NLRB No. 61 (1967), employees told election would be held if enough cards were signed; *General Steel Products*, 157 NLRB No. 59 (1966), employees told cards would be kept secret; *S.E. Nichols Co.*, 156 NLRB No. 106 (1966), employees told they would have opportunity to vote; *John Kinkel & Sons*, 157 NLRB No. 64 (1966), employer told "everybody" in plant had already signed cards; *Cedar Hills Theaters, Inc.*, 168 NLRB No. 116 (1967), employees told they would receive extra work and initiation fee would be waived if they signed; and *R. W., Inc.*, 170 NLRB No. 67 (1968), employees led to believe there would be automatic benefits and that cards would be used for election. Many other similar decisions could be cited.

A mere check of the Teamsters' cards again Petitioner's payroll by an independent third party, as requested by the Union here (A. 115), would have proved exactly nothing. Unless he were a handwriting expert, he could not possibly know whether any of the signatures were forged. A mere check against payroll would not disclose the circumstances under which the cards were signed, whether any threats had been made, what pressures had been exerted or what misrepresentations had been made. All cards would be counted as valid if the signer's name appeared on the payroll list.

It was in the face of this background regarding invalidity of cards, that Petitioner rejected the offered card checks and referred to Chairman McCulloch's talk regarding the unreliability of cards in its rejection letters (G.C. Ex. 7; A. 8, 112; G.C. Ex. 11; A. 10, 118; G.C. Ex. 13; A. 11, 122). A card check obviously could provide Petitioner with no assurance that its employees had freely designated the Teamsters.[74]

In this regard, the Court below held:

> "Here the company made no attempt to discover what the actual card situation was when the union requested recognition for the wire workers unit . . ." (A. 212)

It is difficult to determine on what basis the Court placed such a burden upon Petitioner. The risk of violation of Section 8(a)(1) by an employer in making such investigation is substantial. As stated in *NLRB v. Dan River Mills*, 274 F.2d 381 (CA-5, 1960):

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[74] This was all the more apparent when in August, the Teamsters claimed that they represented a majority of 87 production and maintenance employees at the Appleton plant, an obviously false claim, which was then followed by the demand for recognition with respect to non-existent apprentices. Both the Board and the Court of Appeals failed to consider the effect of this evidence. The Court stated: "Instead of recognizing the union on the basis of its *admitted* card majority, the company insisted on an election . . ." (A. 212). Of course, this analysis completely fails to consider the facts as of the date of the demand for the card check.

> "But like Odysseus, he (the employer) stands almost helpless as he makes the perilous passage between Scylla and Charybdis. If he makes a simple inquiry of each employee and accepts the simple answer, the very pressure apprehended may well bring about the employee's confirmation as well. If he probes deeper, the inquiry unavoidably becomes an investigation . . . At that point, undefined and undefinable, the inquisitor trespasses either on forbidden ground or flounders in the Serbonian bog surrounding it so that what started out to be a means of compliance with law is turned into an affirmative charge of an unfair labor practice." (274 F.2d at 388)

In view of the election procedures established by the Act for determining "questions of representation", there is no warrant in law for even attempting to impose such a burden upon an employer.

The second alternative which was offered by the Court below was that Petitioner should have accepted a mere check of cards against its current payroll. While the instant proceeding provided testimonial evidence by the card signers themselves regarding the authenticity of the cards offered in evidence, a mere card check, as shown above, would have provided no assurance regarding any matter of substantive importance. As explained in detail by the Court in *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562 (CA-4, 1967)):

> "In stark contrast is a decisional rule that bypasses the election processes and places signed authorization cards on a parity with an affirmative vote in a secret election." (386 F.2d at 565)[75]

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[75] In *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), the Board went to great lengths to assure that employees would learn *all* the arguments for and against unionization in an organizing campaign. The Board required that a list of names and addresses of voters be furnished to the union, so they would be exposed to arguments from *both* sides. See *NLRB v. Wyman Gordon Co.*, 397 F.2d 394 (CA-1, 1968), cert. granted Nov. 12 1968, 21 L. Ed.2d 268.

We now discuss the question of "good faith doubt" as applied herein by the Board and by the Court below.

D. The Board Errs When It Attempts To Make The Right To An Election Turn Upon The Question Of Good Faith Doubt. In Any Event The Evidence Of A Lack Of Such Doubt Relied Upon By The Board Does Not Support Its Order.

The question of "good faith doubt" involved two (2) issues. The first, the question of Petitioner's doubt with respect to the appropriateness of the bargaining unit. With respect to both issues, the Board found that Petitioner did not have a good faith doubt on September 20. It held that Petitioner:

> "was not motivated by any good-faith doubt as to the Union's *majority* status in an *appropriate bargaining unit* . . ." (A. 195)

The Board attempts to justify its bargaining orders by focusing on a *past* state of mind which has no relevance to the true issue. Here, the Union made claims of majority representation and demands for recognition in August, in September and in October. Each claim and demand was for a different bargaining unit. In October, it filed a representation petition under Section 9(c) of the Act alleging that it desired to be certified "pursuant to Sections 9(a) and (c) of the Act" (Resp. Ex. 1; A. 86). Early in November, it signed a Stipulation for the conduct of a Consent Election (Resp. Ex. 2; A. 86, 147). Item 8 of that Stipulation provided in part:

> ". . . a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c)." (A. 148)

Over Petitioner's objections, the Union was permitted to withdraw from that Stipulation on November 8 (Resp. Ex. 5; A. 87, 152; Resp. Ex. 7; A. 87, 154). On November 8, it was permitted to file a *second* representation petition requesting that it be certified "pursuant to Sections 9(a) and (c) of the Act (G.C. Ex. 1(a); A. 4). On November 23,

it signed a *second* Stipulation for a Consent Election, which was approved on November 26 by the Board's Regional Director (G.C. Ex. 1(b); A. 4), which also stated that a question of representation existed.

The proper inquiry by the Board should have been, under the foregoing facts and circumstances, did Petitioner engage in conduct on and after November 23, which made it just and proper (1) to permit the Teamsters to also withdraw from its *second* Stipulation even though a question of representation existed at the time it was executed, and (2) to now hold that such question of representation had not been resolved by the secret ballot election which the Union lost?

In this case, the Board attempts to establish, retroactively, that notwithstanding the *two* Stipulations signed by the Teamsters in November, and notwithstanding the October claim of majority and representation petition, that a question of representation did *not* exist in September or at any time thereafter. In effect, the Board has attempted to expunge the October claim and demand, the October and November petitions and both Stipulations from the record.

The Board has done so by directing the issue to alleged "good faith doubt". Still, the Board ruled here that the *same bargaining order* would have issued:

> "*even if the record had warranted the conclusion,* contended for by . . . (Petitioner), *that it relied upon a bona fide doubt* of the Union's majority in refusing to bargain with the Union . . . Effectuation of the policies of the Act would *still require such a bargaining order* in order properly to remedy . . . (Petitioner's) other unfair labor practices herein found". (A. 198)

Therefore, the Board itself, in its Decision here, held that the question of good faith doubt *was irrelevant* to its decision, inasmuch as it would have issued a bargaining order in any event.

Despite the above ruling by the Board regarding the irrelevancy of "good faith doubt", the Court of Appeals not

only relied upon that issue in enforcing the Board's order, but also *placed the burden of proof upon* Petitioner:

> "We therefore conclude that *the Company* made no real showing of good faith doubt either as to the union's majority status or as to the appropriateness of the bargaining unit". (A. 212)

Even the Board did not attempt to impose this burden upon Petitioner! The Board held:

> ". . . The burden is on the General Counsel to establish affirmatively that a good-faith doubt of majority was not the reason for . . . (Petitioner's) refusal to bargain . . ." (A. 195, 196)[76]

It is clear, in this respect, that the Court below did not enforce the Board's order "on the same basis articulated in the order by the agency itself". *Burlington Truck Lines v. United States Lines*, 371 U.S. 156, 169 (1962).

We now discuss the evidence relied upon by the Board with respect to its "good faith doubt" finding, assuming, *arguendo*, that it remains relevant to the bargaining order issue in this case.

E. The Only Evidence Relied Upon By The Board To Support Its Conclusion That Petitioner Lacked A Good Faith Doubt Regarding The Union's Majority Status Was Its "Totality" Findings With Respect To Petitioner's Communications

Numerous Courts have held that there is no rational connection between another unfair labor practice and the state of mind of "good faith doubt". This is particularly so here when the "totality" is related back to September 20 and the subsequent inconsistent conduct by the Teamsters is ignored.

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[76] See also *NLRB v. River Togs, Inc.*, 382 F.2d 198, 206 (CA-2, 1967) and *NLRB v. Fashion Fair, Inc.*, 399 F.2d 764, 768 (CA-6, 1968), where it was held that the General Counsel carried this burden.

The Court of Appeals held in *Lane Drug Co. v. NLRB*, 391 F.2d 812 (CA-6, 1968), that violations of Sections 8(a)(1) and 8(a)(3) were not in themselves sufficient reason to negative a good faith doubt:

> "An 8(a)(1) violation without more is just as consistent with a disbelief in the majority status of the union as it is with the belief in the majority status." (391 F.2d at 820)

The same ruling has been made in *NLRB v. River Togs, Inc.*, 382 F.2d 198, 201 (CA-2, 1967) where it was held that good faith doubt was not negated by a desire to thwart unionization by proper or even by improper means; and in *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562, 564 (CA-4, 1967), "minimally coercive questioning . . . has no relevancy to" refusal to bargain issues; and in *NLRB v. Fashion Fair, Inc.*, 399 F.2d 764 (CA-6, 1968) the Court held that violations of Section 8(a)(3) and (1) did not demonstrate that the employer lacked a good faith doubt of majority status; and finally in *NLRB v. Texas Electric Cooperatives, Inc.*, 398 F.2d 722 (CA-5, 1968), it was held that extensive violations of Section 8(a)(1) did not show an employer's bad faith.

The Board made no findings or analysis to show that there was a rational connection between Petitioner's communications and the presence or absence of good faith doubt on September 20. The record shows that there were no communications with employees after the July speech until November 2, a period of nearly four (4) months![77] During that period the Teamsters made three recognition demands, took four different positions with respect to the appropriate unit, filed a representation petition and executed an election Stipulation.

How the July talk and the communications which commenced on November 2 proved or even tended to prove

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[77]We exclude from consideration here the discussion with Bougie (A. 182) and the notice of October 21 (Resp. Ex. 15; A. 97, 158).

Petitioner's state of mind on September 20 is wholly unexplained on this record. Rather than showing a lack of good faith doubt, Petitioner's communications on and after November 2 show a justified irritation with the conflicting and inconsistent positions taken by the Teamsters with respect to Petitioner's employees.

With respect to the bargaining unit, the Board found it necessary to explain away the non-existent apprentices. The record is clear that Petitioner had insisted that a two (2) plant production and maintenance unit was the appropriate unit. The Union *agreed* with this position in its *first* Stipulation. The *second* Stipulation was for a unit with respect to which the Union had never made a demand for recognition. By reason of automation Petitioner believed that Journeymen weavers were not entitled to separate representation. However, when Board representatives indicated that the contrary might be true Petitioner did not insist upon a hearing to litigate the question. It is difficult to characterize such conduct as being in bad faith.[78]

In this regard we cite only *Lane Drug Co. v. NLRB*, 391 F.2d 812 (CA-6, 1968) where the Court pointed out that the Union's unit request was not clear and that: "The employer was supposed, apparently, to divine" who the Union intended to include in the unit. The Court stated:

> ". . . All of these questions suggest that *the best procedure to be followed* in a case of this kind *is a Board-conducted election*, where the bargaining unit would be determined by the Board . . ." (391 F.2d at 820)

We point out that it is the Board's duty under Section 9(c) to also determine the appropriate bargaining unit, in

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[78]The Court will note the Board's efforts to distort the evidence with respect to the non-existent apprentices. The Board found President Sinclair's "argument" concerning apprentices to be "specious. Sinclair very well knew what an apprentice wire weaver was" (A. 193). The record shows that President Sinclair testified that he "did not know who the . . . *Union* might be referring to when they specified wireweavers and apprentices" (A. 33).

accordance with Section 9(b) of the Act. Through the bargaining order procedure the Board avoids performance of that duty, requires employers to negotiate such questions and unduly emphasizes extent of organization as a factor.

Our attention will now be directed to the Board's conclusions regarding loss of employee support, dissipation of the Union's majority and the alleged "impossibility" of conducting another election.

F. The Board's Conclusions with Respect to Loss of Union Support, that Petitioner Sought Time in Which To Dissipate the Union's Majority and that It Was Impossible To Conduct Another Election Lack the Support of Reasoned Findings and Ignore Large Parts of the Record

The Board has not explained by analysis or by reasoned findings *how* Petitioner's "total" communications with its employees support its conclusions. Having found a violation of Section 8(a)(1), the Board reasoned that such violation *ipso facto* proved all other elements in the case and disregarded substantial countervailing evidence as we will show.

(1) *The Board's Conclusion That Petitioner's Communications Caused The Union To Lose Support Is Not Warranted By The Record Considered As A Whole*

The Board made two findings in this regard, as follows:

> "To the extent that the election revealed a loss of union support, such loss *must be found* attributable to the . . . (Petitioner's) unfair labor practices" (A. 191 and 198).

and

> ". . . (Petitioner) engaged in a coercive course of conduct designed to induce the employees to abandon their support for the Union and which dissipated the Union's majority status" (A. 195).

There are no findings and there is no analysis of the particular evidence which was included in the "totality" which supports this conclusion. The record shows that all eleven (11) of the Union's authorization cards were signed by the weavers *after* the July talk.[79] It, therefore, affirmatively appears that the July talk coerced no one and had no effect upon the Teamsters ability to obtain signed authorization cards.[80] Subsequently the Teamsters believed that it was so successful in its organizing efforts that in August and in October it sought to represent all production and maintenance employees.

With respect to the wire weavers, although the Teamsters had received authorizations from a majority as early as *July 9* it made no attempt to represent them in a separate unit until nearly two and one-half (2-1/2) months later. The Teamsters then promptly abandoned that attempt only twenty (20) days later. It was not until November 8, *four (4) months* after it had received a majority of cards from the weavers, that the Teamsters again instituted its attempt to represent them in a separate unit.

The Board and the Court below gave no consideration to the question whether the Teamster delay, dilatory tactics and frequent change of position had any effect upon the results of the election. Nor is there any evidence in the record to show that a majority of the weavers in fact fav-

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[79]Niesner on July 6 (G.C. Ex. 2; A. 5); Cleland, Goulet and Bougie on July 7 (G.C. Ex. 28; A. 23; G.C. Ex. 31; A. 29; G.C. Ex. 32; A. 85); Hass, St. Germain, Geissler, Sikorski and Dean on July 8 (G.C. Ex. 23, A. 15; G.C. Ex. 24; A. 17; G.C. Ex. 26; A. 20; G.C. Ex. 27; A. 22; G.C. Ex. 29; A. 26); Neil and Brunault on July 9 (G.C. Ex. 25; A. 17, 18; G.C. Ex. 30, A. 28).

[80]Petitioner's subsequent communications were largely a repetition and further elaboration of the July talk. There is no evidence that they had any greater effect than the July talk.

ored separate representation rather than being included in an overall-production and maintenance unit.[81]

Despite the pertinency of these facts to the question as to *why* the Teamsters lost support, the Board completely ignored them, apparently believing that its *ipso facto* conclusion made it unnecessary to do so. In the face of this evidence the Board found that the Union "has been, and still is" (A. 192) the weavers representative.

(2) The Conclusion That Petitioner Sought Time In Which To Dissipate The Union's Support Is Likewise Unsupported By Analysis Or Findings

The Board found that Petitioner's refusal to bargain was not motivated by a good faith doubt either as to the Teamsters' majority status or as to the appropriateness of the unit:

> ". . . but was instead motivated by a desire to gain time within which to dissipate that majority status" (A. 195).

Again this conclusion by the Board was based entirely upon its "totality" bindings. During the period from July to November 2, the date of Petitioner's first letter to employees, Petitioner engaged in no communications with its employee concerning the Teamsters organizing campaign. During this period the Teamsters made the August, September and October demands for recognition, filed its *first* election petition and took at least four (4) different positions with respect to the appropriate unit. *There is no evidence that Petitioner sought to delay at any time.* On November 2 it signed a Stipulation for an election. After being advised by the Board that a wire weaver unit would be considered appropriate, it did not demand a hearing, but

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[81] The Teamsters initial letter (G.C. Ex. 3; A. 6, 108) was sent to all Appleton plant employees and in July the organizing effort was for an overall production and maintenance unit.

instead signed a *second* Stipulation so that an election could be held.[82]

The foregoing evidence was not considered by the Board either with respect to its conclusion that Petitioner sought to dissipate the Teamsters majority or with respect to the issue of "good faith doubt."

(3) *The Board's Conclusion With Respect To the Required Remedy Constitutes An abuse Of Discretion And Is Not Supported By Analysis, Evidence Or Reasoned Findings*

The Board, in the final step of its bootstrapping technique, also used its findings regarding the "totality" of Petitioner's communications to justify its choice of remedy. In that regard the Board stated:

> "While a Board election is normally the best method of determining whether or not employees desire to be represented by a bargaining agent, where, as here, an employer engages in unfair labor practices which make *impossible* the holding of a free election, there is no alternative but to look to the signed authorization cards . . ." (A. 191)

Based upon the above finding of "impossibility" of holding a free election, and upon its further finding that the Union "still is" the representative of Petitioner's employees, the Board issued a bargaining order (A. 198).

As shown above, although the Board relied upon Petitioner's lack of "good faith doubt" it then held that its good faith doubt or lack thereof was irrelevant because:

> "To the extent that the election revealed a loss of union support *thereafter* (i.s., after the September 20

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[82]The *second* Stipulation was arranged by telephone without a meeting. President Sinclair authorized its execution by the Production Manager so there would be no delay.

> demand), such loss must be found attributable to the . . . (Petitioner's) unfair labor practices. Therefore, effectuation of the policies of the Act would *still require* such a bargaining order in order properly to remedy . . . (Petitioner's) *other* unfair labor practices herein found" (A. 198).[83]

The Board made no analysis or reasoned findings to support its *ipse dixit* conclusion that it was *impossible* to conduct a second fair election. In *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962) this Court pointed out that the Interstate Commerce Commission had made "no findings and no analysis . . . to justify the choice made." This Court further stated (371 U.S. 167) that "'Congress did not purport to transfer its legislative power to the *unbounded discretion* of the regulatory body'" and that its discretion must be exercised within the bounds set forth by the applicable statute.

> "And for the court to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' The agency *must make findings that supports its decision, and those findings must be supported by substantial evidence* . . . Here the Commiddion made *no findings specifically* directed *to the choice* between two *vastly different remedies* with vastly different consequences . . ." (371 U.S. 167, 168)

Here, likewise, the Board made no findings specifically directed to the choice between vastly different remedies with vastly different consequences. Particularly, its *key* finding that the Teamsters "still is" the representative of Petitioner's employees is completely lacking in any evidentiary support whatever! While the Board may *contend* that

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[83]This conclusion should be compared with that of the Regional Director in his Report on Objections when he recommended that the results of the election be certified! As pointed out above he had the same evidence before him (G.C. Ex. 1(d) A. 4).

the cards signed in July constitute such evidence, such conclusion can only be reached by ignoring all other evidence shown by the record as a whole.[84] The further key finding of "impossibility" of conducting an election is also without objective support.

The Board's procedure here was (1) to make a finding of violation of Section 8(a)(1) of the Act and (2) to characterize the same facts as also constituting a violation of Section 8(a)(5). In the Board's view this "automatically" calls for a bargaining order instead of a determination by it regarding the proper choice of remedy for the Section 8(a)(1) violation. In this fashion, the employer and the employees are denied the right to an election. We submit that the Board's authority under the Act does not encompass that procedure here.

Other Courts of Appeal have rejected the Board's conclusions in this respect, especially in view of the Congressional policy of free employee choice and the danger of imposing upon employees a bargaining agent not of their choice. While the Courts of Appeal have given lip service to the good faith doubt theory, their decisions show that they have really addressed themselves to the problem of choice of remedy and the evidence supporting such a choice. The "notorious unreliability" of authorization cards is a factor to be considered.

In *NLRB v. Flomatic Corp.*, 347 F.2d 74 (CA-2, 1965), the Court held that a bargaining order was "strong medicine" to be applied only "with restraint" (347 F.2d at 78, 79). It emphasized the danger to the employee's freedom of choice if a bargaining agent was imposed upon them. It held:

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[84]The Court of Appeals held only that it was "reasonable" to conclude that the Union's majority status had been dissipated by Petitioner's "unlawful interference" and that the "Board was warranted in entering a bargaining order rather than ordering a new election" (A. 213).

> "No court, however, has held that a borderline, unaggravated § 8(a)(1) violation, standing alone, occurring prior to an election, warranted a bargaining order" (347 F.2d at 79).[85]

The Court held that a "more appropriate" remedy was a cease and desist order and a second election.

In *NLRB v. Ben Duthler*, 395 F.2d 28 (CA-6, 1968), the Court found that the unfair practices were not flagrant and that the Board's duty was "to protect the bargaining rights of employees, not the bargaining rights of (a) union". It further held:

> "We find that in this case a re-run election would more clearly express the employees' desires, and therefore deny enforcement of the Board's bargaining order." (395 F.2d at 34)

Three recent decisions by the Second and Sixth and District of Columbia Circuits demonstrate the proper principles to be applied. The first is *NLRB v. Priced-Less Discount Foods, Inc.*, ___ F.2d ___, 70 LRRM 2007 CA-6, 1968). There the Court enforced a Section 8(a)(1) order of the Board based upon the Employer's solicitation of withdrawals of authorization cards, which resulted in the Union *being unable to petition for an election.* There was no inquiry into good faith doubt or any other peripheral issue, but only as to the appropriate remedy. Inasmuch as the employer's conduct had gone to the heart of the representation question and had prevented an election from even being held, just as would discharge of all Union supporters, the Court enforced the finding that a fair election would have been impossible and enforced the bargaining order. However, there are no such facts here.

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[85]Here the § 8(a)(1) violation found by the Board was based solely on Petitioner's "words" which the Regional Director found inadequate to prevent certification of the results of the election.

The second decision is *Amalgamated Clothing Workers of America v. NLRB*, ___ F.2d ___, 70 LRRM 2207 (CA-D.C., 1969) where the Board issued a bargaining order based upon violations of Section 8(a)(1). The Court disagreed with the Board's conclusion that employee desires could be most closely approximated by authorization cards. The Court stated:

> "The Board also *says* that a 'fair election' cannot be held . . . But that averment is not impressive on the present record; we do not know upon what the conclusion is based, or what the Board means by 'fair', or to whom" (70 LRRM at 2210).

It held that the Board was required to give effect to the "real choice" of the employees and that it could not "avoid that responsibility upon such a paucity of evidence as this record contains". The Court set the Board's order aside.

The third decision is *NLRB v. Pembeck Oil Corporation*, ___ F.2d ___, 69 LRRM 2811 (CA-2, 1968). There the Court affirmed the Board's findings that the Employer had violated Sections 8(a)(1), 8(a)(3) *and* 8(a)(5) but it nevertheless *refused* to enforce the Board's bargaining order. The Court emphasized the risk of imposing a bargaining agent at a time when the employees "no longer wish it to represent them". The Court stated that a bargaining order should not be enforced by rote:

> ". . . The finding of an unlawful refusal to bargain does not *ipso facto* and in all cases lead to the conclusion that an order to bargain must always be the only remedy for the violation." (69 LRRM at 2817)

The Court held that a bargaining order in this case would be "excessively strong medicine" for the ailment and unfair to both the employer and its employees.

The foregoing shows that good faith doubt or the lack thereof is irrelevant to the issue of a bargaining order. The finding of violation of Section 8(a)(5) should be set aside. In the event it is considered that a violation of

Section 8(a)(1) occurred here, such violation was too minimal to justify the issuance of a bargaining order. In any event, the Board's order is not supported by appropriate findings which would justify such relief.

We have previously stated that it is axiomatic that there could not be a Section 8(a)(1) violation based upon statements, each of which was protected by Section 8(c) of the Act and by the First Amendment to the Constitution. It follows, and it is equally axiomatic, that an alleged Section 8(a)(5) violation, supported only by such a pseudo Section 8(a)(1) violation, must fall.

CONCLUSION

For all of the reasons set forth herein, the judgment of the Court of Appeals should be reversed, and an order should be entered setting aside the Order of the Board.

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February, 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GISSEL PACKING COMPANY, INC., ET AL.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL STEEL PRODUCTS, INC., ET AL.

No. 691

FOOD STORE EMPLOYEES UNION LOCAL 347,

v. *Petitioner*

GISSEL PACKING COMPANY, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case in support of the position of the Petitioners, as provided for in Rule 42 of the Rules of this Court. The consent of the Solicitor General and of counsel for the Union has been obtained. Counsel for the Respondents have refused their consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and twenty-two affiliated labor organizations with a total membership of approximately thirteen million. During the past decade the organizing efforts of the trade union movement have been pursued with great vigor. These efforts have all too often met with illegal employer opposition designed to coerce employees who would otherwise support unionization, *see,* McCulloch, *New Remedies Under the National Labor Relations Act,* 68 LRR 60, 63 (1968); Report of the Special Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 90th Cong. 2nd Sess., *National Labor Relations Act Remedies: The Unfulfilled Promise,* 1-5, 30 (1968) (Thompson Report). It is the consensus of the impartial experts who have studied the matter that this rising tide of disregard for the prohibitions contained in §§8(a)(1) and (3) of the National Labor Relations Act as amended 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.* is the direct result of the impotence of the Board's remedies, Report of the Subcommittee On National Labor Relations Board, of the Committee on Education and Labor, 87th Cong. 1st Sess., *Administration of the Labor-Management Relations Act by the NLRB,* 20-24 (1961) (Pucinski Report); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38, 64-65, 124-125 (1964); Note, *The Need for Creative Orders Under Section 10(c) of the NLRA,* 112 U. Pa. L. Rev. 69 (1963). It is also the consensus of the organizing staffs of the Federation and its affiliated unions that of the Board's traditional remedies

the bargaining order is by far the most effective and meaningful. The practical effect of the instant decisions of the Fourth Circuit is to strip the Board of its authority to issue such orders. The profound impact of these decisions is thus manifest and for this reason the AFL-CIO requests this opportunity to present its views to this Court.

ISSUE NOT COVERED BY THE PETITIONERS

The Board takes the view that the primary basis for the bargaining order stems from §8(a)(5) of the Act. It is our view that in cases such as the instant ones, it is most fruitful to view the bargaining order as a remedy for the employers' violations of §§8(a)(1) and (3) during an organizing campaign. This view, we believe, has the virtue of placing the interests at stake in sharper focus and promises to simplify proceedings involving illegal employer interference with organizational efforts. The main burden of our *amicus* brief will be devoted to developing this point.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant cases in support of the position of the Petitioners.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out in the Petitioners' briefs.

The interest of the AFL-CIO is set out at pp. vi of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

THE NLRB'S REMEDIAL AUTHORITY INCLUDES THE POWER TO ISSUE BARGAINING ORDERS WHEN AN EMPLOYER COMMITS VIOLATIONS OF §§8(a)(1) & (3) OF THE NLRA DURING A UNION ORGANIZING CAMPAIGN

In *Gissel Packing Co., Heck's* and *General Steel,* the National Labor Relations Board found that the majority of the employees in each of the bargaining units had clearly and unequivocally authorized the Union to represent them for the purposes of collective bargaining at the time of its demand for recognition. The Board also found that the authorization cards collected to show majority status were obtained through proper methods of solicitation, in which fraud, duress and misrepresentation played no part. These findings were not disturbed by the court below. In each case the Company responded to this demand by refusing recognition and by waging an anti-union campaign during which it committed substantial unfair labor practices.

Thus, in *Gissel* both the Board and the court below found that the Company coercively interrogated employees concerning their union activities, threatened them with discharge and other economic harm, and promised them benefits—all in violation of §8(a)(1) of the National Labor Relations Act as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq;* and that the Company discriminatorily discharged two employees, in violation of §§8(a)(3) and (1). In *Heck's,* the Board and the court below found that the Company coercively interrogated employees, threatened reprisals against them for supporting the Union, created the impression of surveillance of their union activities, and

offered them benefits in exchange for opposition to the Union—all in violation of §8(a)(1); and that the Company discriminatorily discharged the leading union adherent, in violation of §§8(a)(3) and (1). In *General Steel*, the Board and the court below found that the Company interrogated employees and threatened them with reprisals, including discharge, in violation of §8(a)(1).

The Board ordered the Companies to cease and desist from the unfair labor practices found and to offer reinstatement and back pay to the employees who had been discriminatorily discharged; the court below enforced these provisions of the orders. The Board also ordered the Companies to bargain with the Union involved upon request, but the court below refused enforcement of this portion of the orders. Thus, the point at which the Board and the Fourth Circuit diverged was the proper remedy to apply to an employer who has opposed an organizing campaign by committing unfair labor practices.

The Board's basic argument in support of its position is that it has the power to issue bargaining orders to remedy refusals to bargain which are illegal under §8(a)(5) of the Act, that an employer violates §8(a)(5) when he refuses recognition to a union which has achieved majority status through valid authorization cards unless he has a "good faith doubt" about that majority, and that the commission of independent violations of §§8(a)(1) and (3) makes out a *prima facie* case of an illegal bad faith refusal to bargain rather than a lawful good faith refusal. As its brief demonstrates at length, this argument in favor of the bargaining orders issued here is entirely rational, and in complete accord with the plan of the Act. Nevertheless, it is our view that while the Board's position is sound, it is needlessly complex and difficult to apply. We submit that where, as here, an employer commits a number of §§8(a)(1) and (3) violations during an organizing campaign, there is no need to deal with the question of whether his earlier refusal to bargain violated §8(a)(5), for a bargaining order is the necessary and proper remedy for his acts of restraint and

coercion. The questions relating to the substantive nature of the obligation to bargain imposed by §8(a)(5); the relationship between that obligation and the election process, *compare, Snow & Sons,* 134 NLRB 709 *enforced,* 308 F.2d 687 (C.A. 9th Cir., 1962) *with, Aaron Bros.,* 158 NLRB 1077 (1966); and the comparison between the reliability of authorization cards and a representation election, *see,* Spindel, *Union Authorization Cards: A Reliable Basis for an NLRB Order To Bargain,* 47 Tex. L. Rev. 87 (1968) are all interesting ones but they should not be thought to loom large in the administration of the Act:

> "In fiscal 1967, the Board conducted 8,116 elections, as opposed to 157 cases in which union majorities were established by cards apart from elections (approximately 1.9 percent of the elections conducted). Of these 157 cases, all but 16 involved situations in which a fair election was made impossible or was invalidated by employer unfair labor practices." Supplemental Memorandum of the National Labor Relations Board to the Subcommittee on the Separation of Powers, Committee on the Judiciary, United States Senate, 69 LRR 157, 165 (1968).

These figures make it plain that the debate over the employers right to an election is largely academic, and that the question of the comparative merits of authorization cards and a Board conducted election is basically metaphysical. The critical cases that come before the Board are those, such as the instant ones, in which the employer has violated §§8(a)(1) & (3) of the Act in a manner which makes it fair to say that the unfair labor practices were calculated to frustrate unionization. For unless adequate remedies which may be simply and speedily administered are devised to put aright matters that the unfair labor practices set awry it must be expected that the functioning of the entire representation election system will be placed in jeopardy. It is for this reason that we eschew this opportunity to speak to the full range of issues that might be said to be raised here and concentrate instead on the basic question of the proper remedy for substantial violations of the Act during organizing campaigns.

1. The Fourth Circuit has taken the basic position that the Taft-Hartley amendments to the Act provide an employer with an absolute indefeasible right to a Board certification as the condition precedent to bargaining, *see, National Labor Relations Board* v. *S. S. Logan Packing Co.*, 386 F.2d 562 (C.A. 4th Cir., 1967); *see also, Comment: Union Authorization Cards*, 75 Yale L. J. 805 (1965). If correct, this position would of course be fatal to both our argument and the Board's But the Fourth Circuit position is clearly wrong. Its major flaw is that it is directly contrary to the post-Taft-Hartley decision of this Court in *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U. S. 62, 71-72, 74-75 (1956):

> "Section 8(a)(5) declares it to be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*' (Emphasis supplied.) Section 9(a), which deals expressly with employee representation, says nothing as to how the employee's representative shall be chosen. See Lebanon Steel Foundry v. N.L.R.B. 76 App DC 100, 103, 130 F2d 404, 407. It does not make it a condition that the representative shall be certified by the Board."
>
> • • • •
>
> "Section 7 recognizes the right of the instant employees 'to bargain collectively through representatives of their own choosing' and leaves open the manner of choosing such representatives when certification does not apply. The employees have exercised that right through the action of substantially more than a majority of them authorizing the instant union to represent them . . . and by virtue of the conceded majority designation of the union, the employer is obligated to recognize the designated union."

Normally we would be content to rest on *stare decisis* alone but since the legislative basis of *Arkansas Oak Flooring* has seemingly escaped the Fourth Circuit, and some commentators, and since this point is at the heart of this controversy, we set out the essence of the legislative history. Section 8(5) of the Wagner Act made it an unfair labor practice for an employer "to refuse to bargain collectively

with the representatives of his employees, subject to the provisions of Section 9(a)." The relevant provision of §9(a) was that the representative shall be "designated or selected for the purposes of collective bargaining by the majority of the employees in a union appropriate for such purposes . . ." Thus, while §9(c) of the Act provided for Board certification of the results of "a secret ballot of employees" or "any other suitable method to ascertain [the employees'] representatives," no particular form of designation or selection was prescribed as mandatory by the Wagner Act.

In *Cudahy Packing Co.*, 13 NLRB 256 (1939) the Board ruled that unless both parties agreed to some other method, certifications would issue only after a secret ballot election. However, after *Cudahy*, the Board with court approval, *see, Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702 (1944), continued to issue bargaining orders, as opposed to certifications, where there had been no election. For, before the 1947 amendments to the Act, with the relevant statutory language identical to that which now obtains, it was settled "that an employer may not require certification as condition precedent to bargaining . . ." *L. B. Hartz*, 71 NLRB 848, 871 (1946). "The contention that bargaining was not mandatory until the Board has accredited [the union] as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support." *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F.2d 756, 757 (C.A. 2nd Cir., 1940). In this state of the law, when Congress in the 1947 amendments carried over the relevant statutory language without change, "it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts." *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 366 (1951). But we need not rest with inference from silence, for Congress in 1947 rejected a proposal the precise consequence of which would have been to make bargaining obligatory only in the event of a union's certification as representative.

The House bill, as reported and passed, provided that it was an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees currently recognized by the employer or certified as such under Section 9." 1 Legislative History of the Labor Management Relations Act, 1947 (G.P.O. 1948) 51, 178. Under this provision recognition of an uncertified union was optional with the employer. H. Rep. No. 245, 80th Cong., 1st Sess. 30, in 1 Leg. Hist. 321. But the Senate bill, as reported and passed, contained the preamendment language unchanged. 1 Leg. Hist. 111, 239. The Senate version prevailed in conference. The House Conference Report stated that the conference agreement follows the provisions "of existing law." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41, in 1 Leg. Hist. 545. Senator Taft reported to the Senate that the "Senate conference refused to yield to the House with respect to the provisions contained in the House bill amending the provisions in . . . subsection 8(5) relating to collective bargaining. This means that the five unfair labor practices contained in the present National Labor Relations Act remain unchanged [except for a presently immaterial difference]." 93 Cong. Rec. 6443, in 2 Leg. Hist. 1539. It is true, of course, that while the proposed House amendment to §8(5) failed, §9(c) was amended to restrict the Board to secret ballot elections in issuing certificates. But in light of the *Cudahy* decision this amendment did little more than bring the Act into conformity with the Board's self-imposed limitations. Certainly in light of the well-settled law that certification was not the sole route to recognition and the defeat of the proposed amendment to §8(a)(5), this change in the law does not support the position of the Fourth Circuit.

And so, now as before the amendments, "the right of employees to bargain collectively through an exclusive bargaining representative, is not conditioned upon an antecedent certification by the Board . . ." *National Labor Relations Board* v. *Kobritz*, 193 F.2d 8, 14 (C.A. 1st Cir., 1951). The short of it is that methods other than elections including "cards have been used under the Act for thirty years;

[this] Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley bill to amend §8(a)(5) was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drumbeating should be permitted to overcome, without legislation, this history." Lesnick, *Establishment of Bargaining Rights Without an Election,* 65 Mich. L. Rev. 857, 861-862 (1967) (footnotes omitted).

2. The foregoing demonstrates that the Board has the authority to issue bargaining orders and that there is no absolute employer right to an election. We shall now show that the unfair labor practices here provide a proper basis for such an order.

Before turning to a consideration of the effect of bargaining orders on employees, employers, and unions, there are two preliminary points that should be noted. First, the unfair labor practices committed in the instant cases were proscribed by federal law over thirty years ago. Yet, as exemplified by these proceedings, "although the act is now reasonably mature, violations of its clearest and most fundamental provisions continue to mount" and the result is that "there is little doubt that in many plants an elemental fear of reprisal plays the major role in discouraging organizational activity among employees." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act,* 78 Harv. L. Rev. 38, 60 (1964). As the Chairman of the Board recently stated:

> "Violations of Sections 8(a)(3) and 8(b)(2) are, despite 33 years of industrial experience with the law, still the largest single source of all unfair labor practices, and over the years the percentage of such cases has not changed radically. In Fiscal Year 1967, for example, two out of three charges filed against employers—totaling 7,463 charges—alleged discriminatory discharge in violation of the Act. . . ." McCulloch, *New Remedies Under the National Labor Relations Act,* 68 LRR 60, 63 (1968); *see also,* Bok, *supra,* 78 Harv. L. Rev. at 60 n. 50, 124, n. 236; Report of the Special Subcommittee on Labor, Committee on Educa-

tion and Labor, House of Representatives, 90th Cong., 2nd Sess., *National Labor Relations Act Remedies: The Unfulfilled Promise*, 1-5, 30 (1968) (Thompson Report).

The reasons for the continuing prevalence of these hard-core violations are threefold. As first recognized and stated by this Court in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209 (1921) and as restated in *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, 33 (1937), organization has an inherent appeal for working men and women:

> "Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer."

Employers with an anti-union animus have also recognized that the "necessities of the situation" fuel organization drives and that the building of a successful union works a peaceful revolution which overturns the status quo and threatens their power and perquisites. An employer with 100 employees working eight hours a day, who estimates that the union will cost him 10¢ per hour per man in added wages, fringes, and bargaining costs, knows that every year he remains non-union means a savings of $20,000. He also realizes that, in addition to the threat to his pocketbook, the union poses a threat to the status he derives as sole master of the work place. Recognizing the size of the stakes and the force of the drive to organize among employees who are informed about organization, and who have not been coerced, an employer may well be tempted to resort to unlawful measures to alleviate his concern that the union would otherwise prevail. For employers recognize that if

they "can frustrate a union drive by firing several key union supporters, they may gain much more by staving off the union for a year or more than they will lose by eventually having to reinstate the employees with backpay." Bok, *supra*, 78 Harv. L. Rev. at 59, n. 46; 127.

This temptation to violate the Act is enhanced by the fact that the minimum benefit which may be expected in any event is delay. An employer who litigates an unfair labor practice charge through the Courts of Appeal is assured approximately two years before any remedy at all is imposed, Thompson Report 39-40. During an organizing campaign as during a strike, *Construction Workers* v. *Curry*, 371 U.S. 542, 550 (1963); *Liner* v. *Jafco*, 375 U.S. 301 (1964), time is one-dimensional—delay inevitably works for the employer. Employees seek representation in order to deal with immediate practical problems rather than to fulfill a timeless patonic ideal. If the desire for immediate representation is frustrated by delays caused by the employer's unfair labor practices, the union's strength tends to be dissipated even though the end result of the litigation is in its favor. For there are no means at its disposal to maintain and strengthen the employees' desire for unionization. In light of this fact, it is plain that effective remedies are of the essence. If the ultimate order does nothing more than revivify the campaign years after it was thwarted, there is every reason to violate the law and none but scruple to obey it. Once this is recognized, it is plain that an order to cease and desist is obviously insufficient in itself. It is an invitation to commit unfair labor practices to secure delay safe in the knowledge that the only cost of doing so will be an order not to repeat the violation.[1] Nor are orders to reinstate discriminatees with back pay sufficient in and of themselves where there are §8(a)(3) violations. Such orders do not even serve to make the discriminatee himself whole and in only 10% of the cases is there successful

[1] The Board's recent attempts to insure that the employees are effectively informed of the contents of these orders, *J. P. Stevens & Co.*, 157 NLRB 869 (1966), while course, a step forward does not tend to cure this inherent weakness.

permanent reinstatement, Thompson Report 35-38. And, of course, reinstatement two years after the fact is hardly likely to reassure the employees who would otherwise be disposed to support the union's on-going organizing campaign.[2] Nor is a Board-ordered rerun election the answer. Delay, the difficulty of expunging the vivid demonstration of the employer's economic power brought home to the employees by the prior illegal conduct, and the relative impotence of the cease and desist and reinstatement remedies continue to produce a situation in which it is likely that the employer will gain his central object—permanent defeat of the union. "It is important to bear in mind that an election is a far better cure for union than for employer misdeeds. And the fact remains that, in a regime where there has been just concern over the adequacy of the remedial scheme, the simple notion of doing over again what has worked badly once is hardly a reassuring method of undoing the effects of the abortive attempt." Lesnick, *supra*, 65 Mich. L. Rev. at 862 (footnotes omitted). Given the manifest inadequacy of the other remedies available, the *prima facie* case for the use of the remedial bargaining order is a strong one.

Second, as Prof. Lesnick has noted, there has of late been a good deal of "inappropriate romanticizing about employee free choice and its relevance to what actually goes on when employees are asked to vote for or against unionization . . . employees do not make decisions about unionzation for the same reasons or in the same context that they join veterans' organizations, political parties, churches or bowling leagues." Lesnick, *supra*, 65 Mich. L. Rev. at 865, 866-867. And the most vociferous romanticizers are employers faced with a bargaining order because they have demonstrated their lack of regard for employee free choice by resorting to restraint, coercion and discriminatory discharges. The fact of the matter is that our "scheme of

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[2] The foregoing disregards the possibility of enhancing this remedy through the use of the Section 10(j) injunctions since the latest figures available indicate that the Board seeks approximately 10 such injunctions a year, 32 Ann. Rep. of the NLRB.

collective bargaining is built on the foundation of economic power" and "the lawful coercion of collective bargaining must affect the intended free choice of the votes in a Labor Board election;" thus since "free choice connotes one protected from coercive measures, not merely one informed of them . . . it makes a mockery of free choice to invoke it as the interest which clamors for expression via an employer anti-union campaign," *Ibid.*

The potential for "lawful coercion" by employers is virtually unlimited. The very fact that the man who has sole control of an enterprise and consequently of the working lives of his auditors can state his opposition to unionism is bound to have some coercive effect, particularly in an area in which unions have little overall strength, *see* Karsh, Diary of a Strike, 114-115 (1958). Long before Marshall McLuhan, unions were well aware that the "medium is the message." This is not to imply that the content of lawful coercion in the message is insubstantial; the opposite is the case. Employers have the right to challenge a certification by refusing to bargain, thereby delaying matters for years after they have lost an election *cf., Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146 (1941); to bargain hard, concede little or nothing and refuse to come to terms when the day of reckoning finally comes as long as they do so in good faith, *National Labor Relations Board* v. *American National Insurance Co.,* 343 U.S. 395 (1952); and to impose their views unilaterally after such bargaining, *cf., Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203 (1964). In addition, they have a variety of powerful economic weapons at their control: they may replace economic strikers permanently, *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938); they may lockout in support of legitimate bargaining demands, *American Ship Building Co.* v. *National Labor Relations Board,* 380 U.S. 300 (1965); and they may close down their operations for antiunion reasons as long as the purpose is not to chill unionization in other plants, *Textile Workers Union* v. *Darlington Mfg. Co.,* 380 U.S. 263 (1965).

Through a process of trial and error, and under the tutelage of trained advisers, highly effective methods of getting these points across have been developed.

In addition it is most certainly incorrect to view the prohibitions of §8(a) as an impentrable wall; it is closer to the truth to liken them to a sieve. Particularly in unorganized areas, the employees may be faced with concentrated opposition not only by their employer but also by the entire local power structure whose activities are beyond the Board's remedial sanctions unless they are acting as the employer's agents, Thompson Report 14-29. The use of the veiled threat and the predictive innuendo of harm by third persons has been raised to the status of an art form. Employers retain the right to discharge for good reasons, bad reasons, or no reason at all. Thus even in cases where a disinterested person's suspicions are aroused, proving a violation is no simple matter. Finally, even where the violation is clear, there are often practical difficulties which preclude effective enforcement. It is now settled that an employer who tenders benefits to his employees in order to influence their choice in a representation election violates the Act, *National Labor Relations Board* v. *Exchange Parts Corp.*, 375 U.S. 405 (1964). Yet unions are reluctant to file a charge, since the employees may feel that this action shows a certain disregard for their interests, *cf.* Bok, *supra*, 78 Harv. L. Rev. at 116. Similarly, this Court went to some pains to take steps to prevent the abuse of its ruling in the *Darlington* case, 380 U.S. at 274 n. 20. But a union campaigning for recognition is hardly in a position to demand that an employer who raises the subject of plant closure demonstrate that he seriously intends to carry out his threat.

In sum, because Congress has sought to pursue and harmonize a number of competing, and to some extent conflicting, goals the representation election process cannot be said to be a means for insuring the expression of pure free choice. Certainly there can be no doubt that an election marred by unfair labor practices does not express the choice of the employees. Thus the argument between those

who oppose the remedial bargaining order and those who favor it is not between those who favor associational self-determination and those who are indifferent to it. Rather, the substance of the dispute is whether the consequences of the coercive power of employers is to be maximized to the ultimate point in the name of employee free choice, or whether the coercive pressure of unfair labor practices is to be limited by invoking a remedy designed to thwart such conduct, in a manner as consistent with employee free choice as is possible under the circumstances.

3. When an employer commits violations of §§8(a)(1) & (3) during an organizing campaign, the union and its employee supporters have the right to expect an adequate remedy. And as we have shown, pp. 10-11, *supra*, the bargaining order meets this just expectation. Indeed it is the only presently available remedy which does so fully, and which tends to deprive the employer who has interfered with an organizing campaign of the fruits of his wrongdoing. As the instant cases demonstrate, the importance of an adequate remedy has too often been disregarded. Yet today, as prior to 1947, an integral element of our labor policy is to "encourag[e] the practice and procedure of collective bargaining . . . ," §1 of the Act. Only the trade union movement has the incentive, the resources, and the manpower to aid employees who wish to avail themselves of this basic right. These resources are not unlimited, however; and when an employer succeeds in frustrating an organizing campaign, thereby freeing himself from the obligation to bargain or requiring elaborate efforts at reorganization, there is a general effect on the advancement of collective bargaining. By increasing the costs of organizing, such illegal anti-union activity decreases the union movement's ability and incentive to take steps to effectuate this federal policy. Moreover successful defiance of the Act places at a disadvantage those employers who abide by its provisions. In a competitive economic system, the consequence will naturally tend to be an increase in the number of situations in which there is a lawless reaction

to organizing campaigns, Thompson Report 30. To paraphrase Gresham's law, lawlessness will tend to drive out lawfulness.

It is, of course, well settled that even one who violates the Act may insist that the Board's order be "remedial not punitive" *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 235 (1938), and that it be "a reasonable attempt to put aright matters the unfair labor practice set awry," *Local 60 Carpenters* v. *National Labor Relations Board,* 365 U.S. 651, 658 (1961) (Harlan J., concurring). The remedial bargaining order is clearly well within those confines established by this Court. For its effect is entirely prospective, and the total commitment required of the wrongdoer is that he bargain in good faith, *cf, ILGWU* v. *National Labor Relations Board (Bernhard-Altmann),* 366 U.S. 731 (1961). And because of the substantive nature of this duty, the practical effect of the order on an employer is ultimately a matter of the economic strength of the parties rather than one of governmental dictation, *American National Insurance, supra,* 343 U.S. 395.

In light of the insubstantiality of the employer's interest, it is not surprising that those opposed to the bargaining remedy have laid great stress on its supposedly deleterious effect on employees who have not supported the union or whose support has wavered after the commission of the employers unfair labor practices. It is most unlikely that these deleterious effects pose a serious practical problem. If no contract is reached as a result of the bargaining order, these employees are essentially unaffected by its terms. For the union has no power at its command to force them into membership, or to force them to support its demands by striking. And it is chimerical to suppose that an employer who has actively fought the union will sign a contract which disadvantages his employee-supporters and establishes the union in the plant. It is equally far-fetched to assume that a union which has fought for the right to represent employees would destroy its support by signing such a contract. Indeed, to say that collective bargaining

is a threat to the well-being of employees is to disregard one of the basic presuppositions of the Act—that there is an "inequality of bargaining power" between unorganized employees and their employers, §1 of the Act.

The fear that the bargaining order will have a serious effect on employee free choice is equally spurious. This is perfectly plain if a contract is not negotiated with great promptness. For the bargaining order requires only a limited experiment in collective negotiation. After bargaining is given a reasonable period in which to work, the employees may exercise their right under §9(C)(1)(A)(ii) to file a decertification petition *see The Daily Press Inc.*, 112 NLRB 1434 (1955); *cf.*; *National Labor Relations Board* v. *Universal Gear*, 394 F.2d 396 (C.A. 6th Cir., 1968). On the other hand, if a contract is reached, it is strong evidence that the union has succeeded in mobilizing majority support. For in cases where the remedial bargaining order is utilized, the employer will have made his opposition to unionization crystal clear, and §8(d) of the Act leaves no doubt that he has no legal obligation to make concession to the union. If a bargain is struck it is perfectly rational to conclude that it was the practical reality of the employees' determination to fight for, and secure the contract that was conducive to agreement. Moreover, even where a contract is reached it is not beyond the Board's powers, in appropriate circumstances, to allow for a further test of the employees' sentiments, *cf.*, *Garwin Corp.*, 153 NLRB 664, 667 *modified*, 374 F.2d 295 (C.A.D.C. Cir., 1967) *certiorari denied* 387 U.S. 942.

In sum, we suggest that the bargaining order is consistent with the manifold purposes and policies of the Act after the entire range of interests at stake has been considered. While it is not apparent from the decisions of the court below, this conclusion is by no means revolutionary; for this Court reached it twenty-five years ago in its unanimous opinion in *Franks Bros., supra.*, 321 U.S. at 705:

> "The Board might well think that, were it not to adopt [the bargaining order] remedy, but instead order elections upon every claim that a shift in union mem-

bership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligations . . . That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement. See 29 USCA §160(a) and (c), 9 FCA title 29, §160(a) and (c).

"Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop."

4. We submit that the following conclusions emerge from the foregoing. First, there are situations, of which the instant cases are examples, in which the employer's actions may be fairly said to demonstrate a purpose or intent to defeat an organizing campaign by restraining and coercing his employees through violations of §§8(a)(1) & (3), rather than by employing the considerable lawful weapons at his command, *see* pp. 11-13 *supra*. These situations do not include those in which there is a single minor violation which may be considered an inadvertent excess in a generally lawful anti-union campaign, *see, Hammond & Irving, Inc.*, 154 NLRB 1071 (1965). But where as in each of these cases there has been a pattern of interference by threats, promises of benefits, or even discriminatory discharges, the conclusion that such violations are calculated to frustrate unionization is inescapable.

Second, both sides recognize that during an organizing campaign the ultimate object of the exercise is collective bargaining. When the employer perpetrates deliberate violations of the Act, the practical question is whether the remedy will include a bargaining order. If so, the proceeding to vindicate the rights and privileges safeguarded by §8(a) is meaningful; if not, it is basically a futile exercise

in fact-finding which allows the wrongdoer to retain the most important fruit of his wrongdoing—the frustration of an organizing effort that might otherwise have succeeded.

Third, the issuance of a bargaining order to correct calculated §§8(a)(1) & (3) violations "can fairly be said to effectuate the policies of the Act." *Virginia Electric Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 540 (1944). Normally employees decide whether or not to organize without having the opportunity to see their prospective bargaining representative in action in the specific context in which they are interested. The employer's performance is the only known quantity, and the union must overcome the handicap of being an outsider. In order to compensate for the deleterious effect of the delay caused by the employer's violations and to "encourage the practice and procedure of collective bargaining," it is proper to decree a limited experiment in bargaining. And such a decree, far from being an impediment to employee free choice, actually serves to further that interest. For the employees remain free to withhold their support from the union and to decertify it after a reasonable period of time *see* p. 16 *supra*. If, on the other hand, no bargaining order is issued, the employees in question will at best make a post-NLRB order decision on organization with no more personal experience as to the nature of the bargaining process than that with which they began. They will, however, have learned from personal experience that the employer has the power to delay bargaining indefinitely by violating the law and that the Board does not have the power to bring him to book for his wrongs. And this lesson will in all likelihood serve to demoralize the union and its supporters.

Thus the bargaining order serves the interest in employee free choice in two ways. It affords an opportunity for employees to make their final decision on unionization after having tested their preconceptions against facts. Moreover "in the last analysis those who would resist this remedy in the name of the employees must answer for the employees whose free choice is currently impaired by the lack of adequate remedies. As matters now stand, there are many

workers whose apprehensions cannot be allayed by notices posted in the plant or by the possibility of reinstatement and backpay at some future date." Bok, *supra;* 78 Harv. L. Rev. at 135-136. In short, it is only by seriously overestimating the bite of a bargaining order and by minimizing the need for this remedy that the court below was able to reach the conclusion it did.

Fourth, if the bargaining order is employed as a remedy for willful attempts to interfere with organizing campaigns illegally, the only prerequisite to the issuance of the order, other than the proof of the §§8(a)(1) & (3) violations, should be a showing from which the Board could rationally conclude that the issuance of the order would not be a futile act. *Cf* Bok., *supra.*, 78 Harv. L. Rev. at 138. There should be no need to prove an antecedent majority. As *Franks Bros.* illustrates there are situations in which an employer may be ordered to bargain even though the union cannot demonstrate a majority. For "in an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause." *International Salt Co.* v. *United States,* 332 U.S. 392, 401 (1947). By the same token, where an employer has frustrated an organizing campaign through substantial §§8(a)(1) & (3) violations, the order must "effectively pry open to [bargaining] a [plant] that has been closed by [the employer's] illegal restraints." If proof of majority is required, employers will be tempted to commit their unfair labor practices early enough in the game to insure that the union never approaches majority status, a technique already extensively employed by the J. P. Stevens Co., *see, J. P. Stevens & Co.* v. *National Labor Relations Board,* ..... F.2d ....., 70 LRRM 2104 (C.A. 4th Cir., 1969); Thompson Report 30-33. Moreover, as the record in the instant cases demonstrates, there are substantial administrative burdens incidental to the determination

of whether the union achieved a majority. These burdens add to the already critical problem of delay and should be removed.

Alternatively if some proof of majority support is to be required it should suffice for the union to show that half of the employees had enough interest in exploring the question of representation either to support a petition for an election, or to sign authorization or membership cards. Focusing on the question of whether the union had an antecedent majority, some courts have insisted that any mention of an election either on an authorization card, or by a union solicitor, opens the union's showing of support to impeachment based on the signing employees' later testimony, e.g. *National Labor Relations Board* v. *Petersen Bros.*, 342 F.2d 221 (C.A. 5th Cir., 1965); *National Labor Relations Board* v. *Nichols Co.*, 380 F.2d 438 (C.A. 2nd Cir., 1967). Whatever validity this view may have where there are no violations of §§8(a)(1) & (3) in the picture, *but see, Cumberland Shoe Corp.*, 144 NLRB 1268 *enforced*, 351 F.2d 917 (C.A. 6th Cir., 1965), it is plain that it has no place under the test we propose to cover cases in which those unfair labor practices are committed. As we have stressed, in such cases the order is in essence predicated on the existence of the violations rather than on the proof of majority; thus evidence tending to show that the employees were willing to give support to a move to reconsider the status quo should be deemed acceptable. For it is the employers wrongdoing which has precluded a more exact test.

Moreover, it seems plain that where the employer has resorted to restraint and coercion, every consideration of sound administration supports the rule that "an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought the card meant, cannot negate the overt action of having signed a card designating a union as bargaining agent" *Joy Silk Mills* v. *National Labor Relations Board*, 185 F.2d 732, 743 (C.A.D.C.Cir., 1950). It is inherently unfair to require an employee, in effect, openly to reaffirm his interest in organization after his employer has made it clear that he opposes unionization

and that he is prepared to violate the law if his employees do not bow to his preference. Evidence given long after the fact, and under such circumstances, is simply not probative enough to accept. The simplification of the proof required as a precondition to the issuance of a remedial bargaining order just proposed accords with settled doctrine: "The most elementary conception of justice and public policy require that a wrongdoer shall bear the risk of the uncertainty which his own wrongdoing has created" *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 265 (1946).

CONCLUSION

For the above-stated reasons, as well as those set out by the Petitioners, the decisions of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

GISSEL PACKING COMPANY, INC., ET AL.

and

No. 691

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner

v.

GISSEL PACKING CO., INC.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Brief For Gissel Packing Co., Inc.

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v.

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On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Brief For Gissel Packing Co., Inc.

STATEMENT OF THE CASE

On January 22, 1965, petitioner union notified Gissel Packing Company that the union represented a majority of "eligible employees". The letter did not request bargaining, but indicated that it confirmed a prior telephone conversation of that same day in which recognition and bargaining were requested. (G. C. Exh. 2, R13, 232). The company promptly re-

plied to this letter stating its refusal to recognize the union because the company felt a majority of employees were not represented. This letter mentioned an earlier election conducted by the National Labor Relations Board in which the union also contended that it represented a majority, but subsequently lost the election. The letter also mentioned that the union had made no current attempt to secure an election under fair and honest circumstances. (G. C. Exh. 3, R14, 233-234). On February 11, 1965, an unfair labor practice charge alleging refusal to bargain was filed by the union, beginning proceedings leading to the present cause.

Within the same general span of time, this same union was also involved in organization campaigns with other employers, leading to actions by the National Labor Relations Board so close in activity, charge, testimony and finding as to strongly suggest more than chance. The attempt at organization of Gissel Packing Company was but one minor phase of an extensive campaign aimed at several victualers in the general area. It would be beyond the scope of imagination that the employees of these scattered firms all and at the same time approached the union. As illustrations, see the following cases, involving this same union in the same span of time: *NLRB v. S. S. Logan Packing Company,* 4th Cir., 1967, 386 F.2d 562; *NLRB v. Sehon Stevenson & Co.,* 4th Cir., 1967, 386 F.2d 551; and the *Davis Wholesale Co.* cases, 165 NLRB No. 39, 165 NLRB No. 40, 166 NLRB No. 119, now pending before the United States Court of Appeals for the District of Columbia

Circuit as Cases Nos. 21,155, 21,244, 21,787, 21,788 and 21, 789.

SUMMARY OF ARGUMENT

The actions of the National Labor Relations Board in accepting authorization cards as presumptive or conclusive proof of a labor organization's majority status, and the concomitant duty of an employer to bargain based thereon, are contrary to the intent, purpose and language of the Taft-Hartley amendments to the National Labor Relations Act.

Although the Board has generally recognized as theory that a good faith doubt on the part of an employer is an adequate defense to a refusal to bargain charge, in practice it has improperly based refusal to bargain findings on unconnected findings that violations of sections 8(a)(1) and (3) of the Act negated the employer's good faith doubt.

This general scheme of activity has resulted in the mentioned treatment of such cards as presumptive, despite the widely known and accepted unreliability of authorization cards in the determination of an employee's actual desire.

In so doing, the employee has been caused by the Board to become a forgotten man and the concept of labor-management relations has been characterized for all realistic purposes by the Board as a field of battle where the only interested parties are the unions and employers.

The instant case is a clear example of the Board's activities and bent. There is an open and obvious predilection by the Board to foster recognition of unions without regard to the rights of employees to express their wishes. The Trial Examiner's findings on which the order is based reflect that the burden of proof was not sustained by the Board's counsel, that the burden was in fact shifted to the employer, and that the entire hearing process was so lacking in impartiality as to render valueless the minimum requirements demanded by the Administrative Procedures Act.

The union here involved was engaged in organizational activities in several businesses in the area, and had attempted to organize in years past. The union's predilection for overstatement was known to respondent in fact as well as reputation, since the same union had previously claimed majorities in similar businesses and to this same respondent, but subsequent elections belied the claim of majority.

This affirmative basis for the employer's doubt was given scant consideration in favor of conjecture and speculation by the trier without reasonable basis on the record taken as a whole.

The action of the United States Court of Appeals for the Fourth Circuit on the issues here involved was proper and should be affirmed.

ARGUMENT

I.

An Employer is not Obligated to Bargain with the Union Solely on the Basis of Authorization Cards Allegedly Signed by a Majority of Employees

It should be noted at the outset that the National Labor Relations Board and the petitioning union rely in large part upon a prior decision of this Court, *United Mine Workers of America v. Arkansas Oak Flooring Company,* 351 U. S. 62, 76 S. Ct. 559, 100 L.Ed. 941 (1956). In that case, however, this Court stated, at Footnote 2, 351 U. S. 68:

> . . . Accordingly, we do not now consider the questions that would have been presented if the union or the pickets had represented less than a majority of the eligible employees, *or if there had been a bona fide dispute as to the existence of authorization from a majority of the eligible employees.* [Emphasis added].

It appears clear that in the approximately 34 years since passage of the Wagner Act, there has been a growing tendency on the part of the National Labor Relations Board to foster recognition of unions. In recent years, the Board has diverged from its previous position of generally holding elections when requested, to the present situation wherein the use of authoriaztion cards has come, by and large, to substitute for the elective process unless two unions are competing for recognition.

In 1935, an employer was first required "to bargain collectively with the representatives of his employees." National Labor Relations Act, Section 8(a)(5), 49 Stat. 452 (1935). There was a requirement that the representative be designated or selected for the purposes of collective bargaining by a majority of the employees, but there was no specific manner in which determination was to be made as to whether or not a majority of employees wanted such representation. The Wagner Act allowed the NLRB to "take a secret ballot of employees, or utilize any other suitable method" to ascertain such representatives. National Labor Relations Act, Section 9(c), 49 Stat. 453 (1935).

In 1947, the Taft-Hartley Act revisions to the NLRA were passed. The Taft-Hartley Act, as passed, did not amend Section 8(a)(5) and Section 9(a) was largely unchanged. Section 9(c), however, was completely revised to allow, for the first time, a petition by an employer when only one union was requesting representation, and to provide if "a question of representation exists, it [the Board] shall direct an election by secret ballot and shall certify the results thereof." Thus, the Wagner Act language allowing other forms of determination was stricken. This change is discussed in *NLRB v. S. S. Logan Packing Company,* 4th Cir., 1967, 386 F. 2d 562. See also Comment, *Union Authorization Cards,* 75 YALE L. J. 805, 820 (1966).

The proponents for the determinative use of authorization cards, as stated at great length in

Petitioners' briefs in this matter, attempt to rely on the fact that there was no change in Sections 8(a)(5) or 9(a), under Taft-Hartley.

It should be recognized, however, that the original House version (Hartley) of the bill, as reported by the House Committee on Education and Labor, would have amended Section 8(a)(5) to read that it would be an unfair labor practice for an employer "... to refuse to bargain collectively with the representative of his employees currently recognized by the employer or certified as such under Section 9." H. R. 3020, 80th Cong., 1st Sess. 21 (1947). After passage of the Senate version, the usual conference committee was appointed to reconcile differences. In that conference, the Section 8(a)(5) House amendment was dropped, with the later erroneous indication in the conference report that neither the House bill nor the Senate amendment had changed any provisions of Section 8(a)(5). H. R. Conf. Rep. No. 510, 80th Congress, 1st Sess. 41 (1947).

This erroneous presentation has been taken by at least one commentator to indicate that the conference committee felt there was no necessity for a change in 8(a)(5) in view of the later changes to Section 9(c). Comment, *Union Authorization Cards,* 75 YALE L. J. 805, 820 note 103 (1966). Further, the statements made on the floor of the Senate, in the version passed over presidential veto, clearly indicatd that an employer had a *right* to election. As stated by Senator Taft, reported 93 Cong. Rec. 3954 (daily ed., April 23, 1947):

> Today an employer is faced with this situation. A man comes in to his office and says, "I represent your employees. Sign this agreement, or we strike tomorrow." . . . The Bill gives him a right to go to the Board under those circumstances, and say, "I want an election. I want to know who is the bargaining agent for my employees." Certainly I do not think anyone could question the fairness of such a proposal.

Senator Ball further indicated that the amendment would give the employer "the right to make sure, by a democratic election, that a union really represents his employees before he negotiates a contract with it." 93 Cong. Rec. A2377 (daily ed., May 13, 1947).

The NLRB, in its 1948 report, recognized that a limitation had been placed upon it, noting:

> "Section 9(c) of the Act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed — but rarely exercised — to utilize other 'suitable means' of ascertaining representatives." 13 NLRB Ann. Rep. 32 (1948).

As a reading of Section 9(c) will clearly establish, there is no discretion allowed the Board as to the method of ascertaining a majority or as to requiring such determination if any question of representation exists. The subsection is phrased with the mandatory "shall" rather than the permissive "may".

The Board has chosen to avoid the mandatory

provisions of Section 9(c), by making a subjective determination as to good faith on the part of the employer and, if the employer fails to pass this subjective determination, the Board finds that no actual question of representation arises and an election is therefore not to be held. Cf. *Aiello Dairy Farms,* 110 NLRB 1365, 1368 (1954).

In more recent years, the pattern set forth in this particular case has become more apparent. A union presents authorization cards, the employer declines to bargain, and charges of 8(a)(1), (3) and (5) violations are then filed. A blatant example of the Board's reasoning is shown in the *Wasau Steel Corp.,* 160 NLRB 635 (1966), *enforced,* 377 F.2d 369 (7th Cir., 1967), where the Board ignored the entire process and stated that where a company had foreclosed by any illegal conduct the customary means of resolving a majority, an election, proof of majority status might be made by cards. The Court went on to say that a bargaining order would be appropriate to restore the status, even assuming *arguendo* that the record would *not* warrant a finding of unlawful refusal to bargain under Section 8(a)(5) of the Act.

II.

Authorization Cards Are An Unreliable Indicator of An Employee's Actual Preference as to Representation by A Labor Organization

It is one of the oddities of these times that, in the present posture of labor-management relations,

the general assumption by labor advocates is that the interests of labor and management are necessarily in opposition, with a battle line drawn between "organized labor" on the one hand and management on the other.

This view, apparently followed by the NLRB, is in direct contravention of the intent of labor legislation. The rights given are not phrased to apply to "organized labor", or labor unions. Instead, the rights to be considered are those of the individual employee. As stated in Section 7 of the NLRA:

> *Employees* shall have the right to self-organization, to form, join or assist labor organizations . . . [Emphasis added].

In practice, the individual employee has become the forgotten man. The actions and decisions of the NLRB in large part involve the employee only as a prize with rules regulating the manner of his capture by unions.

The situation present in this cause strongly reflects this treatment. The NLRB has an elective process with which to determine the actual and uncoerced desire of an employee under safeguards far stronger and more protective than are those under which this nation does now, and has from inception, chosen those who are responsible for the actions and continuing existence of the nation.

The Board chooses not to believe its own statements as to elections. It says, at page 65 of the Com-

merce Clearing House reproduction, *Thirty-Second Annual Report of the National Labor Relations Board* (1968):

> Board elections are conducted in accordance with strict standards designed to assure that the participating employees have an opportunity to determine, and to register a free and untrammeled choice in the selection of, a bargaining representative.

It is apparent that the use of authorization cards to effect recognition has become more popular with unions unwilling to risk a fair and honest selection through a supervised election. In recent years, cognizance of the abuses attendant with the securing of such cards on an individual basis has become recognized by some authorities, and by some courts which decline to act as rubber-stamp enforcers of Board decisions.

The reason for union reliance on any method of gaining recognition other than through fair choice is apparent when it is found that in fiscal year 1967, the latest for which figures are available, 7,882 elections were conducted by the Board, and four out of ten were lost by unions. Of the 7,882, 4,722, or 60%, were won by unions, *including* elections where the essential choice was between rival unions. Chart 12, *Thirty-second Annual Report of the National Labor Relations Board* (1968).

Doubt as to the validity of authorization cards has long been present. For instance, then Board

Chairman McCulloch pointed out in a speech to the American Bar Association that in 57 elections where unions presented authorization cards from over 70% of the employees, they won 43, or 75% of them; thus, unions *lost* one in four elections where employees were given a free choice, even though their card-based apparent approval would indicate that a lost election would be a statistical rarity. 1962 PROCEEDINGS, SECTION OF LABOR RELATIONS LAW, AMERICAN BAR ASSOCIATION 14-17.

The Fourth Circuit is not the sole circuit to recognize the deficiencies inherent in authorization cards. The Sixth Circuit, in *N.L.R.B. v. Fashion Fair, Inc.*, 6th Cir., 1968, 399 F.2d 764, quoting with approval the Second Circuit, said

> As both the Courts and the Board recognize, the use of authorization cards is a "notoriously unreliable method of determining the majority status of a union." *N.L.R.B. v. Flomatic Corporation*, 347 F. 2d 74 (C. A. 2). (Other citations omitted). . . . to base a recognition and bargaining order on such questionable procedures in "strong medicine to be used only 'with restraint' ". *Lane Drug Co. v. N.L.R.B.* 391 F.2d 812 (C. A. 6).

The Board, in its brief, attempts to remove the plaguing quotation from *Flomatic Corporation* from consideration by indicating that the comment applies only where two or more unions are competing for the employee. This reasoning would appear to be ill-founded, for under such circumstances, there are at

least competing organizations to check one another's activities. In the single union case, the reliability would be substantially less, for usually — as in the present case — authorization cards are sought quietly and the first indication to management of such activity is the demand for bargaining.

There is, of course, a difference in the standards applying to use of cards and the circumstances surrounding elections. The Fourth Circuit has recognized this in its landmark *N.L.R.B. v. S. S. Logan Packing Co.*, 386 F.2d at p. 564 et seq:

> It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a "card check," unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. This, the Board has fully recognized. So has the AFL-CIO. [footnotes omitted]
>
> * * *
>
> The unsupervised solicitation of authorization cards by union is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feeling of the solicitors and the difficulty of saying "No." This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees

and of potentially powerful union organizers may weigh heavily in the balance.

* * * *

Without adequate supervision, solicitors of authorization cards may resort to a wide variety of other threats. Discrimination in the exaction of initiation fees is frequently encountered, and, particularly where untrained fellow-employees are used as solicitors, use of threats of discrimination against non-signers in the compilation of seniority rosters and other conditions of employment may be a strong temptation.

The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time, however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.

> For such reasons, a card check is not a reliable indication of the employees' wishes. [footnotes omitted]

The unreliability of authorization cards has been recognied by the AFL-CIO in the oft-quoted remark from the *AFL-CIO Guidebook for Union Organizers* (1961) that:

> NLRB pledge cards are at best a signifying of intention at a given moment. Sometimes they are signed to "get the union off my back." Cf. Petitioning union's brief at p. 39.

Counsel for the petitioner union has included as a part of its supplemental appendix, p. 41, Senate Bill 426 as introduced by Senator Fannin in the current 91st Congress. Senator Fannin's comments on two occasions indicate his thought that Section 9(c) of the Act is being ignored by the Board in its attempts to justify authorization card recognition. In 1965, Senator Fannin introduced S. 2226, with the following remarks at 111 Cong. Rec. 15124 (1965):

> "Reliance on card checks instead of secret ballot elections by the National Labor Relations Board is increasing. If it is not slowed down, Section 9—election machinery—and 8(c)—free speech—may as well be repealed . . . The Board's recent thinking seems to be that authorization cards are a true and valid indication of employee desires. This is not so."

In introducing the current S. 426, Senator Fan-

nin makes it clear that he is not acting from sympathy for employers, but to safeguard the laborer in 115 Cong. Rec. 591 (daily ed., January 21, 1969):

> "These bills are the same as those introduced by me in the 90th Congress . . . A second bill would amend the National Labor Relations Act so as to require a Board-Conducted election in all representation cases. Thus the bill would prevent voluntary recognition of a union by an employer, a practice which has led to many abuses. I have always believed that it is the right of the worker, and not his boss or a few union advocates, to cast his ballot secretly for or against union representation."

III

The Board Failed to Sustain its Burden of Proof that Respondent Had No Good Faith Doubt as to the Union's Majority Status

The Board has the burden of proof in any proceeding and, as set forth in Section 10(c) of the Act, ". . . If *upon the preponderance of the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, . . .," the Board may issue an order or take affirmaive action.

In actual practice, the Board assumes a good faith doubt is not present when bargaining based on authorization cards is requested. The Board's position is that a violation of Sections 8(a) (1) or (3)

of the act also negates good faith under Section 8(a) (5).

Determination of the charges originally filed in this cause rested initially with a trial examiner, whose findings were adopted by the Board. Respondent believes that discussion of the findings of violations of Sections 8(a) (1) and 8(a) (3) is relevant here since the finding as to the 8(a) (5) violation is based principally on the other findings.

(a) Alleged Section 8(a)(1) Violations

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7". Section 7 pertains to the rights of employees to engage in or refuse to engage in labor union activities.

The trial examiner found that some eleven acts violated Section 8(a)(1) of the Act. (R pp. 284-286). Of these, nine of the specific incidents are alleged statements made by Charles Gissel. Of the remaining two, one is a statement made by Herbert Gissel and the other is the presence of Terry Lewis, a member of the Gissel family, at a hotel where the labor union had called a meeting.

In general, respondent believes it would serve no useful purpose to discuss in detail the testimony relating to the statements allegedly made by Charles Gissel and Herbert Gissel. In the usual Board man-

ner, it is charged that certain isolated statements were made over a period of several months time, without identifying them in the original complaint. In the present case each of the alleged statements were effectually denied by the Gissels. The trial examiner nevertheless uniformly credited the testimony of board witnesses and discredited testimony of Company witnesses. This uniform crediting will be discussed, below, in more detail.

It should be noted, however, that this Company had been involved in labor proceedings with the same Union some years prior to the present campaign, and had been specifically aware of the minimal statements required for the Board to allege 8(a)(1) violations. It would be contrary to reason that Company officials who worked side by side with employees would make the alleged statements with this knowledge.

There is, however, one incident which should be discussed. This is that designated as No. 9(R 286), relating to the presence of Terry Lewis at the hotel on April 17. Terry Lewis is the nephew of Alfreda Closterman, a company official. His mother is a member of the Gissel family. It is not denied that he was present at a hotel where a union meeting was to be held. He was a part-time employee of Gissel Packing Co., but primarily a high school student, and had seen a notice addressed to all employees. He went into a telephone booth, called his girl friend, and his aunt. The trial examiner, in an obvious attempt to justify her conclusions, relied heavily upon the mere presence of Terry Lewis at the meeting

in finding ultimate violations. (R 294) Her statement is, "the admitted presence of Lewis at the hotel is one of the most significant facts in the record both generally and in connection with the discharge of Mount and Frye." The trial examiner completely ignores the fact that, rather than having been instructed to attend the meeting, Terry Lewis was instructed to leave it promptly upon his aunt learning of his presence there. He did not go inside the meeting. He did not hear anything that transpired or happened at the meeting. He did not undertake to give a report to anybody in the management of Gissel Packing Co. as to what happened at the meeting. (R 185-186). He was, of course, well known to the employees. In fact, Herbert Mount, Jr., one of the employees involved in the 8(a)(3) violation charged, saw him and eavesdropped on the conversation. In Mr. Mount's words, after having heard Lewis pronounce Mrs. Closterman's name on the phone, he said, "Well, then, we shoved the telephone booth door open and he jumped out and ran." (R 65). The trial examiner, while expressing some doubt as to Mount's reliability, generally credited his testimony when in conflict with that of company personnel. This, despite the strong inference of violence created by his actions toward Lewis.

The trial examiner inferred from the mere presence of Lewis at the hotel that all matters relating to this were suspect insofar as company actions were concerned. She completely ignored the fact that he was directed to leave, that he was known to the employees, and that he did so leave without making re-

ports to anyone as to the presence of persons there. In fact, there would be no way for him to know all of the employees present since he left prior to the beginning of the meeting.

Finally, the trial examiner overlooked one factor so important as to be well-nigh conclusive: Terry Lewis, as a part-time employee, not supervisor or official, *was within the bargaining unit and would have been entitled to vote if an election were held.* (See R 305, twelfth name). He had a right to be present at the meeting, and was within the definition of "all employees" in the posted notice of the meeting. (R 183).

(b) Alleged Section 8(a) (3) Violations

The Board has also charged that the Herbert Mount, Jr., and Jerry Lee Frye were discriminatorily discharged. Charles Gissel maintained that they had left the job and did not work on a Wednesday afternoon, but were, in fact, working somewhere else.

The Board charged that the reason for the discharges was because of alleged union activities on the parts of the persons. The trial examiner, in a very tortuous reasoning process, finds in several alternatives that the actual discharge reason was for union activities. Counsel for respondent suggests that a thorough study of the reasons given by the trial examiner beginning at Page 295 of the Record will clearly show that there was no discrimination involved. Mount had been previously discharged but

was recalled because Charles Gissel was fearful that an unfair labor practice charge would be filed. This, of course, controverts the alleged discrimination. The facts involved are clear. The men were expected to work Wednesday afternoon, did not, and it was determined they had quit by Gissel because they were working somewhere else. The trial examiner relied on no substantial facts for credit. Instead, her reasoning process was based upon evidence which, she said, *should* have been produced to satisfy her that Charles Gissel was telling the truth. Respondent submits that this is a blatant reverse of the law which should apply, that is, that the board has the burden of proof. In this instance, as well as in several others in this matter, the trial examiner has shifted the burden of proof entirely to the employer.

(c) The Board, through its Trial Examiner, Attempted to Substantiate A Preconceived Conclusion

Respondent submits that it is clear from the record and from the findings in this matter that the National Labor Relations Board, through its various representatives, had determined that the ultimate result would be a bargaining order and, to support its findings, 8(a)(1) violations were constructed from a gossamer weave of facts.

It should be noted that all discretion vested in the trial examiner as to rulings, the admission of evidence, and inferences to be drawn was exercised in favor of the union. In fact, the reasoning processes

of the trial examiner in upholding the various charges amounted in many instances to inference built on inference built on inference. To cite but a few examples, in addition to those previously mentioned, in her footnote 42, (R 292), the trial examiner indicates that respondent had refused to contend that men were discharged for cause, when this was contrary to fact, and she apparently was dissatisfied because the employer refused to falsify matters which had occurred; in her footnote 29 (R 276), the trial examiner speculates without factual support to further bolster her findings; in her footnote 20 (R 269), the trial examiner credits testimony of one Maynard despite conflicts in his pre-hearing affidavit, and, without facts to substantiate her, excuses Maynard's clear testimony concerning a date upon which an alleged statement was made; in her footnote 12 (R 263), the trial examiner attempts to draw a distinction between a printed signature and a written signature, where an authorization card had been signed with an X; and, in her footnote 8 (R 260-261), the trial examiner states "I am convinced that Pure Oil sent a report and that it was not introduced into evidence because it did not substantiate the Company's claim." There is no fact to support her conviction, and this is a prime example of the tortuous and inferential reasoning to which the trial examiner goes to support her preconceived conclusions.

Respondent submits that the findings of 8(a)(1) and 8(a)(3) violations made by the trial examiner show clearly and convincingly that this result was

pre-ordained despite what the evidence might have been. The trial examiner was not privileged to ignore testimony, or to rely upon evidence taken out of context. Indeed, as shown above, in many instances she relied upon alleged facts and convictions which were non-existent.

Respondent further believes that the hearing and conclusions made as a result thereof by the trial examiner were so biased and prejudiced as to render impartiality wholly absent, despite the statutory duty of the trial examiner. Particularly as to the 8(a)(1) and 8(a)(3) violations, respondent submits that the trial examiner's partiality is so clear that a mockery of judicial process has been made.

The Board's finding is contrary to the statement of the Board, itself, at page 98, Commerce Clearing House reproduction of the *Thirty-second Annual Report, supra:*

> The Board has long held that an employer may refuse to recognize and bargain with a union upon its demand for initial recognition and may insist upon proof of the union's majority status through election procedures unless the refusal is not based upon a good-faith doubt of the union's majority. It is equally clear that in a case involving such a refusal, the General Counsel has the burden of proving the employer's lack of good faith. The cases decided by the Board during the report year include a number requiring determination of whether the requisite lack of good faith doubt had been established. In one such case, the Board explained that:

> . . . the . . . burden-of-proof rule is designed to assure, in implementation of Board policy, that an employer who in good faith withholds recognition because of a doubt of majority, though his doubt is founded on no more than a distrust of cards, may have an election to resolve that doubt, and will not be subject to an 8(a)(5) violation simply because he is unable to substantiate a reasonable basis for his doubt. But . . . the rule . . . is only an evidentiary one which is to be read as dovetailing with, rather than altering, the long-settled substantive principle that an employer may not in the absence of a good-faith doubt refuse to recognize a majority union. (Citations omitted).

The Courts have almost uniformly questioned the validity of the Board's reliance on Section 8(a)(1) and (3) violations to substantiate violations of Section 8(a)(5). See, *e.g., N.L.R.B. v. Hannaford Bros. Co.,* 1st Cir., 1958, 261 F. 2d 638, 641; *Textile Workers Union v. N.L.R.B.,* 2d Cir., 1967, 386 F. 2d 790; *N.L.R.B. v. Dan River Mills, Inc.,* 5th Cir., 1960, 274 F. 2d 381; *N.L.R.B. v. S. S. Logan Packing Co.,* 4th Cir., 1967, 386 F. 2d 567, 568; *Wareson Steel Corp. v. N.L.R.B.,* 7th Cir., 1967, 377 F. 2d 369, 372.

The situation here involved is almost identical with that in *S. S. Logan Packing Co., supra.* The Fourth Circuit there said:

> An employer could not help but doubt the results of a card check as an indication of

> the wishes of employees, for there is nothing in the process to allay it. Unless the employer is extraordinarily gullible and unimaginative, he will at least suspect unreliability in the cards and their signatures. If he had no honest doubt of the union's claim of support by a majority of the employees, it will be because of other evidence known to him, not because of the card check . . .
>
> Here, of course, there was some prior history to add to the employer's doubt of the union's claim. Four years earlier, the union had claimed to represent a majority of the employees, but, thereupon, lost a consent election, the validity of which is unchallenged. The proffer of a card check gave the employer no reason to attribute greater credence to the claim of majority representation than to the similar claim which the employees refuted in the secret consent election four years earlier.

This quotation could be used intact in the instant case.

Here, too, the same union was involved.

Here, too, the union had previously claimed a majority.

Here, too, the union's claim to majority was proven false in the subsequent election.

The trial examiner in this case, unlike the Court in *Logan,* failed to give this direct, affirmative and factual evidence any weight in her subjective determination of the employer's good faith in its doubt.

The entire subject of substitution of administrative decisison for judicial process has long been scrutinized and frequently criticized. Recently, an order of the Interstate Commerce Commission was set aside by this Court in *The Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, ...U.S....., ...S. Ct....., 21 L.Ed.2d 219 (1968). There, this Court stated that to affirm the Commission's finding would be to say that the expertise of the Commission was so great that its mere statement would put an end to a particular controversy. This Court then said, 21 L.Ed.2d at 224:

> The requirement for administrative decisions based on substantial evidence and reasoned findings — which alone make judicial review possible — would become lost in the haze of so-called expertise . . . That is impermissible under the Administrative Procedures Act.

Respondent submits that the evidence is less substantial and the findings reasoned with markedly less basis in the instant case than were those of the Commission. The standards applicable are, however, the same regardless of the title or scope of an administrative body.

(d) There Is No Basis For Failure To Hold An Election To Determine The True Desires of The Employees

There are clear indicators showing that the possibility of an election occured to the Board's representatives in this matter. In Appendix A to the Trial

Examiner's Decision, the following appears as footnote 1 (R 304):

> The persons assumed to be employees are those as to whom there is no evidence in the record. The assumption is for the purpose of determining the maximum number of employees in the unit and does not constitute a finding that they are in fact in the unit if they come within any of the classifications excluded by the Board in its Decision and *Direction of Election.* [Emphasis added].

Further, while the Petitioner's briefs herein discuss the propriety of disallowing elections where flagrant coercion has taken place, this remedy has no application in this case. The trial examiner made no finding of an hostile atmosphere, and there was no suggestion of fact or conclusion of law which even inferred that a fair election could not be held.

The employer's feeling is conveyed in G. C. Exh. 5, R 15, 237:

> * * * Under such circumstances, the National Labor Relations Board may conduct a fair and impartial election wherein the employees may determine for themselves whether or not your Union is entitled to represent them.

In view of the general refusal of the Board's 9th Region to direct elections on request of an employer under similar circumstances, which was well known and later verified, it was felt that a request

for election by the employer would be a useless act. See *N.L.R.B. v. S. S. Logan Packing Co., supra; N.L.R.B. v. Sehon Stevenson & Co., supra; Davis Wholesale Co., supra.* The union, as shown, was invited to have an election conducted.

If this course had been followed, then this entire pending matter could have been fairly and impartially resolved four years ago.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the United States Court of Appeals for the Fourth Circuit correctly applied applicable law as to the issues herein, and its action should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL STEEL PRODUCTS, INC., AND CROWN FLEX OF NORTH CAROLINA, INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC.

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STATUTES:

National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):

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Section 8 (a) (1) 3, 18

Section 8 (a) (3) 3

Section 8 (a) (5) 3, 11, 12

Section 8 (b) (1) 18

Section 9 (a) 12

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National Labor Relations Act (Wagner Act), 49 Stat. 449:

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MISCELLANEOUS:

93 Cong. Rec. 6600, 2 Leg. Hist. (1947) 1539 12

H.R. Conf. Rep. No. 510, 80th Congress, 1st Sess. 41 (1947), 1 Leg. Hist. (1947) 1013 11

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McFarland and Bishop, Union Authorization Cards and the NLRB (Univ. Penna., Wharton School, 1969) 12, 13

13 NLRB Annual Report (1948) 9, 10, 13

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL STEEL PRODUCTS, INC., AND CROWN FLEX OF NORTH CAROLINA, INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR GENERAL STEEL PRODUCTS, INC.[1] AND CROWN FLEX OF NORTH CAROLINA, INC.

QUESTION PRESENTED

We must resist the tenor of the "Question Presented" as stated in the brief of the National Labor Relations Board, since we think it does not fairly embody the position of the Court of Appeals for the Fourth Circuit.

1. General Steel Products, Inc., and Crown Flex of North Carolina Inc., have merged since this case was tried, under the name and charter of General Steel Products, Inc. We do not think that this changes any of the issues presented here.

These cases in which Writ of Certiorari has been granted under No. 573 are all *per curiam* decisions. (A. I 316; A. II 553; A. III 893) The rationale of the Court of Appeals for the Fourth Circuit can only be discovered by turning to the antecedent decisions on which these cases are based. They are: *NLRB v. S. S. Logan Packing Co.*, 386 F. 2d 562; *Crawford Mfg. Co. v. NLRB*, 386 F. 2d 367, cert. denied, 390 U. S. 1028; *NLRB v. Sehon Stevenson Co., Inc.*, 386 F 2d. 551. This Court denied certiorari in the *Crawford* case; no Petition for Certiorari was filed in the *Logan* case (which is the principal case); and the Court of Appeals for the Fourth Circuit enforced the Board's order to bargain in *Sehon Stevenson*.

The question posed by the Petition for Certiorari implies that the Court of Appeals for the Fourth Circuit has held that an employer can *never* be required to bargain with a union unless it has won an election, "irrespective" of unfair labor practices of the employer. This is not a fair appraisal of the decisions. The Court of Appeals has said in these antecedent cases that an election is the method selected by Congress for determining questions of representation, which the Board must follow so long as a valid election can be held; but it has further said that recognition and bargaining can be required without an election: (1) where the employer has confirmed and acknowledged the union's majority (*Sehon Stevenson* case) or (2) if it is shown that the employer's misconduct is so extensive and pervasive as to prevent the conduct of a valid secret election. (See *Logan* case and the present decisions.) The *Sehon Stevenson* case is, as we believe and expect to show, in accord with the views of this Court as expressed in *United Mine Workers*

v. Arkansas Oak Flooring Co. 351 U. S. 62. Whether the Labor Board has authority, at all or in any event, to install a labor union whose majority has not been recognized and which cannot win the majority support of employees in an election, is a question which we think is seriously in doubt under the Act.

What is at stake here in the *General Steel* case is the validity and application of the Labor Board's decision in *Bernel Foam Products Co.* 146 NLRB 1277 and other cases following it, under which the Board increasingly through card-check proceedings, is imposing unionization upon employers and upon their employees *after the union has been rejected by the employees in a secret election.*

STATEMENT OF CASE

In *General Steel,* (unlike the other cases consolidated for hearing under No. 573) the union lost a secret ballot election conducted by the National Labor Relations Board. The vote was 94 to 83 with 13 challenged ballots (A. III 563). Two challenges were resolved by the Regional Director as not being entitled to vote and it was unnecessary to resolve the others. After losing the election the union filed charges alleging violations of Sections 8 (a) (1) and 8 (a) (5) of the National Labor Relations Act, 29 U S C Sec. 158 (a) (1) and (5), and moved to set the election aside.

In *General Steel* there was no allegation that any individual was improperly discharged or otherwise discriminated against in voliation of Section 8 (a) (3) of the Act. Solely on the basis of alleged coercion of employees, the Board reached its conclusion that this employer should be com-

pelled to recognize and bargain with the union, contrary to the desires expressed by its employees in the election.

The election was set aside but no new election has ever been held. On the contrary, the Board in its Order adopting the Trial Examiner's recommendations dismissed the Election Petition and vacated all proceedings in connection therewith (A. III 560). It did this notwithstanding its earlier determination that: "A question affecting commerce exists concerning the representation of certain employees of the employer . . . " (A. III 601)

Here, we take it, is evidence that the Board considers an order to bargain the practical equivalent of having held an election which was won by the union - or at least as a satisfactory substitute in the circumstances for having held an election, thus resolving the question concerning representation which it had previously found to exist.

Contrary to the implication of arguments advanced throughout the Board Brief (Bd. Br. 14, 20, 24, 28, 31, 58 n. 58) neither the Trial Examiner nor the Board ever made any finding in *General Steel* that a fair and valid re-run election could not be held, to confirm the true desires of the employees. The conclusion to be drawn from the record as a whole is surely to the contrary; and the Fourth Circuit specifically so held. It said (A. III 894 n.3):

> "Whether or not the election actually held was properly held invalid, we do not decide, but the 8 (a) (1) violations found to have occurred were not so pervasive that available remedies were not reasonably calculated to assure a 'free exercise of the employees' choice by secret ballot

rather than by resort to a count of questionable cards."

The Trial examiner determined that there were 207 employees in the "unit" on the date of the union's demand, of 229 employees on the payroll (A. III 576). Out of this number, the Trial Examiner found that, in the course of some *five months*, (A. III 565-7) four employees had been improperly interrogated, of whom two were threatened (possibly in jest), four others threatened, all by lower echelon supervisors, another tasteless incident where the issue of race was injected in remarks to one man in the presence of four or five others.[2] The Shipping Department foreman told some employees under him that they were *free to vote as they pleased*, but that some people might not buy products of a union shop or wish to hire employees who came from a union shop (A. III 566). Another employee was told that the union would do "more harm than good," and similar language was contained in a company poster which has been held proper as an exercise of free speech. *NLRB v. Threads, Inc.* 308 F. 2d 1. (CA4, 1962). A company executive made a pre-election speech to assembled employees, and on the testimony of four out of some two hundred (denied by the employer, A. III 873-5) he is found to have said that if the union came in he would "negotiate, negotiate, negotiate" and did not have to sign anything and that employees who went on

2. Only the one man took the conversation seriously as far as the record shows; the supervisor explained it as a joke that had originated among the other employees (A. III 890-91. This supervisor had been demoted to a rank and file job before the election. Transcript 1754.

strike would be fin ed and new employees hired to take their places. (A. III 570-71).[3]

The foregoing is a summary of alleged misconduct by this employer over a five-month period, as found by the Board. The Circuit Court refrained from deciding whether the Board was justified in setting the election aside, but was emphatic in holding that this was not sufficient basis for the Board to install a union over the wishes of employees expressed in a secret ballot and to refuse to hold a further election.

SUMMARY OF ARGUMENT

The National Labor Relations Board has no authority to determine questions of representation in an unfair labor practice case by means of a count of union authorization cards. This authority, which it formerly possessed, was taken away by the Taft-Hartley Amendments to the Act. It has nevertheless continued to exercise this power and has improperly done so in the *General Steel* case. This practice is destructive of employee rights of self organization as guaranteed by the National Labor Relations Act.

Card-check cases are irreconcilable with other policies of the Board and with a serious purpose to determine and protect employees' selections of their own bargaining agents. Cards are signed under a great variety of circumstances and, as compared with a secret ballot election, they are notorious-

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3. Two long letters had been written to employees explaining, among other things, the right of the employer to *replace* strikers; and there was no charge or finding that the letters were coercive. The speeches were mainly a reading of these letters. (A. III 571).

ly unreliable as an indication of employee desires. Card check cases, as administered by the Board, destroy the opportunity of employees to hear both sides of the question before "voting" and deny to the employees the right to change their minds and withdraw their cards after hearing counter-arguments.

Even assuming that card-check cases are within the power of the Board and consistent with the administration of the Act, the Order to bargain directed against *General Steel* cannot be sustained. The Board failed to hold a new election, after the union had lost the first, and under circumstances where, as the Court of Appeals for the Fourth Circuit found, a re-run election could have been held to determine the true desires of the employees. The Board's finding that the employer lacked a good faith doubt of the union's majority is unsupported by substantial evidence. Such information about this as the employer was able to gain led him to the opposite conclusion.

A majority of cards was erroneously counted in favor of the union. These cards had been obtained under representations that they would be used to obtain an election in which employees would have an opportunity to vote either way, and representations that the cards would otherwise be kept secret. These facts were altogether inconsistent with the counting of such cards as votes for the union.

ARGUMENT

I. Where A Question Concerning Representation Exists, As In The General Steel Case, The National Labor Relations Board Has No Authority To Determine Such Question By A Card-Check Proceeding.

The Wagner Act, Sec. 9 (c), originally gave the Board broad discretion in selecting procedures for determining questions of representation. (49 Stat. 453):

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, *either in conjunction with a proceeding under section* 10 *or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.*" (Emphasis added)

Thus, not only did the Wagner Act allow the Board to use a secret ballot or "*any other suitable method*," it also authorized the determination to be made in an *unfair labor practice proceeding* under Section 10. This was entirely changed by the Taft-Hartley amendment in 1947 (61 Stat. 143), and Section 9 (c) now reads as follows, in pertinent part:

> "(c) (1) Whenever a petition shall have been

filed, in accordance with such regulations as may be prescribed by the Board -

* * *

"the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereof. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

After the enactment of Taft-Hartley the Board acknowleged in its Annual Report for 1948 the change in its authority:

> "Section 9 (c) of the act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed (but rarely exercised) to utilize other 'suitable means' of ascertaining representatives." 13 NLRB Annual Report 32 (1948).

Similarly, in the same report, the Board took note of provisions denying certification to unions which failed to file noncommunist affidavits and, in language still highly pertinent to our present problem, observed:

> ". . . an order to bargain is often tantamount in practice to a certification of the union as bar-

> gain representative and that, just as the Board may not issue a certification to a non-complying union, so it should not issue an order requiring an employer to bargain with such a union." Id. p. 49.

Thus, we think it was the clear effect of Taft-Hartley, as well as the understanding of those who interpreted it for the Board at the time, that the secret ballot was to be the exclusive procedure for designating or selecting bargaining representatives. See "Union Authorization Cards" *75 Yale L. J.* 805; cf. *NLRB v. S. E. Nichols Co.* 380 F. 2d 438, n. 1 p. 441.

One might assume that this change in the law, and the Board's recognition of it, would have brought about an equivalent change in the Board's procedures; and, in fact, there appear to have been few card-check cases in the 1950's, although the Board did assert the right, based on meager analysis of legislative history, to continue issuing card-check bargaining orders. *Brown Truck & Trailer Mfg. Co.,* 106 NLRB 999. Increasingly, however, in the 60's the unions and the Board have been turning to unfair labor practice charges with card-check proceedings, to require recognition of a union and bargaining without an election; and in 1964, the Board was emboldened to reinstitute its former practice, abandoned ten years before,[4] of allowing unions to bring such charges *even after losing an election among the employees,* and even though based on circumstances known to the union before the election was held. *Bernel Foam Products, Co.,* 146 NLRB 1277.

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4. *Aiello Dairy Farms,* 110 NLRB 1365.

This of course had the effect of giving unions "two bites" and greatly increased the attractiveness of these proceedings to them, with the accompanying opportunity to gain bargaining rights over an unwilling majority of employees, who had once signed cards but later voted against the union. The card check came to be regarded by unions as an alternate method of obtaining certification. See *Schlossberg* (General Counsel United Automobile Workers) *Organizing and the Law* (BNA 1967) p. 82:

> "The legislative history of Taft-Hartley makes it clear that this change was intended to preclude Board certification based on cards. As this chapter will demonstrate, however, an 'indirect certification' on cards is possible through Board bargaining orders."

The Board in its present Brief (pp. 32-33) turns to analysis of legislative history to support its assertion that Congress intended to leave intact the card-check bargaining-order procedures that had existed before Taft-Hartley. True, the House Bill contained a proposed amendment to Sec. 8(a)(5) which would have made it an unfair labor practice for an employer to refuse to bargain *only* where a union was currently recognized or certified under Section 9. This amendment did not emerge from the House-Senate conference, and Section 8(a)(5) was left intact. The conference report did not say why; in fact it erroneously reported that neither the House nor Senate revisions had changed Sec. 8(a)(5).[5] This may have been "legis-

5. H. R. Conf. Rep. No. 510, 80th Congress, 1st Sess. 41 (1947); 1 *Legislative History of the Labor Management Relations Act of 1947* p. 1013.

lative oversight" as has been suggested, or more likely it was felt that Section 9(a), as referred to in 8(a)(5) was merely "definitional" as to representatives "designated or selected" and that the complete revision of Sec. 9(c) took care of how representatives were to be designated or selected.[6] The brief reference by Senator Taft quoted in the Board's Brief, p. 33 refers to ". . . subsection 8(5) relating to collective bargaining," as not having been changed.[7] This shows that Senator Taft looked upon this section as having to do with *bargaining* rather than *recognition.* Certainly it is clear that no conferee nor any member of the House or Senate suggested that Sec. 8(a)(5) was left intact in order to preserve the Board's card check procedures, or to preserve the Board's "good faith doubt" doctrine, and nobody suggested that leaving 8(a)(5) intact would detract in any way from the objective of the amendment to Sec. 9(c) which elaborately provided for an election as the only method of resolving questions of representation, nor from Sec. 9(c)(1)(B) which for the first time gave *employers* the right to petition for an election upon being presented with a claim by a union to be recognized "as the representative defined in section 9(a)".[8] There was no dissent from the premise that bargaining representatives should be chosen by election, even

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6. See *McFarland and Bishop, Union Authorization Cards and the NLRB* (Univ. Penna., Wharton School, 1969) p. 27; Comment, *Union Authorization Cards,* 75 YALE L.J. 805, 835 (1966)

7. 93 Cong. Rec. 6600, 2 Leg. Hist. (1947) 1539.

8. A thorough analysis of the legislative history of the Act will be found in *McFarland and Bishop, Union Authorization Cards and the NLRB* (Univ. Penna. Wharton School, 1969) p. 18 et seq.

among those who voted against Taft-Hartley.[9] Surely the Senators and Representatives felt they had done enough to accomplish their objective. By striking out old Sec. 9(c) they had taken away the language under which the Board was authorized to determine the representatives *"designated or selected"* by "any other suitable method" than an election. They had also taken away the Board's authority to make the determination in an unfair labor practice proceeding under section 10. This last change has been entirely overlooked and is unexplained by the Board in its subsequent conduct of card check cases, all of them as unfair labor practice proceedings. The legislative history does not lend significant support to the Board, despite its able and labored effort to harvest every innuendo. Congress did not go through all of this merely to leave things as they had been before. This is essentially the position which the Board is now defending."

As matters now stand, the Board, while giving lip service to the law that it must decide "questions of representation" only through an election, has continued to pursue the fiction that no such question *exists* where it finds that the employer lacked a "good faith doubt" of the union's

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9. Ibid pp. 25-6, 28.

10. Long before Taft-Hartley the Board had turned to the election as its preferred procedure, deeming them more reliable than cards. See *The General Box Co.*, 82 NLRB 678, 683, citing *Cudahy Packing Co.*, 13 NLRB 526, 531-2 and *Armour & Co.*, 13 NLRB 567 (1939); see 13 *NLRB Annual Report* 32 (1948): *McFarland and Bishop, Union Authorization Cards and the NLRB*, pp. 13-14, 25. As early as 1939 the Board had invented its "good faith doubt" test for determining whether an employer was entitled to an election. *Chicago Apparatus Co.*, 12 NLRB 1002 (1939)

majority. It thus makes the right of the employees to select or not select their own representative by secret ballot to depend upon the Board's "finding" as to what was in the mind of the employer. This has been generally defended by the Board as resting upon the tenuous legislative history referred to above and upon language of this Court in *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62, 100 L. Ed 941, 947. 76 S. Ct. 559:

> ". . . In the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated Sec. 8 (a) (5) of the Act."

This case does not support, and we submit was never meant to support, the structure which the Board has sought to erect upon it. In *Arkansas Oak Flooring* there had been no election; the union possessed cards from 174 of 225 employees *stipulated* to be validly signed by the employees involved. The employer knew and admitted that the union had majority support. There was indeed no "question of representation." The employer was endeavoring to defeat the union by obtaining a state court injunction. The holding of this Court (which is off-point as far as the present case is concerned) was that the dispute fell within the National Labor Relations Act, notwithstanding failure of the union to file non-communist affidavits, since there was no need to go to the Board for an election; and therefore that a state

court was preempted and could not intervene by an injunction against peaceful picketing."

The Act speaks in terms of "a question of representation," and this Court in *Arkansas Oak Flooring* spoke of a bona fide dispute *"as to the existence of the required majority."* The Board, however, in building upon the case, has changed the nature of the inquiry and now exhibits little interest in whether there is an actual question concerning the adherence of the *employees* to the union. Instead, it is interested in the general attitude and conduct of the *employer*, and if it finds unfair labor practices on his part, *however unrelated logically to the union's standing among the employees, or to the employer's knowledge of it*, the Board generally concludes, and concluded in the *General Steel* case, that the employer was acting in bad faith and therefore must have "known" (non sequitur) that the union had a majority all along. This holding the Court of Appeals refused to sustain. The present Petition for Certiorari acknowledges that this is precisely the Board's approach (Petition p. 10):

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11. The Board also briefs at length *Franks Bros. Co. v. National Labor Relations Board* 321 U. S. 702 (1944) (Bd. Br. 39 et seq.) In this case, *decided before Taft Hartley*, the Court upheld a bargaining order based on cards. But under the law at that time the Board had authority to ascertain representatives by any suitable method. The case was concerned with the appropriateness of a bargaining order as a remedy for extensive unfair labor practices causing a loss of majority, and held that loss of majority did not prevent the Board from entering the order. But this case is not authority for the primary proposition that the Board is now trying to sustain, namely that the Board still has authority after Taft Hartley to select a representative in a card-check unfair labor practice case. See the able analysis in "Union Authorization Cards" 75 *Yale L. J.* 805; cf. *National Labor Relations Board v. S. E. Nichols Co.* 380 F. 2d 438, 441 n. 1.

> "In each case the Board based its conclusion that the Company did not have a good faith doubt as to the Union's majority status on the fact that the Company had committed substantial unfair labor practices during its anti-union campaign."[12]

The Board Brief advances the same theory (p. 18 et seq.). Surely this is nonsense, for an employer who is convinced that a union has not achieved majority may be just as interested in dissuading his employees as one who is convinced that the union has full support. *National Labor Relations Board v. River Togs, Inc.*, 382 F. 2d 198, (C.A. 2); *National Labor Relations Board v. James Thompson & Co.*, per Judge L. Hand, 208 F. 2d 743 at 746, (C.A. 2); *Montgomery Ward & Co. v. National Labor Relations Board*, 377 F. 2d 452, (C.A. 6); *National Labor Relations Board v. Ben Duthler, Inc.*, 395 F. 2d 28, (C.A. 6); *National Labor Relations Board v. S. S. Logan Packing Co.*, 386 F. 2d 562, (C.A. 4)

Noteworthy too, along with failure of the Board to conduct a re-run election in *General Steel* or to make any finding that a valid election could not be conducted, is the

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12. In fact the Board Brief goes even further and says (P. 18): ". . . the employer's other unfair labor practices are a relevant factor in determining *whether he relied upon* such a doubt in refusing to bargain." (emphasis added.) Thus, the Board is saying that it will impose unionization upon employers not only where the employer is without a "good faith doubt" but also where he did not *rely upon* this doubt. Here is certainly a total abandonment by the Board of its obligation to permit *employees* to determine questions of representation, when it is willing to issue a bargaining order even though there was a real "doubt" which the employer failed to rely upon.

Board's further failure to consider or resort to an injunction proceeding as authorized by Congress in Section 10 (j) of the Act. If indeed there were unfair labor practices such as to frustrate a fair election, Congress provided this remedy in the Taft-Hartley Amendments for controlling such situations, for restoring a proper atmosphere under which an election could be held. Again the Board prefers not to use the procedure laid down by Congress.

The Court of Appeals for the Fourth Circuit held in its decision in *Sehon Steveson*, 386 F. 2d 551, that where the union's majority support is known to the employer and is truly undisputed, the employer must recognize it without an election. This is in accord with the decision of this Court in *Arkansas Oak Flooring* and not at variance with it. Where there is a question, however, we submit the employees are entitled to an opportunity for a secret vote, and the employer is likewise entitled to the results of such a ballot. The Board should not be allowed to destroy these rights by engaging in labored construction of the Act or the evidence for the purpose of concluding that there is "no question" to be resolved. *National Labor Relations Board v. S. S. Logan Packing Co.*, 386 F 2d 562, (C.A. 4); *National Labor Relations Board v. River Togs, Inc.*, 382 F 2d 198 (C.A. 2); *National Labor Relations Board v. Ben Duther, Inc.*, 395 F 2d 28, (C.A. 6); *Montgomery Ward & Co. v. National Labor Relations Board*, 377 F. 2d 452, (C.A. 6).

We would further urge that the mere possession by a union of a majority of signed cards and the employers knowledge of it ought not to be a basis for compelling recognition and refusing to hold an election. The employer too should

have his say, and the employees should have the benefit of it. He may well believe that the union majority is transitory, and may properly feel that the employees have made a mistake or have been misled or have made a poor choice of unions. We refer again in a later section of this brief to the Board's inconsistent administration of the Act in this regard. (Sec. II B, post p. 25)

The misplaced emphasis by the Board on the conflicting desires of the union organizer and the employer entirely neglects the interests of the *employees*, whose rights the Act was intended to protect. This is not due to any omission on the part of Congress. The Act is clear: The *employees* have the right of self organization, to bargain collectively through representatives of their own choosing;[13] employers are forbidden to interfere;[14] unions are forbidden to interfere;[15] and to assure complete freedom the Act adds that the employees' rights include the *right not to join a union* - the right "to refrain from any or all of such activities . . ."[16] The *Board* is given the duty of determining whether a question of representation exists, whereupon it "*shall*" hold an election and "*shall*" certify the results.[17] Instead of performing this duty the Board in card check cases engages in an esoteric inquiry to determine whether the employer really thought there was doubt about it - when surely the employer, of all the parties, is the one least likely to know - and then a further inquiry to determine whether the union possessed at some early

13. Act. Sec. 7, 61 Stat. 140, 29 U.S.C. § 157.
14. Act. Sec. 8 (a) (1), 61 Stat. 140, 29 U.S.C. § 158 (a) (1).
15. Act. Sec. 8 (b) (1), 61 Stat. 141, 29 U.S.C. § 158 (b) (1).
16. Act. Sec. 7, 61 Stat. 140, 29 U.S.C. § 157.
17. Act. Sec. 9 (c), 61 Stat. 143, 29 U.S.C. § 159.

stage a transitory majority of card signers—and these collected over a period of time so that they do not necessarily represent a majority on the day they are presented.

What we have been witnessing in the recent cases, we suggest, is a progressive disenchantment among the circuits with the direction which the Board is following. The most recent is probably the Circuit Court for the District of Columbia, which in the past has been among these showing the greatest deference to the Board. In *NLRB v. Henry I. Siegel Co., Inc.* decided January 9, 1969. ..... F. 2d ....., 70 LRRM 2207 (C.A.D.C. Nos. 21086, 21131, and 21316) that Court refused to enforce an order to bargain based on cards, after the union had lost an election. It directed the Board to go back and find out the true desires of the employees. We quote from the opinion (70 LRRM 2210-11):

> "The prime problem in the controversy is: What do the employees of Siegel at Eloy really choose in respect to a collective bargaining agent? We regard as peripheral many of the propositions posed and debated so vehemently in the papers before us and in the extensive literature key-numbered under this heading. Such off-target inquiries include: Did the employer say this or did he say that to the employees? Did the union organizers say definitely that an election would be held, or did they only clearly intimate it? Should these three votes be counted or should they not? * * * Did 51 per cent of the employees sign the cards or only 48 1/2 per cent of them? Did the Union organizer tell the employees the purpose of the cards was to get an election, or did

he only intimate that purpose? Did he say an election was a purpose, or the purpose, or the sole purpose? Did the president of the company say the plant would be abandoned, or did he say it might be abandoned? Were these three specified ballots valid or invalid? Who was afraid of what? * * * We think the consideration should be directed precisely at the prime question in the case: What was the real choice of these employees in respect to a collective agent?

"In the present case the Board frankly says it does not know what these employees choose. And there is ample justification for that skepticism. The Board also says that a "fair election" cannot be held in Eloy. But that averment is not impressive on the present record; we do not know upon what the conclusion is based, or what the Board means by "fair", or to whom. Does the Board mean fair to the Union, or fair to the employer, or fair to the employees? We suggest that the latter ought to be the point of interest, but we are not supplied with an account of circumstances which depict such a difficulty.

"The Board was in possession of flatly contradictory evidence. It has made no test or check of this evidence. It simply says it must accept one side. We think it should not. We think that in such circumstances the Board must inquire further. It must exert a careful, intelligent effort to ascertain what is the real choice of these employ-

ees. As we see it, that is its responsibility under the statute.

* * *

"We are of clear opinion that the Board is not restricted to the evidence shown by an unsupervised poll taken individually in private by agents of one of the interested parties, which is all the Board has before it now in this matter. The Board must ascertain and give effect to the real choice of these employees in respect to collective bargaining. It cannot avoid that responsibility upon such a paucity of evidence as this record contains."

The Court of Appeals for the District of Columbia did not order the Board to hold a new election, but surely this is the proper course under the law to carry out the Court's direction to give effect to the *real choice* of these employees.

A. REMEDIES OF THE BOARD ARE AMPLE AND NEGLECTED FOR DEALING WITH EMPLOYER INTERFERENCE

The Board in its Brief (pp. 41-43, 24, 31) seeks to confront this Court with a hard choice. It suggests that the Court must either sustain the Board's power to issue card-check orders under Sec. 8(a)(5) and approve its "good faith doubt" test, which it regards as a "settled gloss" upon the Act, or else see employer interference go uncorrected. We agree that employer interference should be corrected; we do not agree that the Board is so bereft of remedial powers or imagination in inventing or applying them that the only way it can get to the employer's conduct is by

destroying the right of the employer and the employees to an election. The Board has already demonstrated far more ingenuity than this, going beyond cease and desist orders, in cases where it could not resort to a card check because the union had not achieved majority status. See e.g. *J. P. Stevens & Co.*, 157 NLRB 869, mod. & enf. 380 F. 2d 292 (C.A. 2), cert. den. 389 U. S. 1005; *H. W. Elson Bottling Co.*, 155 NLRB 714, mod. & enf. 379 F. 2d 223 (CA6) —directing the mailing of notices to all employees signed by plant officials, reading of notices to employees in the plant during working time, giving union access to the plant to talk to assembled employees (under some circumstances) and access to plant bulletin boards. All these are in addition to the Board's neglected right to seek injunctions under Section 10(j) and thereby put the employer in contempt if misconduct is continued. These remedies are broad and effective and by no means inconsiderable; they have merely been neglected in favor of the Board's preference for a card-check bargaining order.[18]

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18. The Board has no basis even by its own theories for issuing bargaining orders where the union has not achieved majority, and has never done so. (Cf. Bd. Br. p. 43 n. 45). Section 9(a) refers to representatives designated or selected *by a majority* of employees in a unit appropriate. It is an unfair labor practice for an employer to bargain with a minority union. *Garment Workers Union v. NLRB*, 366 U. S. 731; cf. *J. P. Stevens & Co.*, 163 NLRB No. 24.

II. Apart From Questions Of Legality, The Board's Card Check Cases Are Irreconcilable With Its Other Applications Of The Act Or With The Protection Of Employees Rights.

A. THE UNRELIABILITY OF CARDS:

When the Board conducts elections it insists upon so called "laboratory conditions" - an unlikely term which is hardly descriptive of any election - but as a minimum it always means a closely supervised secret balloting outside the presence of both the employer and the union organizer. This "laboratory" test for elections is impossible to reconcile with the totally unsupervised solicitation of cards by union professionals, under partisan conditions, where the "voter" is required to accept or reject in full view of those who solicit him. The unreliability of such expressions has been nowhere better summarized than by the Court of Appeals for the Fourth Circuit in *National Labor Relations Board v. Logan Packing Co.*, 386 F. 2d 562, 564-6 (C.A. 4): We quote a part of this opinion (footnotes omitted):

> "In stark contrast is a decisional rule that bypasses the election processes and places signed authorization cards on a parity with an affirmative vote in a secret election.
>
> "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check', unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to

such card checks. This, the Board has fully recognized. So has the AFL-CIO. In 1962, Board Chairman McCullock presented to the American Bar Association data indicating some relationship between large card-signing majorities and election results. Unions which presented authorization cards from thirty to fifty per cent of the employees won nineteen per cent of the elections; those having authorization cards from fifty to seventy per cent of the employees won only forty-eight per cent of the elections, while those having authorization cards from over seventy per cent of the employees won seventy-four per cent of the elections.

"The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time,

however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.

"An employer could not help but doubt the results of a card check as an indication of the wishes of employees, for there is nothing in the process to allay it. Unless the employer is extraordinary gullible and unimaginative, he will at least suspect unreliability in the cards, and their signatures. If he has no honest doubt of the Union's claim of support by a majority of the employees, it will be because of other evidence known to him not because of the card check."

B. LACK OF EMPLOYEE OPPORTUNITY TO HEAR BOTH SIDES:

When an election is to be held the Board now insists that the employer furnish the union in advance with a list of names and addresses of all employees. This is done to insure that the union will have a chance to communicate with them so that they may hear both sides and vote intelligently. The Board's reasoning is set out in *Excelsior Underwear, Inc.*, 156 NLRB 1236, 61 LRRM 1217, 1218 (1966):

"Accordingly, we now establish a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties pursuant to Section 102.62 of the National Labor Relations Board Rules and Regulations or after the Regional Director or the

Board has directed an election pursuant to Section 102.67, 102.69, or Section 102.85 thereof, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

"The considerations that impel us to adopt the foregoing rule are these: The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly (are) matters which Congress entrusted to the Board alone. In discharging that trust, we regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to re-

> move the impediment to communication to which our new rule is directed."

Surely this contrasts strangely with the Board's willingness to count authorization cards solicited at a time when no election has even been set or called for and when, more often than not, the employee has been exposed only to the union's solicitations and with no opportunity to hear what the employer or anyone else has to say about it. The Board cannot explain away this anomaly by saying that card check cases only occur where there has been employer misconduct, for the Board will require an employer to bargain with a union on the basis of a check of cards without any coercive conduct at all on his part, if the Board finds that the refusal was not "motivated" by a doubt on his part that the union had a majority. *H. & W. Construction Co.*, 161 NLRB 852 (1966) (one member dissenting). Here is proof that the Board does not intend to give employees a chance to "hear the other side" once they have committed to a union by signing a card. The Board Brief in the present cases asserts this very position (Bd. Br. 18).

C. EMPLOYEES ARE DENIED THE OPPORTUNITY TO CHANGE THEIR MINDS:

A further evil in card check proceedings is that the *employee who signs a card is locked in.* He cannot get his card back or avoid its being counted by anything less than a formal application to the union (if this will do it). An application to the Board will not accomplish anything. *Arkansas Grain Corp.* 163 NLRB No. 92 (1967); (enf. denied other grds. 390 F. 2d 824);

This very thing happened in the present *General Steel* case. Ten employees endeavored to intervene through counsel

of their own before the Trial Examiner, declaring that they had changed their minds and had voted against the union and desired to have their cards suppressed (Trial Examiner's Exhibit I, A. III 609-11, 631). The motion to intervene was denied (A. III 631) and all but two of these cards were counted for the union (A. III 594-97)! Contrast this with a voter's right to change his mind even to the last minute before marking his ballot. The Trial Examiner solemnly recited: "... an employee's thoughts (or afterthoughts) as to why he signed a union card, and what he thought that card meant, cannot negate the overt action of having signed a card designating a union as bargaining agent." (A. III 579) and then he went on to analogize the signing of a union card to the signing of a binding contract (A. III 580). Thus we find the Board virtually holding that one who signs a union card has made a "contract" to vote for the union, at least if the matter reaches a card-check proceeding.

III. The Bargaining Order Against General Steel Cannot Be Sustained, Even Assuming The Legality And Appropriateness Of Card Check Proceedings.

A. FAILURE TO HOLD A NEW ELECTION:

We have already observed that the Board made no finding at all in this case that a valid re-run election could not be held, although the Board's brief implies that such a finding was made and, by implication, that this was a necessary

finding. (Bd. Br. 14, 20, 24, 28, 31 58 n. 58)[19] The Court of Appeals supplied the omission by finding for itself that available remedies could have assured the free exercise of the employees' choice by secret ballot under the circumstances disclosed by this record (A. III 894). This is ample ground for sustaining the decision of the Court of Appeals.

B. THE FINDING THAT THE EMPLOYER LACKED A "GOOD FAITH DOUBT" IS UNSUPPORTED:

The Trial Examiner and the Board found that *General Steel* lacked a good faith doubt of the union's majority (A. III 589-90, 560). This finding is not sustained on the record as a whole. *Universal Camera Corp. v. NLRB* 340 U. S. 474, 71 S. Ct. 456. The employer had no accurate means of assessing union strength. The union conducted its campaign in secret and assured the employees of secrecy (Trial Examiner Ex. 2, A. III 611, 632, 680, 806-7, 832). It wrote a letter to all employees in which it repeatedly spoke of the secrecy of their cards and a secret election to follow. (A. III 611):

> "Your Petition for a Secret Ballot Election has been filed. Your secret cards have been turned over to the Federal Government. . .

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19. The Board Brief blurs the distinction which should be drawn between employer conduct justifying setting aside an election and conduct which might render a re-run election impossible (Br. 24, 28, 31), thus tending to equate the two. This is entirely unjustified considering the remedies available to the Board to restore a proper atmosphere and to control improper conduct of either the union or the employer, including even a Court injunction under Sec. 10 (j) of the Act where needed. Accord: *National Labor Relations Board v. Flomatic Corp.* 347 F. 2d 74 (CA 2).

* * *

"During the next few weeks while you are awaiting your secret vote election, . . .

* * *

"Your signed, secret card and your "X" Yes on a Government Secret Ballot is your democratic way . . .

* * *

"An overwhelming majority has already signed Secret Authorization Cards."

It is strange that this letter, admitted as a Trial Examiner's Exhibit (A. III 632) was never dealt with in the Decision of the Trial Examiner or the Board.

A union demand for recognition presents an insoluble choice for the employer in this situation. An employer is as much obligated under the Act to decline recognition of a minority union as to recognize one having a majority; and this obligation does not depend upon whether the employer himself wants a union or does not want it, nor upon the nature of the conduct in which the employer is engaged. The mere act of recognizing the minority union violates the Act, and good faith belief that the union represents a majority is irrelevant. *Garment Workers v. NLRB,* 366 U. S. 731, 6 L. Ed. 2d 762, 81 S. Ct. 1603.

In the present *General Steel* case, the employer certainly did not know (if such was true) that the union had a majority. The union made no offer of proof. It had concealed its support from the employer. (A. III 611, 632, 680, 806-7, 832). It was reasonable to assume that the union was itself uncertain. It filed 152 cards with the NLRB in support of

its petition. (A. III 848), but only 133 of these turned out to bear names of persons employed by these companies when demand was made, and now the Board is only willing to count 120 of these as valid designations of the union out of a total unit of 207 employees—even taking the Board's criteria for determining what cards to count. (A. III 576, 560 n 2, 594-97).

Uncertainty of the union is evidence that the employer too had reason to be uncertain. "Good faith is not a one-way street." *NLRB v. Laystrom Mfg. Co.*, 359 F. 2d 799, 801 (C.A. 7, 1966); see *NLRB v. Bonnie Enterprises*, 341 F. 2d 712 (C.A. 4, 1965). The closeness of the count (and the vote in the election) are themselves evidence that there was a bona fide question about representation. *NLRB v. A & P Tea Co.*, 346 F. 2 d 936, (C.A. 5, 1965); *NLRB v. Dan River Mills*, Inc. 274 F. 2d 381, (C.A. 5, 1960).

The union and the General Counsel offered no evidence of any other knowledge on the part of the employer. All of the evidence having any direct bearing came from the employer. The Executive Vice President of General Steel made an effort to find out the extent of union support by talking to "many many" employees, and having his foremen do so, although this is a legally hazardous procedure. (A. III 865, 866 et seq.) He named many such employees in the record. (A. III 868 et seq). The Trial Examiner ruled that the employer had a right to make inquiries after receiving the union's demand (A. III 869). See *NLRB v. Lorben Corp.* 345 F. 2d 346, (C.A. 2, 1965); *NLRB v. Trumbull Asphalt Co.*, 327 F. 2d 841, (C.A. 8, 1964). In fact, some Board decisions hold the employer under a duty to do so. *Kay*

Allen Classics, Inc. 152 NLRB No. 134, 59 LRRM 1308 (1965); *Sagamore Shirt Co.*, 153 NLRB No. 27, 59 LRRM 1474 (1965). But most courts have regarded this as a risky road for the employer. See e.g. *NLRB v. A & P Tea Co.*, 346 F. 2d 936, (C.A. 5, 1965); *NLRB v. Logan Packing Co.*, 386 F. 2d 562 (C.A. 4).

The result of this inquiry was the employer's conclusion that only about 30 percent of the employees really favored the union (A. III 867). Yet these efforts to learn the facts were rejected by the Trial Examiner and the Board without any contrary proof, under the general cloud of the employer's supposed "bad faith", (A. III 590) and the inquiries are themselves deemed a suspect activity on the part of the employer. The Board's attitude toward this impossible dilemma has been pointed out, and we could hardly add more. *Operating Engineers v. NLRB*, 353 F. 2d 852, 856 (C.A. D.C. 1965); See *NLRB v. A & P Tea Co.*, 346 F. 2d 936, 940 (C.A. 5, 1965); *NLRB v. Dan River Mills, Inc.*, 274 F. 2d 381, 388-9 (C.A. 5). There was ample basis in *General Steel* for the employer's doubt. The burden was on the General Counsel to prove otherwise and no proof was offered. *NLRB v. River Togs, Inc.*, 382 F. 2d 198 (C.A. 2) and cases collected. The Trial Examiner erroneously placed the burden on the employer (A. III 590).

C. NUMEROUS CARDS WERE ERRONEOUSLY COUNTED AS VOTES FOR THE UNION IN THE GENERAL STEEL CASE AND THIS IS SO EVEN IF TESTED BY THE BOARD'S OWN SHIFTING RULES, AS NOW DELINEATED IN ITS BRIEF:

The customary approach of the Board to the counting of cards has been a mechanical one. If the card itself is un-

ambiguous it will be counted unless it is proved that the employee was told that the card will be used "only" to obtain an election or "just" to obtain an election. *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced 351 F. 2d 917 (C.A. 6). The Board has been critized for its reliance on this "magic words" test," and last year in *Levi Strauss and Co.* 172 NLRB No. 57, 68 LRRM 1338 (1968) the Board "explained" that it did not insist on the uses of such language *in haec verba* as long as the representations amounted to the same thing. We do not read *Levi Strauss* as making any change of substance in the Board's rule, but in any event it was decided more than two years after the Trial Examiner had decided General Steel, and he did not have the benefit of it. His approach could hardly have been more mechanical. See A. III 578-81. *Ninety-seven* cards (out of the union's supposed majority of 120) were counted on the basis of the following ruling of the Trial Examiner (A. III 580-81):

> "Accordingly, I reject Respondent's contention 'that if a man is told that his card will be secret, or will be shown only to the Labor Board for the purpose of obtaining election, that *this* is the *absolute equivalent* of telling him that it will be used '*only*' for purpose of obtaining an election.'
>
> "With respect to the 97 employees named in the attached Appendix B Respondent in its brief

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20. *National Labor Relations Board v. Swan Super Cleaners, Inc.*, 384 F. 2d 609, 617-18 (C.A. 6); *National Labor Relations Board v. S. E. Nichols Co.* 380 F. 2d 438, 442-45 (C.A. 2); *National Labor Relations Board v. Dan Howard Mfg. Co.* 390 F 2d 304, 308-9 (C.A. 7)

> contends, in substance, that their cards should be rejected because each of these employees was told one or more of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face."

Thus the Trial Examiner ruled that even though a man was told *all* of these things: that his card would be used to obtain an election, that it would otherwise remain secret and be shown to nobody but the Labor Board in connection with obtaining an election, and that notwithstanding signing the card he would remain uncommitted and free to vote either way-that still such cards may be counted as votes for the union. A majority of the cards in this case have been counted under this ruling.[21]

We think this is a clear error even under the Board's own rule as now set out in this brief, and certainly so under numerous decisions in the circuits. See 75 *Yale L. J.* 826-31; *Crawford Mfg. Co. v. NLRB* 386 F. 2d 367 (C.A. 4), cert. den. 390 U.S. 1028; *National Labor Relations Board v.*

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21. On top of this, the Trial Examiner also counted six cards where the man testified he was told the card was "only" or "just" for an election (A. II 584 et seq.), on the ground that such testimony was elicited on cross examination by leading questions, which the Trial Examiner deemed to be unreliable.

Winn-Dixie Stores, 341 F. 2d 750, 754 (C.A. 6); *National Labor Relations Board v. Koehler*, 328 F. 2d 770 (C.A. 7); *Bauer Welding & Metal Fabricators v. National Labor Relations Board*, 358 F. 2d 766, 62 LRRM 2022 (C.A. 8); *National Labor Relations Board v. Swan Super Cleaners, Inc.*, 384 F. 2d 609, 617-18 (C.A. 6); *National Labor Relations Board v. S. E. Nichols Co.*, 380 F. 2d 438, 442-45 (C.A. 2); *National Labor Relations Board v. Dan Howard Mfg. Co.* 390 F. 2d 304, 308-9 (C.A. 7)

In the *Bauer Welding & Metal Fabricators* case, *supra* the union had solicited cards by means of a letter which spoke of obtaining an election and assured the employees: "Your employer will never see theses cards". Although the cards themselves were an unambiguous designation of the union as bargaining agent, the Court regarded the letter as a "skillful attempt at misrepresentation" when the cards were later sought to be used in a card check proceeding. Enforcement of the Board's Order was denied. In accord also is the case of *Phelps-Dodge Corp. v. NLRB*, 354 F. 2d 591 (C.A. 7, 1965). In that case the court declined to enforce the Board's bargaining order where the union had inspired the employees to conceal from the employer the facts as to whether they had signed union cards, thereby deceiving him as to the union's strength when demand for recognition was made.

Nor is this matter of secrecy something to be lightly passed over from the standpoint of the employees. The integrity of the Board proceeding is involved. These employees were promised secrecy. The processes of the Board have been used here, we suggest, to further a deception by the

union, at the expense of the men it sought to organize, and to whom it made promises which have now been broken. If, to get these men to sign cards, the union promised that they would not have to stand up and be counted, then the union ought not be allowed to avail itself of the Board's writ to stand them up and count them against their will. The Board doubtless will say that this argument would come with more grace from an employee, rather than the employer whom it is accusing of misconduct, but here several employees did attempt to intervene and their petition was denied (A. III 631). At another point Board counsel asserted, "Well I don't see where the union's good faith has much to do with it. It is not a real issue in the case." (A. III 797) We think this is wrong. Surely this is a case in which the utmost good faith is demanded. The union's display of something less should not be rewarded by certification or its equivalent. *NLRB v. Bonnie Enterprises*, 341 F. 2d 712, (C.A. 4, 1965).

CONCLUSION

The judgment of the Court of Appeals denying enforcement of the Board's bargaining order directed to General Steel Products, Inc. and Crown Flex of North Carolina, Inc. should be affirmed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 205–213) is reported at 397 F. 2d 157. The decision and order of the National Labor Relations Board are reported at 164 NLRB No. 49 (R. 166–204).

JURISDICTION

The judgment of the court of appeals (R. 213) was entered on July 3, 1968. The petition for a writ of certiorari was filed on September 28, 1968, and granted on December 16, 1968 (R. 214). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 43–44.

QUESTIONS PRESENTED

1. Whether the Board properly concluded that the employer's statements in this case contained threats of reprisal and therefore constituted restraint or coercion of employees in violation of Section 8(a)(1) of the National Labor Relations Act.

2. Whether, irrespective of other unfair labor practices, an employer is justified in refusing to recognize a union that bases its claim to representative status solely on the possession of authorization cards signed by a majority of the employees.[1]

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Sinclair Company produces mill rolls, wire, and related products at its two plants in Holyoke, Massachusetts. From 1933 until 1952, the Company's journeymen and apprentice wire weavers were represented by the American Wire Weavers Protective Association. In 1952, the Company was shut down for about three months as the result of a strike over contract negotiations; it subsequently reopened without a union contract. In 1964, the Company was acquired

[1] This issue is the same as that presented in *National Labor Relations Board* v. *Gissel Packing Co.*, and *Food Store Employees Union* v. *Gissel Packing Co.*, Nos. 573 and 691, this Term.

by, and became a division of, the Lindsay Wire Weaving Company of Cleveland, Ohio. David Sinclair, son of the Company's founder, continued as president of The Sinclair Company. (R. 167, 169–171; 94–95.)

Early in July 1965,[2] the International Brotherhood of Teamsters, Local Union No. 404 began an organizing campaign among the Company's Holyoke employees. The Union sent each employee a letter, in which it stated the benefits it had achieved for its members in the wire weaving industry and enclosed an authorization card.[3] The letter also stated: "If you do have an interest in our organization, please sign the enclosed authorization card which will permit us to represent you in collective bargaining when a sufficient number of you have signed" (R. 168; 108–110). The Union obtained authorization cards from 11 of the Company's 14 journeymen wire weavers.[4]

[2] All dates hereafter are in 1965.

[3] The card, in relevant part, authorized the Union to represent the employee "for the purpose of collective bargaining and to negotiate a union security shop and membership fees deduction contract with my employer," and also contained an application for "membership in the above Union" (R. 110).

[4] The validity of the authorization cards is not in dispute. At the Board hearing, 11 employees authenticated their own signatures on the authorization cards (Tr. 12, 26, 29, 35, 39, 64, 69, 72–73, 77, 88, 196–197), and Company counsel stated that he had no objections to 8 of these 11 cards (R. 190). The Company filed no exceptions to the Trial Examiner's acceptance of the cards signed by Brunsault (who testified that he executed and mailed an undated card between July 6 and July 9) and Goulet (who testified that he filled out and dated his card) (R. 190–191; 27–29). The Company did except to the Examiner's action in counting the card executed by employee Dean, who signed a card which his wife and son later mailed without his specific instruction. The Examiner counted Dean's card on the ground that he had never sought to retrieve or revoke it (R. 191; 24–26).

On September 20, the Union wrote President Sinclair that "the majority of your journeymen-wire weavers and apprentices at your Holyoke, Massachusetts location have designated this Local Union * * * as their collective bargaining representative." The Union requested that the Company bargain with it and offered to submit the signed authorization cards to a mutually agreed upon neutral party for authentication. (R. 168; 115–116.)

On September 28, President Sinclair wrote denying the request "(a) because the Company has a good-faith doubt that Local 404 * * * represents an uncoerced majority of its weaving department employees, (b) because * * * authorization cards are unreliable as a means for determining a union's majority status, and (c) because the Company expects that there will be questions concerning the appropriate bargaining unit which should be determined by the Board." He suggested that the Union seek an election (R. 168, 118–119). The Union then petitioned for an election in a Company-wide unit (R. 147–149, 158–159) but on November 8, withdrew this request and sought instead an election among the journeymen wire weavers at the Holyoke plant; the parties subsequently stipulated that this was an appropriate unit for collective bargaining purposes (R. 156, 161, 168–169). The election was held on December 9 (R. 166).

When President Sinclair learned of the union organization effort at its inception in early July (R. 171), he talked with all his employees in an effort to combat it (R. 172, 34). In his meeting with the wire

weavers, he reminded them of the 1962 strike which "almost put our company out of business," and expressed disappointment that they were forgetting the "lessons of the past." He stated that the Company had been on "thin ice" since the strike, that its acquisition by Lindsay gave it a "second chance," but that Lindsay expected the Company to make a profit and otherwise would not support it (R. 172–173; 35–36). He added that contract negotiations with the Union could lead to a strike, because "If a Union made unreasonable demands on our company that we couldn't meet * * * the union would strike us," since "the union's only weapon is to strike" (R. 172; 36, 43); and that a strike "could lead to closing the plant"—the Holyoke operation was not necessary to "the successful operation of the total [Lindsay] company" because Lindsay had facilities elsewhere, in Mississippi and Ohio (R. 43–45, 49). He also noted that the wire weavers would have difficulty obtaining other jobs because they were a small craft, their skills were not transferrable, and many of them were too old to compete successfully in the job market (R. 172–173; 35, 49). Finally, he warned, "if you don't feel that the plant can go out of business all you have to do is look around Holyoke and see a lot of them out of business" (R. 174; 65).

On November 2 and November 5, after the Union's first petition for election was filed, President Sinclair sent letters to the employees which repeated essentially the same points (R. 123–129). The November 5 letter emphasized that the new ownership had "no

ties with Holyoke or Massachusetts. If a dollar invested here can't earn as much as a dollar invested in Mississippi or Ohio * * * you can be sure that their dollars are going to go where they can earn the most pennies" (R. 128).[5]

Two or three weeks before the December 9 election, President Sinclair distributed a pamphlet addressed "To All Wire Weavers" (R. 176–177; 143–146). The pamphlet, containing words and pictures, was captioned "Do You Want Another 13-Week Strike?" It stated that "The Union has only one weapon with which it can try to make good its big campaign promise to the Wire Weavers. That weapon is a strike. We had a 13-week strike in the Wire Weaving Department in the early 1950's. The Wire Weaving Department was closed" (R. 144). It added (*ibid.*): "We have no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike. We have no hopes that the Teamsters Union Bosses will not call a strike. * * * The Teamsters Union is a strike-happy outfit."

On November 30, President Sinclair sent another letter to all wire weavers, in which he again reminded the employees of the long strike of 1952 which put the Company "virtually out of business" (R. 177–178; 130). Although the plant "reopened on a non-union basis after that strike" (R. 130), Sinclair emphasized that the Company was then a locally owned business. "Today it is a different story. We are part

[5] The Company's statements prior to filing of the November 8 representation petition were relied on by the Board only for background purposes (R. 183).

of a multi-plant operation. A strike can still close the * * * plant, but other plants can pick up the work"; "the new ownership * * * is interested in profits and not pressure" (R. 131). Finally, he warned that the Union "can make 'big' demands which the Company cannot meet"; "[w]hen the Company answer is 'no' to the Teamsters Union 'big' demands, it can call you out on strike"; "a strike is a Union's only weapon to enforce its 'big' demands" (*ibid.*). The very next day, he sent another letter stressing the Teamsters' "hoodlum control" (R. 133–135).[6]

On December 7, two days before the election, a four-page leaflet signed by President Sinclair was distributed to the wire weavers (R. 178–180; 137–140). Entitled "Let's Look At The Record," the first page carried a large cartoon depicting the preparation of a grave for the Sinclair Company by persons labeled "IBT" and "Hoffa's Hood"; the other headstones in the cemetery contained the names of other plants in the area which allegedly closed because of unions (R. 137). The following statements appeared below the cartoon: "The Holyoke-Springfield industrial graveyard is filled with companies which died under union pressure." Some textile and paper mills have moved South whereupon "makers of [relevant wire woven

[6] Several of the letters and pamphlets emphasized the criminal elements in the leadership of the Teamsters Union and the fact that union dues went towards paying their legal and other expenses; on November 22, President Sinclair sent each employee a copy of the late Senator Kennedy's *The Enemy Within* and urged them to read it (R. 129–130, 133–135, 141). The Board made clear, however, that it had not relied on the latter act in making its findings (R. 204).

products] opened plants in the South to be near their customers" (*ibid.*). The leaflet suggested that "every wire weaver in this place would find it profitable to visit a few of the sites of once prosperous companies in the Holyoke area" before deciding how to vote (R. 137). The second page of the leaflet listed 12 named companies, with the number of "jobs lost" opposite each, totaling "around 3500" (R. 138). The leaflet acknowledged that "some of the industrial corpses were already sick when the Unions came in," but added that "the 'Union Doctors' gave them bloodletting strikes, restricted production and higher labor costs." Although Sinclair admitted at the hearing that he had no objective basis for linking union demands to the demise of these companies (R. 40–41, 61–63), the pamphlet stated that "the result * * * was the death of these companies" (*ibid.*). On the back of the leaflet were photographs of five plants, under the captions, "Remember When These Plants Furnished Jobs To Area People * * * Think * * * Unions Furnished No Job Security Here!" The plants were identified by name, and were characterized as follows: "Not Even G.E. Could Make A Profit Here," "Death Along The River," and "So Quiet Today" (R. 140).

On December 8, the day before the election, President Sinclair addressed the wire weavers (R. 180–182). He repeated that the Company's financial condition was precarious; that the Teamsters' demands "could lead to even larger losses than we have had," and result in a strike; and that this would

jeopardize the continued operation of the plant since the new ownership "have made it clear * * * that they look for profit and not a hole to pour money down" (R. 163). He added: "Now I would be the last one to blacklist you from getting another job if this plant closed by strike, but the Teamsters can't guarantee you another job either" (R. 164). He then repeated an earlier warning that age and lack of education would make it hard for some of the weavers to obtain new jobs (R. 164, 69–72).[7]

The Board election was held on December 9, and the Union was defeated by a vote of 7 to 6 (R. 169). The Union timely filed both objections to the election and unfair labor practice charges. These were consolidated for hearing before a Trial Examiner. (R. 166, 168).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board agreed with its Trial Examiner that President Sinclair's communications with the employees on and after November 8, considered as a whole and in the light of his earlier letters and speeches, "reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the

[7] At the Board hearing, President Sinclair admitted that the Company had made a profit in 1965 (R. 69). He also admitted that Local No. 404 had never made any demands upon the Company, and that he had no basis for concluding that this local or its leaders were connected with the racketeering or picket line violence which he had mentioned (R. 184; 51, 47–48).

weaving production, with the resultant loss of jobs to the wire weavers." Accordingly, the Board found that the Company violated Section 8(a)(1) of the Act (R. 183). The Board also found that the Union had valid authorization cards from a majority of the employees when it requested recognition on September 20; that the Company declined recognition, not because of a good faith doubt as to the Union's majority status, but in order to gain time to dissipate that status; and that the Company's refusal to bargain thus violated Section 8(a)(5) and (1) of the Act (R. 189–195). The Board set the election aside (R. 188–189), and ordered the Company to cease and desist from its unfair labor practices and to bargain with the Union upon request (R. 198–200).

C. THE COURT OF APPEALS' DECISION

The court of appeals sustained the Board's findings and conclusions and enforced its order in full (R. 205–213).

SUMMARY OF ARGUMENT

This case presents two separate questions. The first is whether the Company violated Section 8(a)(1) of the National Labor Relations Act by leading its employees to believe that it would be likely to close its plant or transfer its operations if they selected the Union. The second is whether the Board properly concluded, in part on the basis of the Section 8(a)(1) violation, that the Company had not predicated its refusal to bargain with the Union in good faith on a

doubt as to its majority status, and appropriately ordered the Company to bargain with the Union, which represented a majority of its wire weavers as shown by the authorization cards.

I.

Whether the Company violated Section 8(a)(1) by its pre-election communications to its employees, or rather engaged in a simple expression of views protected by Section 8(c) of the Act, must be decided in the context in which the communications were made, and with an eye to their likely impact on the employees. The crucial issue is whether the communications contained a "threat of reprisal or force or promise of benefit"; "an employer is free to tell his employees what he reasonably believes will be the likely economic consequences of unionization that are outside his control, as distinguished from threats of economic reprisal to be taken solely on his own volition." *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 202 (C.A. 2). In the labor management context, words which standing alone might appear innocuous may carry a coercive sting. Section 8(c) does not protect such words. Reliance on context does not render the Board's distinction impermissibly vague; and because of the importance of context, it is for the Board to make the initial assessment whether or not a proscribed threat has been made.

In this case, the Board reasonably concluded that President Sinclair's communications conveyed to the

employees a threat that the Company would be likely to close its plant or transfer its operations if they selected the Union. His statements relied on a categorical assumption that the local Union would make unreasonable demands the Company could not meet and then call a strike so severe as to put the Company out of business. He also relied on assertions, for which he knew he had no factual basis, that unionization had caused other factories in the neighborhood to close down. Conscious overstatement or misrepresentation of the perils of unionization has often been found by the Board to be coercive. Employees readily understand that such remarks really express not predictions about economic matters beyond management's control but threats as to what management will do if the union wins the election.

II

As we show in detail in our brief in *National Labor Relations Board* v. *Gissel,* Nos. 573 and 691, this Term, a Board election is not the only means by which a Union's majority status may be established. Petitioner considerably overstates the alleged unreliability of union authorization cards. Its statistics are incomplete and on the facts of this case, as in *Gissel,* there was neither any reason to doubt the reliability of the authorization cards obtained nor any challenge to the cards before the Board on the grounds of misrepresentation or coercion. Although a secret ballot election is the preferable means for determining representation questions, when the employer's unfair practices interfere with the election

process the Board is justified in relying upon cards. Nothing in the legislative history of the Act forecloses such reliance.

In this case the Union plainly represented a majority of the unit at the time of its demand for recognition. Moreover, the Company's unfair practices justified the Board's inference that, whether or not it knew the Union had a majority of cards, its refusal to deal with the Union was not motivated in good faith by doubt about its status, but by a desire to gain time in which to dissipate by unlawful means whatever strength the Union had. The Board could also properly conclude that the implied threats of plant closure if the Union was selected, made by one in a position to carry them out, chilled employee support for the Union, and that a second election would provide only another reflection of this unlawfully influenced sentiment and further opportunity for employer coercion. In this situation, a bargaining order is the only appropriate remedy.

ARGUMENT

I. THE COMPANY VIOLATED SECTION 8(A)(1) OF THE ACT BY LEADING ITS EMPLOYEES TO BELIEVE THAT IT WOULD BE LIKELY TO CLOSE THE PLANT OR TRANSFER ITS OPERATIONS IF THEY SELECTED THE UNION

A. IN DETERMINING WHETHER EMPLOYER COMMUNICATIONS CONSTITUTE A THREAT OF REPRISAL OR FORCE, IT IS NECESSARY TO LOOK BEYOND THE BARE WORDS AND TO EVALUATE THEIR IMPACT UPON THE EMPLOYEES IN THE CONTEXT IN WHICH THEY ARE USED.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their right to self-organization. Section 8(c), in turn, provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof * * * shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Read together, these provisions leave an employer free to communicate to the employees his views respecting unions, so long as that communication does not contain a "threat of reprisal or force or promise of benefit."

The line between a threat of reprisal and a permissible expression of views is easy to draw in general terms. "[A]s the dictionaries tell us, a 'threat of reprisal' means a 'threat of retaliation' and this in turn means not a prediction that adverse consequences will develop but a threat that they will be deliberately inflicted in return for an injury." *National Labor Relations Board* v. *Golub Corp.*, 388 F. 2d 921, 928 (C.A. 2). Thus, "an employer is free to tell his employees what he reasonably believes will be the likely economic consequences of unionization that are *outside his control,* as distinguished from threats of economic reprisal to be taken solely *on his own volition.*" *National Labor Relations Board* v. *River Togs, Inc.*, 382 F. 2d 198, 202 (C.A. 2) (emphasis added).[8] However,

[8] "The most obvious reason for excepting coercive speech [from the protection of the First Amendment] is to prevent the employer from trading on his economic power over the employees by threatening retribution if they vote for the union." Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 Harv. L. Rev. 38, 69 (1964).

since today relatively few employers make express threats,[9] the problem is to determine when words couched as "predictions" in fact convey a threat of reprisal.

In *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 479, this Court recognized that innocuous words may be "raised * * * to the stature of coercion by reliance on the surrounding circumstances."[10] Similarly, words or statements which convey no threat, when read separately, can have a coercive impact when read as a whole. "[W]ords and speech are not governed entirely by mathematical concepts. Words and phrases, each lawful when considered alone, can be united in such a fashion as to yield an improper end product." *Daniel Construction Co.* v. *National Labor Relations Board*, 341 F. 2d 805, 811 (C.A. 4), certiorari denied, 382 U.S. 831. The "impact of the words is a function of the time and place, of the positions of the speaker and listener, of the tone and past relations—in short, of environment and experience. * * * The dictionary

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[9] "Today the employer seldom engages in crude, flagrant derelictions. Nowadays it is usually a case of more subtlety, perhaps the more effective, and certainly more likely to escape legal condemnation." *National Labor Relations Board* v. *Neuhoff Bros.*, 375 F. 2d 372, 374 (C.A. 5).

[10] Although in that case the Court rejected the Board's conclusion that the employer's speeches were coercive *per se*, it held that the Board should consider whether coerciveness appeared in the light of the employer's other conduct. As the Court added in *Thomas* v. *Collins*, 323 U.S. 516, 537–538: "When to [employer] persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed."

meaning is irrelevant; the question is, what did the speaker intend and the listener understand." Cox, *Law and the National Labor Policy* 44 (1960). Though an employer "proceed[s] carefully in attempting to limit his communications to the legally permissible, his words must be judged by their import to his employees * * *. [O]ne who engages in 'brinksmanship' may easily overstep and tumble into the brink." *Wausau Steel Corp.* v. *National Labor Relations Board*, 377 F. 2d 369, 372 (C.A. 7).[11]

Section 8(c) of the Act is consistent with this analysis. That section makes an expression of views or opinion privileged "if such expression contains no threat of reprisal." It does not require that the threat of reprisal be express, nor does it provide any guides for determining whether an utterance contains a

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[11] As Judge Learned Hand observed long ago:

"Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first." [*National Labor Relations Board* v. *Federbush Co.*, 121 F. 2d 954, 957 (C.A. 2).]

Although this Court's *Virginia Electric & Power* decision, *supra*, overruled the *Feberbush* holding that the Board could infer coercion merely from the circumstance that the employer had addressed his employees on plant premises (see *National Labor Relations Board* v. *American Tube Bending Co.*, 134 F. 2d 993 (C.A. 2)), it did not impair the validity of Judge Hand's statement.

threat. Moreover, the legislative history of Section 8(c) shows that it was aimed at:

> The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose. * * * The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination. [H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 45, 1 Leg. Hist. (1947) 549.] [12]

In *Linn* v. *United Plant Guard Workers*, 383 U.S. 54, the Court accepted this view of Section 8(c), in holding that it did not protect libelous statements which were maliciously disseminated in the course of a labor dispute. "The wording of the statute indicates * * * that § 8(c) was not designed to serve [the inter-

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[12] As Senator Taft added:

"The purpose of the conferees * * * was to make it clear that the Board is not to construe utterances containing neither threats nor promises of benefit as an unfair labor practice standing alone or as making some act which would otherwise be legal an unfair labor practice. The conferees had in mind a number of Board decisions in which because of the fact that an employer has at some time committed an unfair labor practice a speech by him, innocuous in itself, has been held not to be privileged. * * * There have also been a number of decisions by the Board in which discharges of employees, even though there was no evidence in the surrounding circumstances of discrimination, have been deemed unfair labor practices simply because at one time or another the employer has expressed himself as not in favor of unionization of his employees. * * *" (93 Cong. Rec. 6859, 2 Leg. Hist. (1947) 1624.)

est of encouraging free debate on issues dividing labor and management] by immunizing all statements made in the course of a labor controversy. * * * It is more likely that Congress adopted this section for a narrower purpose, *i.e.*, to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements." 383 U.S. at 62, n. 5.

Moreover, in distinguishing between simple statements of distaste for unions or arguments against unionization, on the one hand, and threats—however guarded—about what the employer will do if a union is voted in, the Board's rule is not impermissibly vague. Section 8(c) was never intended to permit sophisticated employers to circumvent the Act's prohibition against coercion of their employees' choice by couching their threats in a particular way. The touchstone of vagueness is whether conscientious employers may be deterred from making their views on unionization known, and nothing in the Board's statement or application of its test for coercion suggests that such deterrence is likely to occur. Although there may inevitably be imprecision in the *formulation* of a distinction, such as this, whose application is so heavily dependent upon context, employers are intimately familiar with the particular labor-management context from which the distinction draws meaning. Thus, in focussing on "the question * * * what did the speaker intend and the listener understand," Cox, *op. cit. supra, ibid.*, the Board's rule provides a meaningful and workable standard of behavior. Cf. *Federal Trade Commission* v. *Texaco, Inc.*, No. 24, this Term, decided December 16, 1968; *Giboney* v. *Em-*

pire Storage Co., 336 U.S. 490; *United States* v. *National Dairy Products Corp.*, 372 U.S. 29. As here, the cases in which the Board has found statements in the form of predictions to have been coercive (*infra* at pp. 22, 24, 26) are uniformly characterized by reckless if not deliberate overstatement or misrepresentation of the effects unionization has had on other plants, or "might" have in the employer's plant—overstatements from which the employees can readily infer that their employer is in reality describing effects which he will bring about if a union is selected.

Finally, because of the importance to this inquiry of a thorough acquaintance with the context in which such statements occur, it is particularly appropriate for the reviewing court to recognize "the Board's competence in the first instance to weigh the significance of the raw facts of conduct and to draw from them an informed judgment as to the ultimate fact. * * * [T]he significance of conduct, itself apparently innocent and evidently insufficient to sustain a finding of an unfair labor practice, 'may be altered by imponderable subtleties at work, which it is not [the Court's] function to appraise' but which are, first, for the Board's consideration upon all the evidence. *Labor Board* v. *Virginia Power Co.*, 314 U.S. 469, 479." *National Labor Relations Board* v. *Insurance Agents*, 361 U.S. 477, 505–506. Nor is this a rule limited to non-speech cases; the quotation from the *Virginia Power Co.* case directly concerned "the purport of * * * utterances." 314 U.S. at 479.

This is neither to say that the Board's findings have presumptive validity, nor to relieve the reviewing

court of the obligation, which it discharged here, to review the entire record and satisfy itself that the Board has not abridged the right of free speech. But as this Court has made plain, "the requirement for canvassing 'the whole record' in order to ascertain substantiality does not * * * mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488. "An administrative agency * * * may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based on the facts proven. One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration * * *." *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 48–49, quoting from *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 800.

In sum, as in the case of unfair labor practice conduct generally, it is for the Board to make the initial assessment whether or not a proscribed threat has been made. Nothing in Section 8(c) or the Constitution precludes it from predicating that assessment on apparently innocuous words and phrases which, when viewed as a whole and from the stand-

point of their likely impact on the employees, in fact convey to them an employer threat of reprisal.[13]

B. THE BOARD REASONABLY CONCLUDED THAT PRESIDENT SINCLAIR'S COMMUNICATIONS CONVEYED TO THE EMPLOYEES A THREAT THAT THE COMPANY WOULD CLOSE THE PLANT OR TRANSFER ITS OPERATIONS IF THEY SELECTED THE UNION

President Sinclair's speeches and other communications to the wire weavers made the following points: (1) that the 1952 strike had left the Company in a state of continuing financial difficulty; (2) that a union would make unreasonable demands which the Company could not meet, and then its only recourse would be to strike; (3) that such recourse was particularly to be expected of the Teamsters Union, which was a "strike happy outfit" led by racketeers; (4) that another strike could result in the closing of the plant, as Lindsay (the parent corporation) would shift work to its Mississippi and Ohio plants if Sinclair did not make a profit; and (5) that the wire weavers would then lose their jobs and, because of their advanced age and limited craft skills, they would find it difficult to find other work.

To support these "predictions," President Sinclair relied on a categorical assumption that Local 404 would make unreasonable demands the Company could not meet and then call a strike so severe as to put the Company out of business, and an assertion,

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[13] *National Labor Relations Board* v. *Exchange Parts Co.*, 375 U.S. 405, is not to the contrary. Although the Court there declined to place any reliance on the employer's letter of March 4 promising benefits (at 409–410, n. 3), it had no occasion to consider whether the letter, standing alone, violated Section 8(a)(1), since no such violation was alleged.

for which he knew he had no basis, that unionization in other area plants had led to their closure. The question before the Board was whether these were *bona fide* predictions of economic matters beyond management's control, or in reality statements which the employees would understand as relating to matters subject to its volition and bearing an implied threat as to the choice management would make if the employees chose the Union.

By insisting on the inevitability of unreasonable demands from the Union, followed by a strike and the possibility of concomitant closure, President Sinclair's actions were such as to make it proper for the Board to find that he had engaged in a form of conscious overstatement or misrepresentation of the perils of unionization of the sort which the Board has frequently found to have been coercive. See, *e.g.*, *Miller-Charles and Co.*, 146 NLRB 405, enforced 341 F. 2d 870 (C.A. 2); *Harvey Aluminum*, 156 NLRB 1353, 1358–1360; *Surprenant Mfg. Co.*, 144 NLRB 507, 510–511, enforced 341 F. 2d 756, 761 (C.A. 6); *Ideal Baking Co.*, 143 NLRB 546; *Kolmar Laboratories, Inc.*, 159 NLRB 805, 807–810, and cases cited in n. 3,[14] enforced 387 F. 2d 833 (C.A. 7). Local 404 had as yet presented no demands to him (R. 51), much less threatened a strike.[15]

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[14] These were the cases relied upon by the Trial Examiner in concluding that President Sinclair's communications had been coercive (R. 183–184, n. 9).

[15] In July, before the Union's organizing drive started, Robert Williams, President of the Wire Weavers Trade Division of the Teamsters International, sent the Company's employees a letter which indicated that the Teamsters Union had

The employees would be likely to interpret Sinclair's remarks as really intended to express an intention on the part of the Company to adopt an intransigent attitude toward the Union's demands, no matter what they were, and thus force the Union to strike. They would realize, too, that in repeatedly warning that if a strike occurred the parent corporation could close the Holyoke plant and transfer its work elsewhere (R. 44, 46, 49, 60), Sinclair was also speaking of matters within management's control. A majority of the employees had been members of the American Wire Weavers Protective Association in 1952 (R. 75–76), were thus aware of how the Company had "broken" that union, and could well have understood President Sinclair's apparent predictions as a firm statement of intention not to deal with the Union under any conditions, even if this meant closing the plant or transferring its work elsewhere.

The Board could find that this was not a permissible expression of "views and opinion," but rather a threat of reprisal proscribed by Section 8(a)(1) of the Act. "[W]hen statements such as these are made by one who is a part of the company management, and who has the power to change prophecies into realities, such statements, whether couched in language of prob-

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organized the major weaving firms in the country and that it had just obtained "a collective bargaining package which was better than 62½¢ over the three year period" from a firm in Wisconsin (R. 108). There is little basis for petitioner's assumption (Br. 59–60, n. 53) that Local 404 would have presented a similar demand to the Company, which was located in a different area and which allegedly had a depressed financial condition.

ability or certainty, tend to impede and coerce employees in their right of self-organization, and therefore constitute unfair labor practices." *National Labor Relations Board* v. *Nabors*, 196 F. 2d 272, 276 (C.A. 5), certiorari denied, 344 U.S. 865. Accord: *Surprenant Mfg. Co.* v. *National Labor Relations Board*, 341 F. 2d 756, 761 (C.A. 6); *National Labor Relations Board* v. *Kolmar Laboratories, Inc.*, 387 F. 2d 833 (C.A. 7); *National Labor Relations Board* v. *Louisiana Mfg. Co.*, 374 F. 2d 696, 702–703 (C.A. 8).[16]

President Sinclair's references to other plants in the Holyoke area allegedly closed because the "'Union

[16] As Dean Bok has pointed out:

"* * * When the employer declares that he will have to move or close down if a union comes in and obtains higher wages, union organizers can reply that their negotiators will take account of the company's position and endeavor not to induce its departure from the area. Under these circumstances, the arguments on both sides are legitimate, and the voters are free to choose between them. But if the employees are led to believe that the company will simply close down automatically if the union is selected, they are left with a devastating and improper assertion which the organizer is unable to rebut save by pointing out that the employer cannot carry out his plan without violating the law. * * * [T]his is an argument that will often make little or no impression on the voters. Hence, much may turn on whether the employees understand that the employer will close down only if economic considerations impel him to do so, and the Board can legitimately take exception to any statement that could reasonably convey a contrary impression. Indeed, one may even condemn ambiguous references to the closing of other plants that have no apparent purpose other than to arouse the apprehensions of the employees. * * *" [Bok, *op. cit.*, *supra*, 78 Harv. L. Rev. at 77.]

Doctors' gave them bloodletting strikes, restricted production and higher labor costs" were equally coercive. At the Board hearing, he admitted that he had no basis for his assertion that the closing of these plants was attributable to a union.[17] These reckless or deliberately false statements about plant closings, which petitioner's brief makes no attempt to justify (see Br. 62–64), provided an adequate basis for the Board to

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[17] President Sinclair testified (R. 40–41):

Q. Did the union have anything to do to your knowledge [with] the closing down of the White & Wyckoff Company?

A. No.

Q. Did * * * a union have anything to do with the closing down of Chemical Fine Paper Company?

A. I don't believe so, no.

Q. Did a union hav[e] anything to do with the closing down of G.E.?

A. G.E. was constantly faced with wildcat strikes and other types of strikes in that plant. I have no knowledge of their policy or decision but my feeling would be that, yes a union certainly was evident in their decision to close.

* * * * *

Q. Based on information that you had at the time you prepared that pamphlet. Did a union have anything to do with the closing down of [Crocker-McElwain] company?

A. Not that I know of.

Q. * * * C. F. Church & Company * * * based on any information that you had did a union have anything to do with the closing down of that company?

A. Only hearsay information that I had.

He later testified that C. F. Church & Co. had merely moved its plant 20 miles away, to Palmer, Massachusetts (R. 62), and that, although the union was a factor, he "wouldn't say it caused" the closedown of the G.E. plant (R. 63).

find that President Sinclair was threatening closure, not simply presenting his opinion as to the consequences of unionization. Employees are particularly sensitive about remarks which equate the union with plant shut downs (see n. 16, *supra*); thus, the Board could find that the Company's employees would interpret these statements, too, as a warning of the economic reprisals which the Company itself would take if they selected the Union. "It seems clear that Congress did not intend to protect an unqualified assertion of such importance unless the utterer can show that he had some reasonable basis for it." *Int'l Union of Electrical Workers* v. *National Labor Relations Board,* 289 F. 2d 757, 763 (C.A. D.C.). Accord: *National Labor Relations Board* v. *Miller,* 341 F. 2d 870, 873 (C.A. 2); *National Labor Relations Board* v. *Antell,* 358 F. 2d 880, 881, n. 1 (C.A. 1). Cf. *National Labor Relations Board* v. *Golub,* 388 F. 2d 921, 928 (C.A. 2) ("what is in form a prediction could so far outrun any possible basis for it that the Board might be justified in concluding a threat was intended * * *").

Finally, it is clear that the Trial Examiner and the Board relied upon these factors in finding that the Company had violated Section 8(a)(1) of the Act "by threatening employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment for the wire weavers, if they were to select the [Union] as their

collective bargaining representative" (R. 197). The cases the Trial Examiner cited, *supra*, at note 14, each involved management "predictions" about what the union would inevitably demand, and the economic hardships which would necessarily result to the employees from that demand; in each, those hardships were within management control and the employees would understand that it was management that was likely to impose them if the union won. See also *National Labor Relations Board* v. *Golub Corp.*, *supra*, 388 F. 2d at 930 (dissenting opinion). Thus, the Board reasonably found the required element of coercion, and properly ordered the Company to desist.[18]

[18] The Board's order is not, as petitioner alleges (Br. 46), "almost a complete prohibition of speech," but is the typical form of remedy the Board prescribes for such unfair labor practices. It requires the Company to cease and desist from—

"(b) Threatening the employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, if they were to select the [Union], or any other labor organization as their collective-bargaining representative." (R. 199.)

When read against the Board's findings and the supporting evidence, the order adequately informs the Company of what is required of it in the future. It is on notice that it must refrain from threatening to close the plant if the employees select a union representative, either overtly or by means of statements like those here, which, though couched in terms of predictions, would reasonably be construed by its employees as conveying such a threat. See Jaffe, *Judicial Control of Administrative Action* (1965) 275–276, 279. Petitioner is free to express its views and opinions respecting unionization, so long as those statements do not, as did those here, threaten reprisal.

II. THE BOARD PROPERLY CONCLUDED THAT THE COMPANY'S REFUSAL TO BARGAIN WITH THE UNION WAS NOT BASED ON A GOOD FAITH DOUBT AS TO ITS MAJORITY STATUS; A BARGAINING ORDER IS AN APPROPRIATE REMEDY FOR BOTH THIS UNLAWFUL REFUSAL TO BARGAIN AND THE OTHER UNFAIR LABOR PRACTICES

A. UNDER THE ACT, A BOARD ELECTION IS NOT THE ONLY MEANS BY WHICH A UNION'S MAJORITY STATUS MAY BE ESTABLISHED

The Board found that the Union had valid authorization cards from 11 of the 14 wire weavers on September 20, 1965, when it requested recognition as their representative; that the Company's refusal to bargain with the Union was not based on a good faith doubt as to its majority status, but a desire to undermine the Union by unlawful means—as shown by its action in threatening the employees with reprisals if they selected the Union; that the Company's conduct in fact did dissipate the Union's majority and made a fair election impossible; and that a bargaining order was an appropriate remedy (R. 189–192, 195, 198).

Such findings and orders have been approved, as in this case, in all Circuits save the Fourth, which in a series of recent decisions, beginning with *National Labor Relations Board* v. *Logan Packing Co.*, 386 F. 2d 562, has departed from these settled principles chiefly for the reasons which the Company here asserts: (1) authorization cards are inherently so unreliable that an employer who refuses to bargain with a union whose claim to represent a majority of the employees is based thereon must always be deemed to be acting on a good faith doubt that the union

does represent a majority; and (2) Congress, in amending the Act in 1947, intended to make a Board election the only method of resolving questions of majority status under the Act. In general, we rely on our Brief in *National Labor Relations Board* v. *Gissel,* Nos. 573 and 691, this Term, to show that these arguments overstate the deficiencies of authorization cards and misread the legislative history of the 1947 amendments to the Act. Here, we deal only with the additional considerations which the Company and the amici advance.

1. The reliability of cards

In arguing that cards are inherently unreliable, petitioner claims that the Teamsters Union failed to obtain 30 percent of the vote in 73 of 190 elections recently held in units of comparable size, although it was required to produce cards from that proportion of the employees in order to have its election petitions processed (Br. 77–79). But a careful examination of the Board's statistics [19] shows that petitioner's sample includes only the elections in which the Teamsters were defeated. In the same period, the Teamsters Union won 223 elections. Thus, the net result is quite different: that in 340 of 413 elections (82.5 percent), the Teamsters received more than the 30 percent employee support pledged by the authorization cards. This figure shows an impressive correlation between card authorizations and actual election results.

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[19] *NLRB Election Reports*, compiled by the Board's Division of Administration.

Moreover, as in *Gissel,* the facts furnish no basis for doubting the reliability of the authorization cards obtained by the Union in this case. Not one card here is challenged on the ground of misrepresentation or coercion. Similarly, the argument that a card signing drive deprives employees of the opportunity to hear the employer's side is wholly inapposite, since the Union's demand for recognition was not made until almost two months after the Company became aware of the campaign—time enough for the Company president to have delivered coercive speeches to all the employees.

Finally, as in *Gissel,* petitioner's arguments that secret ballot elections are more dependable than cards and that the Board's present rules foreclose effective checking of cards must be viewed against its conduct. A secret ballot election is not more dependable than cards if the employer has coerced his employees in their choice, thus precluding a fair election. And the alleged dilemma of choosing between an "independent" card check which tells the employer nothing about how the cards were obtained and a personal investigation which risks unfair labor practice findings—the "Scylla and Charybdis" of Judge Brown's oft-quoted metaphor (*National Labor Relations Board* v. *Dan River Mills,* 274 F. 2d 381, 388 (C.A. 5))—is more apparent than real. An employer is not obligated to accept a card check as proof of majority

status; nor is he required to justify his refusal to do so by making his own investigation of employee sentiment. Rather, so long as he acts in good faith, he may lawfully demand a Board conducted election to resolve his doubts of a union's majority based on cards. *Aaron Bros. Co.*, 158 NLRB 1077, 1078; *H & W Construction Co., Inc.*, 161 NLRB 852, 857. But where, as here, the employer proceeds to undermine the election process through substantial unfair labor practices, he is in no position to complain that the unreliability of cards trapped him in a legal paradox.

2. The legislative history

Petitioner adds nothing new to the discussion of the legislative history, which is fully dealt with in our *Gissel* brief, pp. 33–35. As did the Fourth Circuit, it concentrates on the elimination from Section 9(c) of the Wagner Act of its provision that a Board representation hearing might be held "either in conjunction with a proceeding under section 10 or otherwise" and that the Board could either take a secret ballot of employees "or utilize any other suitable method to ascertain such representatives" (Pet. Br. 73). But these changes did no more than make a Board election the sole basis for *certification*: under the Wagner Act, the Board had sometimes joined representation and unfair labor practice proceedings and, on finding in the latter that a union with which the employer had refused to bargain represented the majority of employees, *cer-*

tified the union without an election and dismissed the representation petition.[20]

Petitioner overlooks the legislative history of Section 8(a)(5), which the House sought to amend in 1947 to permit a refusal to bargain violation to be found only where an employer failed to bargain with a union already recognized or currently certified; the employer's duty to bargain on the basis of cards and the Section 8(a)(5) proceeding as a means of enforcing such duty would have been totally eliminated. But as Senator Taft reported to the Senate (93 Cong. Rec. 6443, 2 Leg. Hist. (1947) (1539), "the Senate conference refused to yield" on this matter, thereby assuring that the "unfair labor practices contained in the present National Labor Relations Act remain unchanged. * * *" Thus, by an explicit choice, Congress retained the statutory authority for bargaining orders issued in unfair labor practice proceedings on the basis of authorization cards. "Cards have been used under the Act for thirty years; the Supreme Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley bill to amend section 8(a)(5) * * * was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drumbeating should be permitted to overcome, without legislation, this history." Lesnick, *Establishment of Bargaining Rights Without an NLRB Election,* 65 Mich. L. Rev. 851, 861–862 (1967).[21]

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[20] See *Atlantic Refining Co.*, 1 NLRB 359, 369; *Shell Oil Co.*, 2 NLRB 835, 853; *Omaha Hat Corp.*, 4 NLRB 878, 892.

[21] The American Retail Federation contends in its brief *amicus curiae* that the Board once recognized that the amended Sec-

B. THE BOARD CORRECTLY FOUND THAT THE UNION REPRESENTED A MAJORITY OF UNIT EMPLOYEES AT THE TIME OF ITS DEMAND FOR RECOGNITION, AND THAT THE COMPANY'S REFUSAL TO RECOGNIZE AND BARGAIN WITH IT WAS NOT PROMPTED IN GOOD FAITH BY DOUBT AS TO THAT FACT

It is undisputed that, before Local 404 presented the Company with its September 20 demand for recognition, it had obtained valid authorization cards from a majority of the wire weavers. On September 28, the Company rejected this demand, alleging as its reasons: (a) a good faith doubt of the claimed majority; (b) the general unreliability of cards; (c) the probable existence of unit issues which should be determined by the Board. But as soon as an election appeared near, President Sinclair launched a month-long barrage of anti-union letters, speeches, handbills, photographs, and cartoons. As shown above, the totality of the Company's message was that a Union victory would precipitate an *inevitable* succession of dire consequences—strikes, shut down, loss of jobs—a message which the employees would be likely to interpret as a

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tion 9(c) left "election by secret ballot as the sole method of resolving a question concerning representation * * *" (at p. 12, n. 25, quoting the Board's Annual Report for 1948). But this recognition was limited to the question of certification. The Board stated at page 60 of the same report:

"An employer acting in good faith may insist, as a condition precedent to recognition, that the union submit proof that it represents a majority of employees in the unit and that the proof be made through the medium of a Board-directed election. But when the employer does not make its request for proof of majority in good faith, as when it is made against a background of unfair labor practices intended to destroy the union's majority, noncompliance with the request does not constitute a defense to a refusal to bargain charge."

The Board's position is the same today.

threat to close the plant or transfer its operations elsewhere.

Threats of this nature, made by the president, cannot be reconciled with the Company's alleged desire to resolve good faith doubts of the Union's majority status in a Board election, for they are serious enough to preclude a fair election (see *infra*, pp. 38–40). Nor is such conduct consistent with a conclusion that the Company was concerned one way or another with the number of cards actually obtained by the Union. Thus, as in *Gissel* (Brief, pp. 23–25), the Board reasonably could infer, not that the employer actually knew that the Union had a majority of cards, but that any doubt which he might have had was not the basic motive for his refusal to bargain.

> Even if respondent had some doubts as to the majority status of the union, its entering upon an unlawful course of conduct in violation of section 8(a)(1) and clearly directed at undermining whatever support the union had * * * indicates that such doubt, if any, was not the key motivating factor in its refusal to bargain. To the extent that respondent had any good faith doubts it apparently was not anxious to resolve them until such time as it could be sure that no matter what the proper unit was the union would not have a majority. [*National Labor Relations Board v. Luisi Truck Lines*, 384 F. 2d 842, 847 (C.A. 9).]

Judge Friendly (on whose views petitioner relies) has similarly recognized that—

> the Board may properly insist not only that there be a reasonable basis for doubt but that

> this be a substantial reason for the employer's refusal to recognize the union rather than simply an excuse later manufactured for a position he would have taken in any event, and that his commission of unfair labor practices has some bearing on these issues, particularly the latter. [*National Labor Relations Board* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829, 838 (C.A. 2).]

Thus, the Board properly found the Company's refusal to bargain to have violated the bargaining obligation imposed by Section 8(a)(5) of the Act.[22]

Petitioner contends, however, that the Union's "confusing" equivocation as to the appropriate bargaining unit fully justified a rejection of the demand for recognition (Br. 82–83, 85–86). Thus, a month prior to the September 20 demand, President Sinclair received notification through an attorney for the parent Company in Cleveland that the Teamsters International was claiming majority status in a production and maintenance unit comprised of about 87 employees at the Holyoke plant (R. 30–31). Since he

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[22] Under the Board's *Bernel Foam Products Co.* doctrine, 146 NLRB 1277, there is no inconsistency between the finding of a refusal to bargain and the Union's participation in a consent election agreement which stated, *inter alia*, that a "question of representation" existed. See the Board's *Gissel* Brief at 53–55. Although the Board stated that a bargaining order would have been an appropriate remedy in this case even if a good faith doubt had been present (R. 197–198), that ruling hardly suggests that the Board considers the question of such doubt irrelevant, as petitioner urges (Br. 83–84). That statement simply reflects the Board's view that the unfair labor practices here were particularly damaging, and intractable by any lesser remedy. See *infra*, p. 39, n. 24.

thought it "strange" that the request did not come from a local representative (R. 30) and since he did not believe that the Union could have gained majority status in a full production and maintenance unit (which in any event included only about 65 employees) (R. 31, 80–81), President Sinclair rejected the demand.

Whatever the merits of this initial rejection, it provided no basis for denial of the September 20 demand. Quite the contrary, that demand fully repaired all the purported deficiencies of the earlier request: *i.e.*, the demand came directly from Local 404 and it was expressly limited to a relatively small unit which the Union could well have organized. Indeed, President Sinclair admitted knowing that the campaign had begun in the wire weavers department (R. 34). Early in July, he had received a copy of a letter which the wire weavers division of the Teamsters Union had sent to the employees, and shortly thereafter he spoke to the wire weavers about the Union, announcing his intention to be "blunt" (R. 31, 34, 108–109). Moreover, Sinclair was fully aware that the union which had previously represented his employees had done so in just such a unit of wire weavers and apprentices (R. 82, 193–194). In this context, when the Company received the September 20 demand, it had every reason to believe that Local 404 had tendered a *bona fide* request for recognition, in an appropriate and potentially organizable unit.

Petitioner further contends that the September 20 demand was itself confusing and misleading because of the inclusion of apprentices—a classification which

the Company had not employed for several years. Specifically, petitioner argues that it did not know what the Union meant by "apprentices," or whether this referred to other employees in the weaving department or to a wholly separate classification (R. 32–33). But, as the Trial Examiner noted:

> Sinclair very well knew what an apprentice was. He admitted that Respondent had in the past employed wire weaver apprentices, that it had not been unusual for a wire weaving department to employ both journeymen and wire weaver apprentices, that the only union which ever represented any of Respondent's employees represented the journeymen wire weavers and apprentices, and that many of the journeymen who were employed by Respondent during the period from July through December had started as apprentices and had served their apprentice years with Respondent. He further admitted that the helpers employed in the weaving department "to assist the weavers in the various operations of setting up and removing cloth" are not apprentices. [R. 193–194; 81–83, 74.]

Moreover, at the time of the refusal to bargain, petitioner made no mention of the alleged confusion in regard to apprentices, but, rather, responded only that it doubted the Union's majority and that it believed there were unit issues that should be settled by the Board (R. 192–193; 118–119).

Finally, petitioner points out that, after the September 20 refusal to bargain, the Union altered its unit position several times, presenting a new demand in a different unit on October 11, then stipulating to

an election in still another unit on November 2; and finally filing a petition limited to the wire weavers on November 8 (R. 120–121, 159, 161). However, these post-refusal events could not possibly have "confused" the Company at the time of the September 20 demand and its rejection.[23] Indeed, the Company's unlawful conduct after November 8, when the election date had finally been set and all the unit confusion had unquestionably ended, justifies the conclusion that the underlying motivation for its actions was an intent to avoid the statutory bargaining obligation—regardless of what unit was requested.

C. A BARGAINING ORDER IS AN APPROPRIATE REMEDY FOR THE UNFAIR LABOR PRACTICES FOUND

The Board found that the Company's unlawful refusal to bargain, coupled with its subsequent coercive conduct, dissipated the Union's majority and required that the election, which the Union lost, be set aside. In these circumstances, a remedy which merely imposed a cease-and-desist requirement and directed a rerun election would be inadequate. It would force the employees to choose their representative in an election that inevitably would still be tainted by the past violations, and thus permit the Company to gather the fruits of its illegal conduct; moreover, it might encourage the Company to meet the new election with

[23] As the Court of Appeals for the Seventh Circuit stated in *National Labor Relations Board* v. *Richman Bros. Co.*, 387 F. 2d 809, 814, "[w]hen all genuine doubt of the union's majority in an appropriate unit has been erased, the employer's duty to bargain becomes fixed. * * * Events subsequent to that time * * * are irrelevant."

renewed coercion—at no more apparent risk than the possibility of still another election. Thus, the Board could properly conclude that the *status quo ante* could most nearly be restored, and the policy of the Act best effectuated, by an order requiring the Company to bargain with the Union which, at the time of the refusal to bargain, had been the designated representative of a majority of the employees.[24] See, *e.g., Franks Bros Co.* v. *National Labor Relations Board*, 321 U.S. 702; *National Labor Relations Board* v. *Ralph Printing and Lithographing Co.*, 379 F. 2d 687, 693 (C.A. 8); *National Labor Relations Board* v. *Luisi Truck Lines*, 384 F. 2d 842, 847–848 (C.A. 9); *National Labor Relations Board* v. *Goodyear Tire and Rubber Co.*, 394 F. 2d 711, 713 (C.A. 5); *National Labor Relations Board* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 183 (C.A. 2), certiorari denied, 370 U.S. 919.[25]

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[24] The Board also held that, even in the absence of the refusal to bargain violation, a bargaining order would have been necessary and appropriate to repair the unlawful effect of the Company's other unfair labor practices on the Union's previous valid majority (R. 198). It is well established that, where an employer engages in conduct violative of Section 8(a)(1) or other provisions which destroy a union's valid majority, the Board may appropriately enter a bargaining order remedy, irrespective of whether a Section 8(a)(5) violation could also be found. See, *e.g., J. C. Penney Co., Inc.* v. *National Labor Relations Board*, 384 F. 2d 479, 485–486 (C.A. 10); *United Steelworkers* v. *National Labor Relations Board*, 376 F. 2d 770, 772 (C.A.D.C.), certiorari denied *sub nom. Northwest Engineering Co.* v. *National Labor Relations Board*, 389 U.S. 932.

[25] *Amalgamated Clothing Workers* v. *National Labor Relations Board* (*Henry I. Siegel Co.*), 70 LRRM 2207 (C.A.D.C.), and *National Labor Relations Board* v. *Pembeck Oil Corp.*, 69 LRRM 2811 (C.A. 2), on which petitioner relies (Br. 94), are

Contrary to petitioner's contention (Br. 87–92), the record supports the findings on which the bargaining order rests. President Sinclair showered the employees with what amounted to threats that, if they selected the Union, the Company would be likely to close the plant or transfer its operations elsewhere. The Board could reasonably conclude that such threats, communicated by a man who shared the power to implement them, chilled employee support for the Union and thus contributed to the subsequent reduction in the Union's substantial majority (11 of 14 employees); and that, in these circumstances, a rerun election would provide nothing more than another reflection of unlawfully influenced employee sentiment.[26] It was not necessary for the Board to adduce further proof; the Board can properly draw reasonable inferences from the evidential facts. *See Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 800.[27]

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both contrary to this well settled authority. But the District of Columbia Circuit has vacated the *Clothing Workers* opinion and ordered the case to be reheard *en banc;* the question whether to petition for a writ of certiorari in *Pembeck* is presently under consideration.

[26] See, *e.g.*, *Independent, Inc.* v. *National Labor Relations Board*, 70 LRRM 2413, 2416 (C.A. 5); *National Labor Relations Board* v. *Stow Mfg. Co.*, 217 F. 2d 900, 905 (C.A. 2), certiorari denied, 348 U.S. 964; *National Labor Relations Board* v. *Frank C. Varney Co., Inc.*, 359 F. 2d 774, 775 (C.A. 3); *National Labor Relations Board* v. *Delight Bakery, Inc.*, 353 F. 2d 344, 347 (C.A. 6); *National Labor Relations Board* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176, 183 (C.A. 2), certiorari denied, 370 U.S. 919.

[27] Petitioner errs in asserting (Br. 92) that any violation of Section 8(a)(1) automatically leads the Board to find that a refusal to bargain was not based on a good faith doubt as

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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to majority and to enter a bargaining order. As shown in our brief in *Gissel*, p. 22, n. 20, the Board will find an unlawful refusal to bargain and enter a bargaining order only where, as here, the violation of Section 8(a)(1) is substantial enough to warrant the conclusion that it contributed to the loss of majority and precludes a fair election.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * * *

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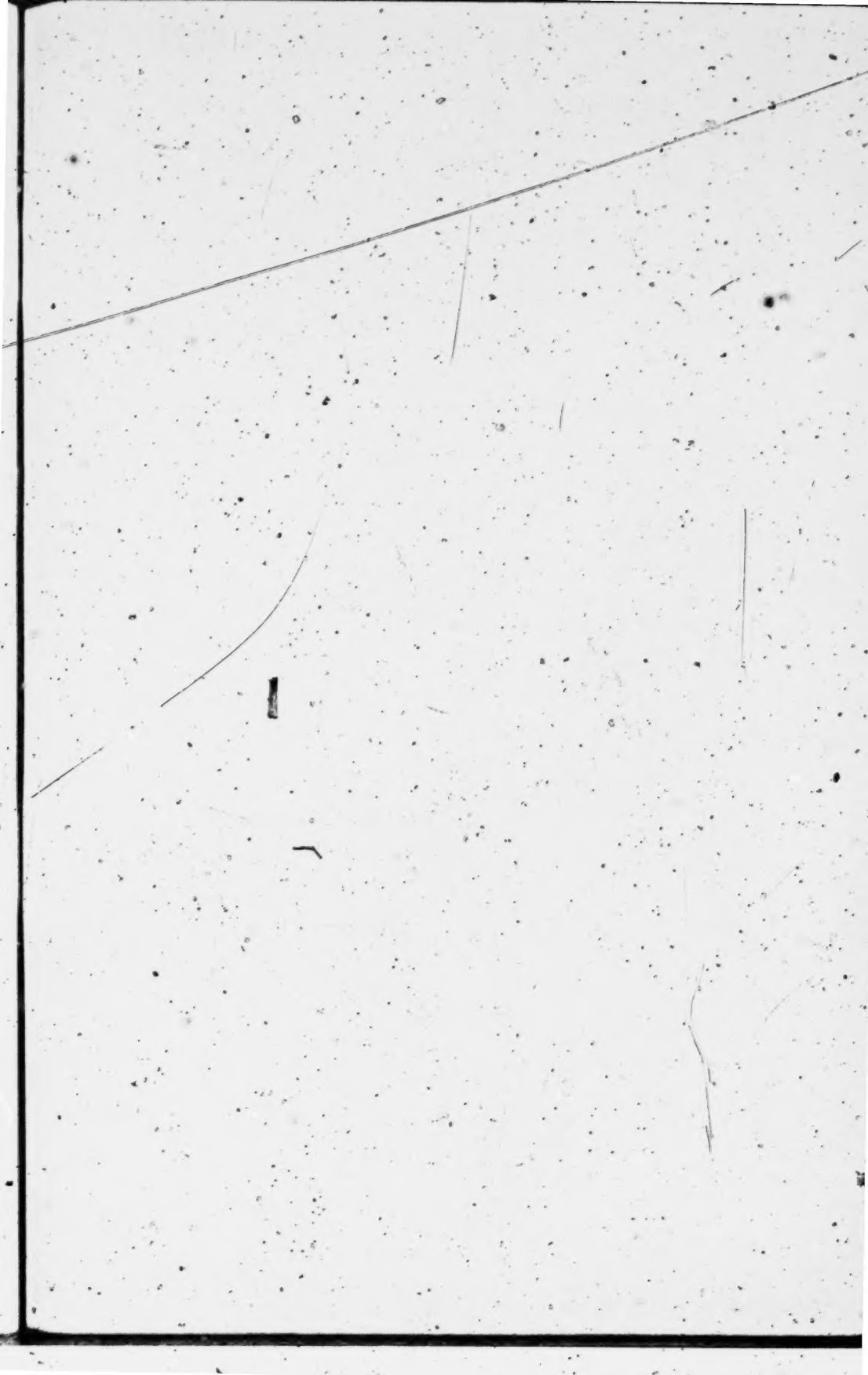

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HECK'S, INC.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR HECK'S, INC.

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BRIEF FOR HECK'S, INC.

STATEMENT OF THE CASE

Heck's is engaged in the operation of 13 retail stores in West Virginia and Kentucky. The Charleston, West Virginia warehouse involving the Teamsters Union and the Ashland, Kentucky Retail store, involving the Meat Cutters Union, are involved in these proceedings.

In 1964, the Teamsters Union secured union cards from 13 of the 26 employees of Heck's. These union cards authorized the Union to represent the employees in their dealings with Heck's. Operating under the mistaken belief that it represented a majority of the employees, the Union demanded recognition. Heck's

declined to recognize the Union. Thereafter, the Union secured one more union card giving it a card majority of one. The Union, without further communicating with Heck's filed a petition for a Board conducted election under Section 9 of the National Labor Relations Act. Two days after it filed this petition, the Union made another demand for recognition, without stating that it had received additional support. Heck's, feeling that the election procedure was the best method to determine the Union's majority status, again declined to recognize the Union.

In its election campaign, Heck's vigorously opposed the Union. The Board by credibility determination found that Heck's over-stepped the line of permissible conduct. The election was never held. The Board's Trial Examiner initially found that Heck's did not have a duty to bargain with the union; but upon reversal of the Board, Heck's was ordered to bargain with the Union.

In 1965, the Meat Cutters Union obtained union cards from 21 of 38 employees of Heck's in its Ashland, Kentucky store. With this slim majority the Union demanded recognition. The Company asked the union if the majority claimed contained department heads (supervisors). The Union replied that it had a majority with or without the department heads. Thereafter Heck's conducted a poll of its employees which resulted in a majority of the employees responding that they did not want the Union to represent them. The Union's demand for recognition was then declined.

The Board found that Heck's overstepped the line of permissible conduct in its poll of employees and

other anti-union statements. It accordingly held that no good faith doubt could exist as to the Union's majority status based on its *per se* doctrine. Heck's was ordered to recognize the union as the bargaining agent of the employees.

Both bargaining orders ended up in the Fourth Circuit Court of Appeals. After approving the Board's order in other regards (discharge for union activity and illegal threats and interrogation) the Court stated:

> However, the Board's finding that the refusal of Heck's, Inc. to bargain with the unions was a violation of §§ 8(a) (5) and (1) of the Act cannot stand. The Teamsters and Meat Cutters based their demands for recognition and bargaining on union authorization cards. In the Charleston area warehouse, the union had obtained 13 signed authorization cards from the employees in the requested unit of 26 members when the first demand for recognition was made. An additional card was procured the next day when a second demand was made. The Ashland store union fared a little better, obtaining 21 signed authorization cards from 38 employees in the unit, although there was some ambiguity as to the precise size of the bargaining unit requested. Heck's, Inc., refused to recognize and bargain with the unions under a claim of belief that they had not yet attained majority status in the respective bargaining units.
>
> We have recently discussed the unreliability of the cards, in the usual case, in determining whether or not a union has attained a majority status and have concluded that an employer is justified in entertaining a good faith doubt

of the union's claim when confronted with a demand for recognition based solely upon union authorization cards. We have also noted that the National Labor Relations Act after Taft-Hartley amendments provides for an election as the sole basis of a certification and restricts the Board to the use of secret ballots for the resolution of representation questions.

This is not one of those extraordinary cases in which a bargaining order might be an appropriate remedy for pervasive violation of § 8 (a) (1). It is controlled by our recent decisions and their reasoning. See *N.L.R.B.* v. *S. S. Logan Packing Co.*, 4 Cir. 386 F. 2d 562; *N.L.R.B.* v. *Sehon Stevenson and Co.*, 4 Cir. 386 F. 2d 551; *Crawford Mfg. Co.* v. *N.L.R.B.*, 4 Cir. 386 F. 2d 367 Cet. denied ..... U. S. ....., 36 LW 3403. There was not substantial evidence to support the findings of the Board that Heck's, Inc., had no good faith doubt of the unions' claims of majorities.

It is upon this finding that the Board sought its writ of certiorari. The issue before this Court is therefore as follows:

ISSUE

Whether the Court of Appeals for the Fourth Circuit properly construed Section 8 (a) (5) of the National Labor Relations Act, which requires an employer to bargain collectively with the representative of a majority of its employees by its holding that even though an employer has committed unfair labor practices it may not at the same time entertain a good faith doubt as to the Union's majority status.

SUMMARY OF ARGUMENT

Heck's argues to this Court that the present method of forcing recognition and bargaining upon an employer and its employees based upon union authorization cards is improper and contrary to the clear intent of Congress that an election is the sole method of determining a union's majority status when a question concerning this majority status exists.

The union cards demonstrate absolutely nothing more than that an employee has signed the card. The reason for his signing the card may be many—to get a solicitor out of his hair, to do a favor for a friend or because he does not have the employer's viewpoint available to him—any of which do not necessarily mean (as the Board holds) that the employee wants the union to represent him.

The Board's policy of rejecting the employer's claim of a good faith doubt as to the union's majority because of unfair labor practices committed after the demand for recognition is not sound reasoning. For it follows that an employer may be just as anxious to prevent the union from obtaining a majority as it may be to dissipate the claimed majority.

This Court is asked to formulate a rule requiring the Board to hold elections in all cases, involving a question concerning representation.

ARGUMENT

I. Authorization Cards—Their Net Worth

Authorization cards are usually postcard size tools used by a union to assist in its organizational efforts. Evidently, the union reasons, it should get the employee "on record" as favoring the union before it makes its bid for bargaining rights. These cards are universally and almost exclusively used to establish the 30% showing of interest required to petition for a Board conducted election under Section 9 of the Act.

Unlike the "laboratory conditions" of a Board conducted election, there are no rules on solicitation of union authorization cards. Their solicitation is not regulated or supervised by the Board. The solicitors may apply virtually any pressure, short of actual coercion to secure the employees signature. *Peoples Service Drug Stores* v. *N.L.R.B.*, (CA-6) 375 F. 2d 551.

It is well known that cards are frequently signed for reasons other than to authorize representation. Some employees have difficulty in saying "no" to persistent pressure of fellow workers, friends or high-pressure salesmen of the union. Some are super-sensitive and are coerced under mild implied threats or coercion of the solicitors. Still others merely sign to "get them off my back". See Comment, *Union Authorization Cards*, 75 Yale L. J. 805.

As indicated in all three cases before this Court on this issue, cards are usually solicited and signed before the employer becomes aware of the union's

campaign. The Board on one hand has taken the position that the free flow of information to the employee is necessary to permit him to make up him mind, on the question of union representation. See *Excelsior Underware Inc.*, 156 NLRB 1236, where the Board adopted a rule requiring an employer to give the union the names and addresses of all employees in the voting unit within seven days of the setting up of the election by direction or consent. The Board listed as one of its reasons for adopting this rule that without it the employee's free choice would be impeded or:

> "In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice, . . . without a list of employees names and addresses a labor organization, whose organizers normally have no right to access to plant premises has no method by which it can be certain of reaching all the employees with its argument in favor of representation, and, as a result employees are often completely unaware of that point of view."

In footnote 14 of this Case, the Board expanded the rule to cover all interested parties, in all Board conducted elections noting, "In short, the disclosure requirement here adopted applies whenever a Board election has been scheduled and insures all parties to the election, whatever their viewpoint, of an opportunity to communicate with the lectorate." It is therefore obvious that the Board itself feels that in selecting a representative all employees should be in possession of both sides of the issue.

Unlike the voter in a secret ballot election the employee, who is asked to sign an authorization card

has not had an opportunity to reflect on all the advantages and disadvantages. His effort to reclaim his card before recognition is demanded will usually be rejected. *N.L.R.B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562.

Just how extensive the union has gone to secure union cards improperly is difficult to report. The Board by its holding in *Cumberland Shoe*, 144 NLRB 1268, greatly restricted the presentation of evidence to establish improperly secured cards. The Board has stated that it will not accept evidence as to the intent of the card signer. The Board will only receive evidence of coercion or intimidation. If the employee is told by the union that "*a*" purpose of the card is to secure a secret ballot election the card will be counted regardless of what the signer thought "a" purpose meant. On the other hand, if the signer is told that "*the*" purpose of the card is to secure a Board election the Board will not count it toward the majority. The Board's reasoning on not allowing background testimony for the reason for signing the authorization card is that the intent is clear on the fact of the card. This *Cumberland Shoe* rule is unrealistic. The lapse of time between the signing and the testimony, the presence of company officials in the hearing room, the possible change of mind of the signer, etc., is not justification for rejecting the evidence *per se*. The Trial Examiner of the Board may of course consider these factors in its determination of credibility of the witnesses. It should not be precluded as unreliable before it is even received.

The Board itself has reflected on the unreliability of authorization cards. Under the pre 1947 Amend-

ments the Board held that the "intent" of the signer could be questioned under a card check majority. *Lady Esther Lingerie Corp.* 10 NLRB 518 (1938). Recognizing the inherent unreliability of cards the Board abandoned their general use in 1939 in favor of the more reliable Board conducted election. *The General Box Co.*, 82 NLRB 678.

Even the chairman of the Board, Frank McCulloch, recognized the difficulties involved. He reported the following factual picture of the 1961 Board conducted elections:

> In 58 elections, the unions presented authorization cards from 30 to 50 per cent of the employees; and they won 11 or 19 per cent of them. In 87 elections the unions presented authorization cards from 50 to 70 per cent of the employees; and they won 42 to 52 per cent of them. In 57 elections the unions presented authorization cards from over 70 per cent of the employees, and they won 43 or 74 per cent of them. (Section of Labor Relations Law, American Bar Association, pp 14-17.)

This report establishes clearly that employees who sign union cards do not necessarily want the union to represent them. The elections cited by the Board's chairman were not those involving unfair labor practices, which, according to the Board, make a free election impossible. These elections were the run-of-the-mill type elections. Where the union has slightly over a majority of employees signed upon authorized cards, (as was the case in both Heck's demands), it wins less than half of the Board conducted elections. It is no wonder that the union prefers the card check method of recognition. Yet, it is obvious that the

employees Section 7 right to join a union *or to refuse from joining a union*, is not protected.

In 1948, Harry Truman was counted out in his bid for election to the presidency by every pollster. Yet, when the vote was counted he had been elected. Obviously, a large segment of the voters were stating in public to the poll takers that they were not going to vote for Mr. Truman. Yet, when allowed to express their opinion in secret, they voted for Mr. Truman. Much the same was true in the early months of the 1968 presidential campaign. At least up to the middle of October, 1968, virtually all pollsters were giving the election to Mr. Humphrey. This was based on their taking the public opinion of the voters. The private opinion in secret, however, gave the election to Mr. Nixon. This, of course, is the reason for a secret ballot. It is reasonable to assume that employees are the same as average voters. Their rights to a secret election and unobserved expression of opinion should be no less than a voter. This is the democratic way. This is why, and only why, the system works.

We must thereby assume from the above related facts, that the authorization cards have no actual value to prove a union's majority status, and that their net worth to establish employee sentiment is zero.

II. The Right of Employees To An Election

Section 8 (a) (5) of the National Labor Relations Act states as follows:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with

> the representatives of his employees, subject to the provisions of Section 9 (a).

Thus, an employer is required to recognize and bargain with a union who represents a majority of its employees. At first impression this seems like a clear unambigious legal requirement. *Yet*, at the same time Section 8 (a) (2) of the Act provides:

> "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ."

Under this section a company who recognizes a union who does not represent a majority of its employees, has violated the Federal Law regardless of its good faith in the matter. This Court held in *Garment Workers Union* v. *N.L.R.B.*, (1961) 366 U. S. 731, 48 LRRM 2251, that an employer who recognizes a union that does not represent a majority of the employees violates Section 8 (a) (2) of the Act *per se.* A good faith belief of the union's majority status is irrelevant and no defense.

Putting these two sub-sections together the employer is on the throws of a dilemma. If he refuses to recognize a union who in fact represents a majority he envokes the Board's rath; as he did in this case before the Court; but, if he recognizes a union who asserts that it represented a majority when in fact it did not, he also envokes the Board's rath and may be ordered to refund out of his own pocket union dues withheld.

Congress in its wisdom set forth the election procedure in Section 9 of the Act, to prevent such dilemmas. This provision states in part:

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board
>
> * * *
>
> The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the Regional Office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

It is significant to note that the last portion relating that the Board "shall direct an election . . ." was rewritten from the original Act. The original Act stated that the Board ". . . may take a secret ballot of employees or utilize any other suitable method to ascertain such representation. . .", This was removed from the Act in 1947. It was not by oversight that Congress removed from the Board the power to determine representation by methods other than elections. The House Committee Report (H. Rep. No. 245 80th Cong. 1st Session) stated that the purpose of the change noted above was ". . . to do away with the practices of the old Board by which it has subjected literally millions of workers to control by labor unions notwithstanding that the employees did not wish the

unions to represent them and voted against the unions in the Board's elections." (Page 7) Even the union and company cannot deprive the employees of the right of the election by the use of cards according to the House Committee Report. "... but when the parties waive a hearing, the Administrator must conduct a secret ballot, not check membership cards as the Board sometimes has done in the past." (page 39) It should follow that if the union and company cannot force employees into the union without an election by mutual agreement, the Board cannot do so in collusion with the union against the company.

It will be noted that the present Act Section 9(a) refers to the union representative as one "designated or selected" by a majority of the employees. The Board in its Brief, page 18, construes this language "designated or selected" to mean any method including but not limited to an election. It is however, reasonable to construe this language as the different forms of secret ballot election, i.e., that "designated" means the choice between one union or no union in a single union election and that "selected" means a choice between more than one union in a multi-union election. See *Comment Union Authorization Cards.* 75 Yale L. J. 805 (1966)

The intent of Congress that the Board should conduct elections in cases involving questions concerning representation was further indicated in Section 8(b)(7)(c) of the Act, where the Congress made it illegal for a union to picket to force recognition" . . . where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the com-

mencement of such picketing . . ." and by Section 8(b)(4)(c) that it is illegal for a union to strike with an object of ". . . forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees, if another labor organization has been certified as the representative of such employees under the provisions of Section 9.

The statutory obligation of the Board is to effectuate the policies of the National Labor Relations Act. The purpose of the Act as stated in Section 1 is as follows:

* * *

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of *full freedom of association*, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. [emphasis supplied]

In addition Section 7 of the Act, spells out the rights of employees as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection *and shall also have the right to refrain from any or all of such activities . . .*" (emphasis supplied)

It is not enough to say that the union actually represents a majority of the employees most of the times when it obtains a majority showing on authorization cards. This is true because it is not enough to say that employee's rights are protected *only* most of the time. If protection of employees rights is the main object of the Act, then the system must work all the time, not just most of the time.

Section 9 of the Act, according to the Board, has established a procedure which employees can vote in "laboratory conditions", to determine whether they want a union to represent them. Great care is exercised to require both parties to campaign carefully without threats or promises on the part of the employer or the union. When the actual vote comes, the supervising Board Agent requires the most extreme formality and propriety in and around the polling place. When the ballots are handed out only the voter and Board Agent are permitted to touch them. All this is done before the watchful eyes of observers representing both the employer and the union. If there is the slightest question about a voter his vote is challenged and sealed to remain in the custody of the Board Agent until resolved. The ballots, when counted, are exposed to all parties. If an employee's name appears thereon, thus destroying the secrecy, it is declared invalid. With this extreme care in "effectuating" the policies of the Act on one hand, the Board permits unions to walk into an employee's home, with virtually no limits and threaten or promise and force the employee to "vote" for the union by signing a union card. The employee has none of the protection of an election. The employee's rights are not protected at

all. The entire purpose of the Act is defeated and frustrated. The Board even puts the employer in the position where he cannot even question the employees concerning the signing of these cards by receiving them into evidence by third parties. This is violative of the basic rules of evidence and contrary to due process of law.

In *N.L.R.B.* v. *Flomatic Corp.*, (CA-2) 347 F. 2d 74, the Court upheld the Board's finding that Flomatic violated Section 8(a)(1) by certain threats and promises. But the Court refused to go along with the Board's order requiring bargaining merely because unfair labor practices of "interference" were found. Regarding the bargaining order, the Court said:

> "A bargaining order, however, is strong medicine. While it is designed to deprive employers of a chance to profit from a stubborn refusal to abide the law, and although it undoubtedly operates to deter employers from adopting illegally intrusive election tactics, its potentially adverse effect on the employees' Section 7 rights must not be overlooked. Since a bargaining order dispenses with the necessity of a secret ballot election, there is a possibility that the imposition of such an order may unnecessary undermine the freedom of choice that Congress wanted to guarantee to the employees . . ."

The Board in many cases has set aside elections because of irregularities in the laboratory conditions. In *Peerless Plywood Co.*, 107 NLRB 429, the Board decided that neither the employer or the union can talk to employees in a "captive audience" speech (i.e. where attendance is compulsory) within 24 hours of the election. In *Gummed Products Co.*, 112 NLRB

1092, the Board found that if an employer or union circulates false information and the other side does not have an opportunity to dispute it the laboratory conditions are destroyed and the election will be set aside. The Board will reject a ballot of an employee if his identity can be established from the ballot. *Bridgeton Transit*, 124 NLRB 1047. This destroys the laboratory conditions. Likewise, where one side reproduces a sample ballot purporting to be a copy of an official ballot, the election will be set aside as unfair. *United States Gymsum Co.*, 124 NLRB 1026. If employees cannot (in the board's judgment) properly evaluate election propaganda the election will be set aside. *Heintz Division, Kelsey-Hayes Co.*, 126 NLRB 151. If a secret "straw vote" is taken before the official vote the election will be set aside. *Offner Electronics, Inc.*, 127 NLRB 991. Likewise interviewing employees away from their work station affects the laboratory conditions and may result in the election being set aside. *National Cateiers of Virginia, Inc.*, 125 NLRB 110. If the employer visits employees at their home to urge them to vote against the union (even without coercive statements (the election will be set aside. *F. N. Calderwood, Inc.*, 724 NLRB 1211. Where employees are paid to attend union meetings before the election the Board decided the standards of the election procedure will be lowered and a new election ordered. *Teletype Corporation*, 122 NLRB 1594. If the employer does not give the union the names and addresses of all employees well in advance of the election, the union may have the election set aside. *Excelsior Underwear, Inc.*, 156 NLRB No. 111. Misleading propaganda by either party prior to the election may result in the election being set aside.

Reiss Associates, 116 NLRB 217, Movies have resulted in elections being set aside. *Plochman & Harrison Cherry Lane Foods, Inc.*, 140 NLRB No. 11, as have racial propaganda which is in flammatory. *Sewell Mfg. Co.*, 138 NLRB No. 12, and even "chatter" in the line of poling place during the election, *Milchem, Inc.*, 170 NLRB No. 46.

The above cases show the great effort the Board employs to protect the laboatory conditions of selecting a representative, which is commendable on the part of the Board. Employees should be given the right to make up their own minds absence interference from either the union or the employer. However, if the union is to be permitted to go to employees in the manner used in the case before this court and force them to vote (by signing a union card) without the safe-guards of the usual election procedure, the entire purpose of the Act is destroyed. The clear intent of Congress was to place employees in a position of being able to decide these issues by being in possession of both sides of the union in question. To allow a union to drop in out of the sky and overnight, frequently unknown to the employer, sign up a majority of the cards by hook or crook and then force the employer to deal with the union is clearly contrary to this intent and in violation of the rights of the employees and of due process.

The Fourth Circuit in *N.L.R.B.* v. *S. S. Logan Packing Co.*, (CA-4) 386 F 2d 562 further dealt with this point as follows:

> We deal with the rights of employees. Under §7 of the Act, they are guaranteed the right to

choose their representatives and, under the Taft-Hartley Amendments of 1947, a rejection of representation is a concomitant right, guaranteed by the statute, of equal rank and dignity with the right to select a union. Under §9 and implementing decisions, there are elaborate processes and rules to insure that the choice of the employees is truly free and unfettered. There must be a secret ballot, so that each employee may express his true conviction free of any concern that employer, union, or others to whom he may have made a commitment, or of whom he may feel in awe, will know his true feeling. Conduct which seriously impairs the "laboratory conditions" under which such elections are to be held will result in their invalidation and new elections.

In stark contrast is a decisional rule that bypasses the election processes and places signed authorization cards on a parity with an affirmative vote in a secret election.

It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a "card check", unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful persons has attributed reliability to such card checks. This, the Board has fully recognized. So has the AFL-CIO. In 1962, Board Chairman McCulloch presented to the American Bar Association data indicating some relationship between large card-signing majorities and election results. Unions which presented authorization cards from thirty to fifty per cent of the employees won nineteen per cent of the elections; those having authorization cards from fifty to seventy per cent of the employees won only forty-eight per cent of the

elections, while those having authorization cards from over seventy per cent of the employees won seventy four per cent of the elections. This suggests that the greater the majority of authorization cards, the greater likelihood of a union election victory, but obviously there are exceptions. Though ninety per cent of the employees may have signed cards, a majority may vote against the union in a secret election. Overwhelming majorities of cards may indicate the probable outcome of an election, but it is no more than an indication, and close card majorities prove nothing.

The unsupervised solicitation of authorization cards by union is subject to all of the ciriticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying "No." This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance.

That is not the most of it, however. Though the card be an unequivocal authorization of representation, its unsupervised solicitation may be accompanied by all sorts of representations. "We need these cards to get an election. You believe in the democratic process, don't you? Do you want to deny people the right to vote? Isn't it our American way to resolve questions at the polls? Do you want to deprive us of that right? Are you a Hitler or something?"

As the affidavits tendered by the employer in this case, indicate, unsupervised solicitation of

cards may also be accompanied by threats which the union has the apparent power to execute. Few employees would be immune from a frightened concern when threatened with job loss when the union obtained recognition unless the the card was signed. Whether or not the organizers could ever obtain the power to procure the discharge of uncooperative employees is beside the point as long as they claim the power and the employee is without a basis for a firm disbelief of it. On a similar plane stand the reported assertions that the union had a right to require Logan's customers to cease doing business with it and thus to destroy Logan's business, and the threat that the right would be exercised if Logan's employees did not join the union. An employee might distrust the organizer's claim, but without a basis for its clear refutation, he cannot escape its influence.

Without adequate supervision, solicitors of authorization cards may resort to a wide variety of other threats. Discrimination in the exaction of initiation fees is frequently encountered, and, particularly where untrained fellow-employees are used as solicitors use of threats of discrimination against non-signers in the compilation of seniority rosters and other conditions of employment may be a strong temptation.

The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to axoid stands which appear to be non-conformist and antigonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and with-

> out an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time, however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.
>
> For such reasons, a card check is not a reliable indication of the employees' wishes. (Footnotes Omitted)

The Board in its brief (page 39-40) cites this Court's finding in *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, to the effect that a bargaining order without an election is, at least in some cases proper. It is submitted that in *Franks Bros. Co.*, the employer did not question or raise the issue of the union's majority status at the time of the demand but rested its case upon its proffer that the union lost its majority status. This case is not in point, because no issue of good faith doubt was raised. Additionally, *Franks Bros.* was decided by this Court in 1944 long before the 1947 amendments which as reflected above clearly reject the use of the authorization cards to establish a contested union majority.

Perhaps the most reckless use of its authority in this area is the Board's Bernel Foam doctrine (*Bernel Foam Products Co.*, 146 NLRB 1277:) In that case the Board held that it will permit a union to go to an election and if it loses to obtain a bargaining order based upon the employer's refusal to bargain prior to

the election when it had a majority of the employees signed up on authorization cards. Under this rule a union has nothing to lose by going to an election when it can secure a majority of the employees' names on cards prior to the demand. This method totally rejects the employee as a factor in the collective bargaining process. His secret and personal opinion is rejected. His signature on union cards replaces his private opinion.

The Board's reliance upon this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring*, (1955) 351 U. S. 62, is mis-applied. (Board's brief, page 19-20) In the first place this court by way of dictum dropped a footnote (8 at page 72) relating that the election is not the only way an employer can satisfy itself as to the union's majority status. This was not an issue in this case before the Court. The issue was whether or not an employer need bargain with a union, who at the time of its demand for recognition was not in compliance of the non-communist filing provision of the Act (since repealed) but later came into compliance. Second, this Court specifically stated that it was not considering the question "that would have been presented . . . if there had been a bona fide dispute as to the existence of authorization from a majority of the eligible employees." 351 U. S. at 68 N. 2. This decision does not hold as the Board claims that authorization cards are appropriate to determine questions of representation but as all agree that the Act does not preclude an employer from recognizing a union voluntarily where the employer believes that the union does in fact represents a majority. Third, this Court did not speak in any way of the use of authorization cards

to establish a majority contrary to an employer's claim of a good faith doubt of that majority status. Fourth, the Court did not discuss (and evidently did not consider) the congressional intent of Section 9(c) of the right of an employer to an election. Lastly, the Court in its dictum that an election is not the only method to determine the union's majority status relied exclusively upon the pre 1947 amendment and did not discuss or evidently consider the 1947 amendments.

Here, Heck's, Inc., is relying upon the general unreliability of cards. Heck's is also relying upon the fact that the three prior cases involving it and the Meat Cutters Union before the Board at the time of the demand herein, resulted in a conclusion that the union did not in fact represent a majority. *Heck's, Inc.*, 159 NLRB No. 127; *Heck's, Inc.*, 159 NLRB No. 104; and *N.L.R.B.* v. *Heck's, Inc.*, (CA-4) 386 F. 2d 317.

In the Ashland case the only basis for rejecting the good faith doubt of Heck's is the conduct of a poll of employees conducted immediately after the demand and two other isolated incidents, one involving an alleged vague and at best, veiled threat by president Haddad, five months before the demand and the other involving a discussion between a minor supervisor and an employee in a friendly, social type non-work discussion shortly after the demand. (Appendix, pp 528-540)

In the warehouse case the union did not represent a majority when the initial demand was made. The Trial Examiner found initially that the demand was so confused that Heck's did not have to reply to it. (Appendix 435) However, the Board remanded the

case to the Trial Examiner with the instructions that the demand for recognition was not so confused. (Appendix 444-445) The Trial Examiner thereafter found that unfair labor practices after the demand were sufficient to justify a bargaining order on the basis of the majority claimed by authorization cards. It should be noted, however, that *after* the union made its first demand (which was not supported by a majority) and before it obtained a majority status, it filed a petition for an election. (Appendix 426-428)

Trial Examiner Thomas Maher, in his decision, after relating the factual background stated:

> Upon the foregoing conglomeration of scanty data the Board, through me, is being asked to conclude that the Union represented the majority of the Respondent's employees in a unit appropriate for bargaining and that President Haddad's refusal to bargain, as detailed above, was not grounded in good faith either as to his doubt of the majority, or of the appropriateness or scope of the unit requested, or both.
>
> Section 9 of the Act provides the framework for the laboratory conditions which the Board deems so essential for the determination of employee representation. Through appropriate rules of decisions and its regulations procedures have historically been availed of to provide a forum to assess the duties of those sought in a bargaining unit, the extent of unit's scope, and a myriad of complications that must be resolved to achieve a reasonable determination of the unit in which a fair election is to be held; all of this through the orderly participation and contribution of both employer and union rperesentatives. Similarly in the conduct of the election itself,

> where eligible employees are permitted the privacy of their choice, safeguards are provided in the form of challenge available to all parties to insure that eligibility is maintained and that irregularity is eliminated.
>
> With all due respect to able counsel participating in this proceeding and with full recognition of my own procedural limitations, I fail to see how the materials presented in evidence here provides an adequate substitute for the orderly procedure and determination customarily available.

Considering all the facts of the case before this Court it is clear that the best method to resolve the question of representation was an election.

III. Unfair Labor Practices And Good Faith

Even assuming *arguendo* that the Board acts within its authority to compel bargaining based on the union's majority status evidenced by authorization cards and absence of good faith on the part of the employer, it seems clear that subsequent unfair labor practices have nothing to do with good faith at the time of the demand.

The Court in *N.L.R.B.* v. *S. S. Logan Packing Co.*, (CA-4) 386 F. 2d 562 stated "* * * in a typical case subsequent unfair labor practices have a tendency to prove only the employer's opposition to the union's organizational efforts. They throw no light on his belief or disbelief of the union's claim of majority status." In *N.L.R.B.* v. *River Togs, Inc.*, (CA-2) 382 F. 2d 198, the Court refused to enforce a bargaining order of the Board, holding that an employer may properly have

reasonable doubt as to the union's majority status in view of the general unreliability of authorization cards. The Court further stated that the employer's subsequent unfair labor practices could have been motivated by an effort to prevent the union from obtaining a majority status rather than, as the Board found, to dissipate the union's claimed majority. The Court found that other unfair labor practices were supported by substantial evidence. In *N.L.R.B.* v. *James Thompson & Co.*, (CA-2) 208 F. 2d 743, Judge Learned Hand stated that the employer's refusal to recognize "* * * however, unlawful in itself it might have been, throws substantially no light on how far he thought the effort had succeeded to form a union. As a penalty it might be proper but as a link in reasoning it seems to us immaterial." See also in accord *N.L.R.B.* v. *Montgomery Ward & Co.*, 377 F. 2d 452 and cases cited therein.

The matter of good faith depends on a state of mind. Of course, the courts must look at all the circumstances surrounding the event to arrive at its conclusion as to the actual state of mind of the person involved.

It offers no solution to pre-determine a state of mind by merely stating as the Board has done, that whenever unfair labor practices have been committed which supposingly undermine the union's majority, the company could not have had a good faith doubt as to the union's majority status. This is, of course, another *per se rule* of the Board. *N.L.R.B.* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829 (CA-2)

Consider this example: A Company president receives from his secretary a message that a union

agent is in the waiting room to talk to him. He is unaware of any union movement among his employees. He calls his top supervision who are also unaware of any union movement. His attorney advises him not to talk to the union agent. He refuses to see him. He then receives a letter in the mail demanding recognition and offering to prove the majority status by a card check. Stopping at this point the president surely must have a good faith doubt that the union represents his employees. He notifies the union that he doubts the union's majority claim and will not recognize the union, unless the union proves its majority by an acceptable method which would not include the card check method. Up to this point the Board would probably hold that the company who has not committed any unfair labor practice need not recognize or bargain with the union.

Assuming further that after this, the company supervision became curious about the call from the president and asked around among the employees if they know anything about a union movement (which even though it is illegal, this a natural thing to do) the next question would be who is involved in the union push (also a natural question—but illegal). Thereafter the company official questions several employees about the union and threatens to close down if the union were to come in. It is at this point that the Board would hold the unfair labor practices would tend to undermine the union's majority status, and a bargaining order would issue. Assuming two points to be fact, i.e., the company had a good faith doubt on the date of the demand and the subsequent unfair labor practices undermined the union's status with the employees,

it does *not* follow that the second fact (the unfair labor practices) has anything at all whatsoever to do with the good faith doubt in the first instance. The Board, none-the-less holds, as it did in the case before the Court, that it will not be concerned with the employer's state of mind at the time of the demand in light of the subsequent unfair labor practices, which may not have been committed by the person upon whom the burden of doubt rests.

For the Court to adopt this reasoning would be the same as to say that an accused man is guilty of the crime simply because he later resisted arrest on the warrant. Of course, this Court would not stand still for a defendant's rights to be so violated. Should a corporation's right be considered as any less than that of an accused criminal? Due process is due process regardless of what court it is in.

This *Per se* rule of the Board, by its very nature, precludes the possibility of the employer introducing evidence to show that it had a good faith doubt at the date of the demand. Several Circuit Courts have refused to enforce Board orders where the Board would not consider other factors which occurred at the same time as the unfair labor practices which followed the demand for recognition. *Hannaford Bros. Co.* v. *N.L.R.B.*, (CA-1) 261 F. 2d 638; *Edward Fields, Inc.* v. *N.L.R.B.*, (CA-2) 325 F. 2d 754; *N.L.R.B.* v. *Dan River Mills*, (CA-5) 2744 F. 2d 381; *Montgomery Ward & Company.* v. *N.L.R.B.*, (CA-6) 377 F. 2d 452.

The Fourth Circuit in *N.L.R.B.* v. *S. S. Logan Packing Co.*, (CA-4) 386 F. 2d 562, analyzed this problem faced by the employer as follows:

The natural response of an employer entertaining real doubt of the union's claim is an affirmative, investigatory one. The doubting employer, seeking to inform himself, will turn to interrogation, though there was precious little of it here, and, possibly to surveillance. He, technically, has a right to interrogate for the purpose of resolving his doubt, but not inquiry can be limited to a search for answers to the one question, "at any time on or before the date of the bargaining demand, have you signed a union authorization card?" Affirmative answers must be probed more deeply, if the investigation is to have a semblance of adequacy. An adequate investigation must include questions designed to disclose the possible presence of threats or misrepresentations and of subsequent attempts at revocation. When the interrogation is designed to expose all of the circumstances surrounding the card signing, it approaches so perilously close to the employee's real wishes, that the interrogator may well overstep the narrow bounds; he certainly will expose himself to the grave risk of unfair labor practice charges which, on the basis of conflicting recollections, the Board may sustain. In the colorful language of Judge John R. Brown, [*N.L.R.B.* v. *Dan River Mills*, 274 F. 2d 381, 388-389 (5th Circ., 1960)] referring to such an employer:

> * * *But like Odysseus, he stands almost helpless as he makes the perilous passage between Scylla and Charybdis. If he makes a simple inquiry of each employee and accepts the simple answer, the very pressures apprehended may well bring about the employee's confirmation as well. If he probes deeper, the inquiry unavoidably becomes an investigation or intimations in terms of relative evaluation of union or nonunion conditions. At that

> point, undefined and undefinable, the inquisitor trespasses either on forbidden ground or flounders in the Serbonian bog surrounding it so that what started out to be a means of compliance with law is turned into an affirmative charge of an unfair labor practice. And all the while, all that is done, all that is said, all that is asked, all that is answered, rests in the uncertain recollection of the partisan participants. What begins as the employer's quest now ends in the employer's flight. And no longer will his conduct be judged alone by what was said. Now, through the unavoidable nature of our legal administrative machinery, it will be judged by what interested partisans say one said was said, or what others said to have said say was said.
>
> A finding of a § 8(a)(1) violation out of such investigatory conduct of an employer tends to confirm his claim of a good faith doubt of the union's majority; it has no tendency to negate it.

Inconsistently the Board holds as it did in this case, that it will not take the word of a company official as to his motive for denying recognition on a card check demand. Yet at the same time the Board will not permit the company to show the motive of the card signer to establish whether or not the signer actually intended to designate the union to represent it in fact.

Equally as inconsistent is the Board's approach to the employee's ability or inability to be frightened into abandoning his beliefs. On one hand the Board holds that virtually any statement or question directed to an individual employee by a company supervisor makes it impossible for that employee to be able to cast a vote

in secret without having the previous conduct of the employer's supervisor follow him into the voting booth and force him to cast his ballot against his true belief. On the other hand, the Board as cited *Supra* permits union officials to obtain signatures by hook or crook and then the Board will not permit the employee to explain why he signed.

RECOMMENDATIONS OF THE COURT

Of course, Heck's believes that the decision of the Fourth Circuit should stand and that it should not be required to bargain with the union pursuant to the rejected Board order. But, this is not enough. Heck's and thousands of other employers and unions should know if, and under what circumstances it should be required to bargain with any Union when there is doubt as that union's majority status among the employees. More important, is the unsettling impact upon employees, i.e., whether their rights are *fully* protected. We respectfully suggest the following:

1. The Board be prohibited from issuing a bargaining order, unless and until it has conducted an election among the employees involved.

2. The Board be authorized to issue a bargaining order after an election which the union lost *only* upon affirmative and conclusive evidence that the employer's unfair labor practices actually resulted in the union's loss of majority *and* that a re-run election after the correction of these unfair labor practices would be pointless.

It is significant that others in this field have recognized the problem of ignoring the rights of employees

and bending to the almost overwhelming demands of the unions or employers. In its exhaustive study of the issue, the University of Pennsylvania's Wharton School of Finance and Commerce* concludes as follows:

The authorization card issue involves the problem of equating the encouragement of collective bargaining with insuring the fullest freedom of association for employees—the right to join or not to join labor unions and to be represented thereby or not. In our view, the National Labor Relations Board has failed to establish such a policy. More than 30 years after the authorization card policy was instituted, and after much shifting of interpretations and emphasis in this time, the Board's policy is less acceptable to courts and to commentators than ever.

We feel that the basic failure of the Board's policy, in light of the statutory purposes, has been its refusal to recognize in practice that the secret-ballot election is a far superior test of employee support than authorization cards. Although the Board will agree in theory, its practice reflects a reliance on authorization cards in numerous cases where the employer's misconduct is minimal and would appear not to have coercive effect on employee freedom of choice.

Basic to this problem is what we feel are two plain errors in policy: (1) the reliance on the good-faith

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*"Union Authorization cards and the N.L.R.B.—A study of Congressional Intent Administrative Policy and Judicial Review" (University of Pennsylvania Press, Philadelphia, Pa.).

doubt test to determine whether the employer is entitled to an election, *i.e.*, to determine whether a "question of representation" exists; and (2) the failure adequately to regulate cards and police their solicitation. We discuss these points below.

1. We feel that the test of good-faith doubt is so uncertain and unworkable in determining whether an election should be held that, in order best to effectuate statutory purposes, the Board should reject the test. Instead, since an employer can never know whether cards in the possession of a union actually reflect the desires of a majority, the statutory purposes require that the Board find that a question of representation exists whenever a card majority is claimed and that it conduct an election in all cases except where the employer voluntarily recognizes the union.

First, uncertainty is created by the good-faith doubt test because it is never certain whether the employees will have an opportunity to express their desires in a secret-ballot election. And, as the Board has long noted, there is more "certainty and prestige" in the results of a secret-ballot election. Second, the test of good-faith doubt in no way is relevant to determining a question of representation. Inquiry into the employer's conduct in no way indicates lack of doubt of the union's status; it may indicate opposition to the union, but that is hardly a reason for finding no question of representation.

Thus, the test of good-faith doubt is an irrelevant test, and for this reason has been held more and more in disfavor by the courts. In fact, the test in itself has promoted the opportunity for committing unfair

labor practices, for an employer seeking to find information in opposition to the union's majority claim treads a thin line when he talks to his employees about the union's strength. Nor does the test add in any manner to the obligation to bargain. Either the union represents a majority or it does not; the employer has an obligation to bargain in the former situation, but not in the latter.

Moreover, requiring an election in all cases, except for voluntary recognition, is fully consistent with congressional intent. It would comport with the views of Senator Taft, and that of practically all other members of Congress who spoke on the subject in the Taft-Hartley debates, who successfully argued for the employer's right to an election because he otherwise "has no way in which to determine whether [the union] . . . really does represent his employees or does not." This procedure would also eliminate from the employer the burden of having to determine, at the risk of being found in bad faith, matters such as the appropriateness of the unit sought by the union and inclusions or exclusions from that unit. The Board would determine these matters in the regular representation manner.

In sum, we believe that abolition of the good-faith doubt test and requirement of an election in all cases will better comport with statutory purposes, and will reflect a policy consistent with the intent of Congress, the fair needs of the parties, and an approach satisfactory to the courts.

2. Assuming *arguendo* that reliance upon authorization cards in lieu of an election is consonant with

statutory purposes, it is essential that the Board regulate the contents of the card and more stringently police their solicitation. There is no legitimate reason for the Board to refuse to prepare a clear card acceptable for representation purposes and refuse to accept any other card as valid for that purpose. Such a card should indicate in simple words that the signing of the card was the signer's indication that he wanted to join the union so that it might bargain for him.

As to policing the solicitation of the cards, we urge the rejection of the *Cumberland Shoe* rule. Instead, we would require that cards be invalidated whenever it was established that a solicitor failed to inform employees that, in words to this effect, the card would be treated as a vote for the union. Moreover, whenever the validity of the cards is put in issue, we believe the General Counsel should be required affirmatively to establish the circumstances under which the cards were solicited. This would require the General Counsel, as it does now, to authenticate the signatures on the cards. But once the employer presents evidence that the card was obtained through coercion or misrepresentation, we would require the General Counsel to produce the solicitor, or other parties present at the soliciting if he is unavailable, to testify as to the circumstances of the solicitation. Only so can the credibility issues, and other factual questions, be meaningfully resolved.

Although some may think this burden is harsh, we think it is necessary to protect the employee from the many pressures which can be placed on him by solicitors or friends. This requirement, since it would call for a solicitor to remember all solicitations on his part,

would encourage more soliciting of groups than of individuals, on whom the pressures can be more coercively exerted.

3. These policy changes do not, however, directly reach the difficult question of the course to follow in the few cases where employer conduct is found to render a free election impossible. In most cases, where the unfair labor practices are minimal, a cease and desist order and a re-run election is undobtedly sufficient. Without some reasonable indication that these unfair labor practices caused a defection from the union, the employees would be deprived of their free expression via the secret ballot. Similarly, where there is no indication of majority support through cards, the re-run election is the only appropriate remedy.

The hard decision to be made is in those cases where the union possesses a majority of cards but loses the election after pervasive employer unfair labor praceices (*e.g.*, direct threats of discharge, closing down the plant, and the like, if the union is victorious). Where this is the case, the decision must be made as to whether the inherent unreliability of authorization cards is sufficient to reject reliance upon them in any circumstance as a basis for a bargaining order. The statute itself does not give an express answer to the question, and therefore, the answer must be drawn from interpretation of statutory purposes.

The arguments on each side of the question are familiar. Of course, the Board's view is well-known. It feels that once an employer "has engaged in unfair labor practices, the results of a Board-conducted elec-

tion are a less reliable indication of the true desires of employees than authorization cards." Accordingly, when the Board finds that a union loses an election after substantial employer unfair labor practices, it will rely on authorization cards as a better indication of employee support and issue a bargaining order. The Board finds statutory support from the refusal of Congress in Taft-Hartley to adopt the House bill aimed at eliminating reliance on cards.

The opposing argument sees cards as so inherently unreliable that they should never be used to determine majority support. According to the proponents of this view, reliance on cards for a bargaining order frustrates statutory purposes, as indicated in *N.L.R.B.* v. *Flomatic Corp.*, 347 F. 2d 74 (CA2-1965).

> Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees, and thus frustrate rather than effectuate the policies of the Act.

Further, the bargaining order suffers the defect of ignoring the interests of employees in order to punish the employer's misconduct. On balance, then, the card is never a valid substitute for an election as a basis for a bargaining order. As a leading proponent of this view has concluded:

> A secret ballot election may not, in every instance, reflect with perfect accuracy the desires of every individual who casts a ballot. It is impossible for me to accept, however, that such a ballot is less accurate than a union card

> requiring the disclosure of the individual's identity and preference. The secret ballot is fundamental to our political system. The cause of industrial peace would be well served if the Board would permit the secret ballot to be fundamental to the selection of a union representative. (Address to Kenneth C. McGuiness 68 L. R. R. M. 85)

Despite disagreement between the Board and the courts of appeals over the efficacy of relying on cards to order bargaining, the Board appears to be adamant in adhering to its view. Accordingly, the issue must be resolved either by Congress or the Supreme Court.

Fortunately, the Supreme Court has recently agreed to hear three cases in which the Board's use of authorization cards rather than a secret-ballot election is the sole issue. Thus, the Court will determine the very issue of whether authorization cards may be used to determine majority status as a predicate for the issuance of a bargaining order. (Footnotes omitted)

CONCLUSION

Respondent Heck's, Inc., would have this Honorable Court affirm the decision of the Fourth Circuit Court of Appeals and admonish the National Labor Relations Board that it is not the National Union Protection Board; that its duties consist of effectuating the policies of the Act, which include principally the protection of the rights of employees to bargain through a union or to refrain from bargaining through a union; that whenever there is a question as to the union's majority status the election procedure is the method of settling this question; and that it was not the intent

of Congress to permit unions to force membership upon employees by the card check method.

The Decision of the Fourth Circuit Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

GISSEL PACKING COMPANY, INC., ET AL.

and

No. 691

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner

v.

GISSEL PACKING CO., INC.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Supplemental Brief For Gissel Packing Co., Inc.

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Supplemental Brief For Gissel Packing Co., Inc.

STATEMENT

This Supplemental Brief is submitted for the sole purpose of bringing to the attention of this Court certain authorities not available at the time this respondent's brief was submitted to the printers. The explanation as to each follows, below.

AUTHORITIES

In a thorough study of the authorization card issues, the University of Pennsylvania Press released, on February 26, 1969, the booklet by McFarland and Bishop, UNION AUTHORIZATION CARDS AND THE NLRB (U. Pa., 1969). This study supports the position of Gissel Packing Co., and is cited in the brief of Heck's, Inc. This was not received in this office in sufficient time to include it due to the printing leadtime necessary.

An additional major article was published as a result of a study by a committee of one of the major bar associations in the United States. This was received in this office on March 13, 1969. The conclusions reached, with detailed reasons and bases for them, are set forth at length in the article, which is highly critical of the use of authoriation cards by the NLRB. See 24 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 101 *et seq* (Feb. 1969)

The final additional authority is directly in point and was published in the Labor Relations Reporter dated March 17, 1969. In an opinion by Medina, J., the following appears in *Schwarzenbach-Huber Co. v. NLRB*, 2d Cir., 1969, ——F.2d——, 70 LRRM 2805, 2815:

> What do all these miscalculations and errors of fact and law by the [National Labor Relations] Board add up to? Surely they do not support the widely held supposi-

> tion that the Board and the Trial Examiners have a special expertise to handle this type of case. This "representation" (sic) card business is an abomination. As presently administered it is a pro-Union device that serves no other purpose than to afford a method by which elections can be bypassed and the Unions ushered in without giving the employees individually or collectively any voice in the matter. And this is accomplished by the invention of new *per se* rules of evidence and new standards by which the proofs are to be evaluated, that fly in the face of common sense and elementary concepts of justice and fair play. * * *
>
> * * *
>
> * * * The forgotten man seems to have been the employee who was one of those who comprised the unit of production and maintenance workers in the Company's Juniata Plant.

Respondent Gissel Packing Co. submits that the foregoing language applies with equal strength and substance to the situation in the instant cause.

CONCLUSION

Respondent Gissel Packing Co. respectfully requests that the foregoing additional authorities be considered by this Court in the disposition of this cause.

Respectfully submitted,

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Nos. 573 and 691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GISSEL PACKING COMPANY, INC., ET AL.

and

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner,

v.

GISSEL PACKING CO., INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

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MOTION OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Associated Builders and Contractors, Inc. respectfully moves this Court for leave to file the accompanying brief in this case as amicus curiae.

The consent of the Solicitor General has been obtained, but counsel for Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, has refused to consent and counsel for the respondent, General Steel Products, Inc., has likewise refused to consent although indicating an intention not to object. Under the circumstances consent was asked from none of the other interested parties.

Associated Builders and Contractors, Inc., is a nonprofit corporation organized and existing by virtue of the laws of the State of Maryland and having a membership of approximately 2500 in 19 states. Its members are construction contractors, suppliers, financial institutions and others that have a direct interest in the construction industry.

The applicant's interest in this matter arose basically because it represents a segment of the construction industry and it has noticed that the construction industry app. rs to have no representation. The issues involved could be of vital effect throughout the entire industry.

Keeping proper balance and fairness in the nation's labor laws as applied to the construction industry is not only important, but somewhat specialized because several provisions of the National Labor Relations Act, as amended, are applicable only to the construction industry.

Hence this applicant moves that it be permitted under Rule 42(3) to file this brief as an amicus curiae.

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---

BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE

II. INTRODUCTION

This brief amicus curiae is submitted by Associated Builders and Contractors, Inc. as provided in Rule 42(3) of the Rules of the Supreme Court.

III. INTEREST OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.

Associated Builders and Contractors, Inc., herein at times called ABC, is a Maryland non-profit association and has chapters in 19 states and represents approximately 2500 members. Its members consist of contractors and subcontractors together with other business enterprises, such as suppliers, dealers and financial institutions that are involved in construction.

The construction industry is one of the most important in the nation. Its volume of business in 1968 was approximately $80 billion. ABC has noted with concern accordingly that this industry's views are not represented in these cases. So through this brief it presents the views of its approximate 2500 members who are a segment of this industry.

Employers in the construction industry have more than a passing interest in the issues involved in these cases. It is of great concern to them because the powerful building trades unions, augmented by special considerations given them in certain provisions of the Labor-Management Relations Act, 1947, as amended, present serious problems of equity and balance in our nation's labor laws.

IV. QUESTIONS

Corollary questions which should be considered in addition to the question stated by the National Labor Relations Board are whether a Board-directed recognition based on authorization cards may thwart the desires of employees and be contrary to the intent of Congress.

V. STATUTES INVOLVED

Involved are Section 9(c) of the Wagner Act, 49 Stat. 449 (July 5, 1935) and the Labor-Management Relations Act, 61 Stat. 136 (June 23, 1947) and amended by P.L.

86-257 (Sept. 14, 1959) 29 U.S.C. Chapter 7, Subchapter II, #151, et seq.

VI. SUMMARY OF ARGUMENT

Reliance cannot be placed on card-count cases decided before the 1947 amendments to show an employer's obligation because the deletion at that time from the old Wagner Act of the words "or utilize any other suitable method" (besides the election method) nullifies such cases. Neither are cases based on an agreed or stipulated majority of any force and effect in connection with the problem before the Court.

Board policy regarding reliance on authorization cards has been inconsistent. It has relied on them at times to the detriment of labor relations stability and contrary to the intent of the act. Reliance on misleading cards and cards which have been misrepresented by the union solicitor has thwarted the real desires of employees. Cards in any event are not a dependable indication of the majority wishes of employees. The Board's contention that unfair labor practices make the conduct of elections impossible or undesirable and justify reliance on cards is without foundation in fact and is also contrary to the intent of Congress. The facts are that the Board can conduct elections under the most difficult circumstances. Its power to proscribe unfair labor practices helps make this possible. If the Board desires at times to abandon use of the election it should ask Congress for a change in the law, not change it by administrative fiat.

The entire problem is of great importance to employers in the construction industry because unions in that industry are very powerful and are the recipients of a number of statutory favoritisms.

VII. ARGUMENT

The Board urges an argument at the outset of its brief that recognition of union authorization cards as proof of majority is an employer obligation absent good faith doubt.

The pre-1947 precedents relied upon by the Board show that this argument is without merit.

In support of it on pages 18 and 19 of its brief the Board mentions three cases, in one of which there was an opinion of this Court [1] and in the other two of which it denied certiorari. These cases have no force and effect now because they were decided before the 1947 amendment to Section 9(c) of the Wagner Act, which struck out the words "or utilize any other suitable method" as an alternative to holding an election.

The Board in its brief further urges its argument on the point by referring to this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956) obviously decided after the change effected by the 1947 amendments. That case adds nothing to the issue here presented, however, because there was no dispute in it about union majority. The union majority was conceded on the basis of a stipulation. There has never been any question but what an employer's voluntary recognition of a bona fide union's majority status can be valid. Such fact contributes nothing, however, toward resolving the problem where the employer as in the cases here presented questions the majority claimed solely on the basis of cards.

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[1] The Board brief refers to *Natl. Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 339-340 (1940); *Natl. Labor Relations Board* v. *Remington Rand,, Inc.*, 94 F.2d 862, 868 (C.A. 2), cert. den. 304 U.S. 576 (1938); *Lebanon Steel Foundry* v. *Natl. Labor Relations Board*, 130 F.2d 404, 407 (C.A. D.C.), cert. den. 317 U.S. 659 (1942).

To bolster its argument for reliance on signed cards to demonstrate a majority, the Board's brief indicates such reliance is proper unless the employer entertains "good faith doubt." It indicates the employer's "other unfair labor practices" are a relevant consideration in determining whether "good faith doubt" exists. It states further that substantial unfair labor practices may justify a remedial order to bargain with a union which has obtained authorization cards from a majority.

A careful consideration of the problem shows that the commission of unfair labor practices proves nothing about "good faith doubt." A vicious employer might commit gross and numerous unfair labor practices against a very weak union because of determination that it should not become strong. He might at the time know full well the union represented less than a majority. On the other hand a conspicuously fair employer who scrupulously avoids unfair labor practices might or might not have honest doubt that a union which asks bargaining rights has a majority.

In commenting on imposition of the bargaining requirement as a result of unfair labor practices, Judge Learned Hand once stated, "as a penalty it might be proper, but as a link in reasoning it seems to be immaterial." *National Labor Relations Board* v. *James Thompson & Co.*, 208 F.2d 743 (1953).

The Inconsistency of the Board's Stand is Implicit in its Own Decisions.

The Board brief makes the point that bad faith will not be found in every case where the employer commits other acts constituting unfair labor practices. As examples, in footnote 20 of its brief, the Board cites eight cases in which orders to bargain were not issued despite refusals to bargain in the context of unfair labor practices.

It should be noted at this point, however, that the Board at times orders the employer to bargain on the basis of

signed authorization cards even though he has committed no "other" unfair labor practice at all. Of special concern to this friend of the Court in this connection is *H. & W. Construction Co., Inc.*, 161 NLRB 852 (1966) wherein a small construction employer which had committed no "other" unfair labor practices was required to bargain.

It is obviously Board policy moreover that once an employer examines authorization cards, which on their face show a majority, he forecloses any right to demand an election. It is well known that the proffer of such cards by a union representative to a naive employer is a common technique. An innocent employer is likely to look over such cards and may on the spur of the moment state that a majority of his employees appear to have signed.

Because of the inherent unreliability of signed cards as contrasted with an election, however, it is completely unrealistic to hold that an employer has no good faith standing to ask for an election after examining cards which have been proffered him.[2]

Professor Howard Lesnick, Professor of Law at the University of Pennsylvania, explains the unreliability of cards as follows:

> "Cards can be collected one at a time, in small groups, or at a meeting, as best suits the tactics of the organizer. There is no assurance that an employee even if he freely believes at the moment that he wishes to have the union represent him, "really" has made a measured decision. The trappings of the secret ballot election—governmental personnel, ballot boxes, and so forth—serve to impress upon the

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[2] In this connection see *H & W Construction Co.*, supra; *C & C Packing Co.*, 163 NLRB No. 90 (1967); *Pierotti, Jr. d/b/a Pierotti Motors*, 164 NLRB No. 32 (1967).

These and other cases seem to indicate that once an employer examines union authorization cards, which on their face indicate a majority, he cannot in good faith ask for an election.

> employee that he is not simply picking Miss Rheingold of 1967. Beyond that, the employees, solicited in whatever manner best suits the union, do not ordinarily have the opportunity to consider, or even be informed, about possible disadvantages to them of collective bargaining or of representation by the particular union involved. The employer, because of financial and other interests in opposing unionization, serves a public function in bringing relevant consideration to the employees' ears. Thus, employee sentiment registered after a campaign more truly reflects their free choice than does an affirmative response to what has been called 'instant unionism' through solicitation of cards." [3]

Completely out of line with Professor Lesnick's observation, the Board has taken the position that an employer's effort to gain time in which to ascertain the facts or present his point of view to the employees may show bad faith.[4] This stand of the Board is tantamount to the view that the employer should say or do nothing while the union conducts a drive to make members of employees —that the employees should hear only the union side of the case. The result negates the free speech amendment adopted in 1947 as Section 8(c) of the Act. It also undermines the democratic process which requires that the electorate should have all the *pro* and *con* information before making its decisions.

Use of Misleading Cards can Thwart Desires of Employees

A further consideration which would naturally raise good faith doubt in the mind of the employer is that the cards used are at times misleading. For example, in *S.N.C. Mfg. Co.*, 147 NLRB 809 (1964), 352 F.2d 361 (D.C. Cir. 1965) the Board found a majority without

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[3] 65 Mich. Law Review, 851, 864 (1967), *Establishment of Bargaining Rights . . . .*

[4] *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 87 U.S. App. D.C. 360, 185 F.2d 732, cert. den. 341 U.S. 914, 71 S.Ct. 734, 95 L.Ed. 1350 (1951).

holding an election where the only line of full capitals on the card recited "I want an NLRB election now." There is, to say the least, grave doubt that cards so worded could rightfully establish the fact of a union majority. Board findings of 8(a)(1) violations cannot possibly change the facts that the cards in themselves may have so deceived the employees as to nullify the value of the cards as proof of employee desires. The article in 65 Michigan Law Review 851, 856, mentioning this case, refers to "cards which on their face seem calculated to mislead."

An example was the case of *Lenz Co.* and *International Union of Electrical Radio and Machine Workers, AFL-CIO, Local 178*, 153 NLRB 1399, enf. in part 396 F.2d 905 (C.A. 6, 1968), wherein the Board, reversing its trial examiner, upheld a card-count in a background of several discriminatory discharges. The cards involved were dual purpose ones. One of them in evidence bore a request for an election in large, bold print and set forth the bargaining authorization in small print. The trial examiner found failure to establish a union majority and observed, "These cards partake too strongly of the fine print clauses in contracts used by businesses to dupe and deceive the public and the encouragement of the practice does not seem to be a proper federal function." The Board in overruling the trial examiner, failed to resolve the problem of the fine print as against the bold type but stated, "The Board has never held a card per se unreliable because it was sought for two purposes." The Court found that there had been misrepresentation in obtaining the cards and accordingly denied enforcement of the Board's order to bargain.

It has, in fact, been a common practice of the Board to rely on dual purpose cards to establish a union majority.[5]

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[5] See *International Union, United Automobile Workers* v. *NLRB.*, 363 F.2d 702 C.A.D. of C. 1966, Cert. den. sub nom. *Aero Corp.* v. *NLRB*, 385 U.S. 973 (1966); *Garland Knitting Mills of Beaufort, South Carolina, Inc.*, 170 NLRB No. 39 (1968); *Ed's Foodland of Springfield, Inc.*, 159 NLRB 1256 (1966).

In this connection the Board brief admits on page 27 that there have been abuses in the use of cards on the point of whether the employees were designating the union or were merely authorizing it to seek an election. The Board defends the use of cards, however, in those instances where there has been employer "conduct tending to destroy the conditions necessary for a fair election." To eliminate use of cards in such instances, the Board says, would permit employers "to delay or prevent unionization through interference with the election process."

This sort of reasoning by the Board is mere conjecture and thwarts the purpose of Congress as embodied in the 1947 amendments which did away with the words "any other suitable method," in Section 9(C). The Congress in these amendments obviously was undertaking to eliminate the use of other methods than elections as a means of determining a majority.

Along with those situations in which Cards are Ambiguous or Misleading are those in which the Union Organizer Misrepresents the Purpose of the Card, Telling the Employee that the Purpose is to Obtain an Election.

This appeared to be the thrust of the Court's decision regarding the cards in the *Lenz* case, supra. The bad result of such misrepresentation can be just as serious as a card which is ambiguous or misleading on its face.[6] Many employees have little ability or inclination to read. They could in such cases rely entirely on what the solicitor might tell them.

> "It is ironic," stated one observer, "that the Board denies an election or re-run in order to protect employee free choice and then orders bargaining on the basis of cards which offer even less protection."[7]

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[6] *National Labor Relations Board* v. *Gotham Shoe Manufacturing Co., Inc.*, 359 F.2d 684 (C.A. 2 1966).

[7] 25 Yale Law Journal 805, 819 (1966), *Union Authorization Cards.*

The basic danger is that if cards are relied upon the actual desires of the employees may be undercut. Cards may have this effect, it is emphasized, even though not so worded on their face as to mislead. Judge Castle ably stated the point in his dissent in *Happach* v. *National Labor Relations Board*, 353 F.2d 629 (C.A. 7, 1965) as follows:

> "The fact that the employer was subjectively in 'bad faith' in refusing to bargain with the Union—was unaware of the understanding of the circulator and the representation he had made to the other employees in obtaining their signatures—is not a basis for imposing a penalty on the employees in the form of Representation by a Union they have not chosen to represent them. On the record in the instant case an order to bargain is inconsistent with the basic purposes of the National Labor Relations Board Act. It defeats rather than contributes to industrial peace and stability in labor-management relations.
>
> "I would deny enforcement of the Board's order that the petitioner bargain with the Union."

Reliance on Cards has Been Used to the Detriment of Labor Relations Stability and the Intent of the Act.

A purpose of the nation's labor legislation is to promote stability in management-labor relations. Section 1 of the National Labor Relations Act as amended recognized this principle. It states, "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, . . ."

In implementation of this principle Section 9(e)(2) bars an election for one year in any bargaining unit or subdivision in which a valid election has been held during the preceding twelve-month period.

But in the case of *Conren, Inc. d/b/a Great Scot Supermarket* v. *N.L.R.B.*, 368 F.2d 173 (C.A. 7, 1966), cert. den. 386 U.S. 974, it was held by the Board and enforced by the Court, with a dissenting opinion that a valid election resulting in a "no union" vote did not preclude the rejected union from demanding recognition during the ensuing year on the basis of authorization cards.

This decision encourages unstable labor relations. It keeps ever alive the threat that there will be a union campaign for employee support through authorization cards immediately following a lost election. It has been observed that the opinion fails to give proper consideration to the purpose of Section 9(c)(3).[8] One authority points out that it creates a dilemma for employers. Since the employer cannot petition for an election and he is unwilling to go through the ordeal of defending an 8(a)(5) charge, he is inclined to bargain with the union claiming a card majority. There is danger a competing union may file 8(a)(2) charges and upset industrial stability. Further, the decision throttles the employer's right to campaign legitimately for employee support.[9]

Those who believe in fair play are naturally disturbed when they discover that the use of authorization cards within a year to upset a union-lost election does not work in reverse. The Board holds that if the union wins an election, but a majority of employees in the unit sign a repudiation of the election result, nevertheless the election stands.

In the case of *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, affirming 204 F.2d 899, and enforcing 98 N.L.R.B. 976 (1954), the union won an election. A week later and before certification a letter signed by an even greater majority of the employees than had voted

[8] See 1967 Duke Law Journal 444, 448, *Labor Law: . . . Section 9(c)(3).*

[9] See 42 New York University Law Review 369, 375 (1967), *Union may achieve representation . . . within one year of "No Union" vote.*

for the union, repudiated their desire to have the union represent them. The Board nevertheless ordered the employer to bargain and was upheld. Justice Frankfurter stated in rendering this Court's opinion:

> "Since an election is a solemn and costly occasion, conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation. A petition or a public meeting—in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth."

Good reasons for refusing to decide the majority question by the election process are lacking.

Usually the situation represents a setting in which the employer is found to have committed violations of Section 8(a)(1) because of interrogation of his employees or because of comments made to them. If the employer is to look into the majority question with thoroughness it is almost a necessity that he have conversations with employees about the subject. As Judge Brown indicated in *NLRB* v. *Dan River Mills*, 274 F.2d 381, 388-89 (C.A. 5, 1960), the employer stands almost helpless when he understages such an inquiry. He stated further:

> "All the while, all that is done, all that is said, all that is asked, all that is answered rests in the uncertain recollection of the partisan participants. What begins as the employer's quest now ends in the employer's flight. And now no longer will his conduct be judged alone by what was said. Now, through the unavoidable nature of our legal administrative machinery, it will be judged by what interested partisans say one said was said, or what others have said to have said say was said."

This type of situation, which is the rule rather than the exception, presents no sound reason for refusing to rely

on the election process. It is absurd, moreover, to conclude that such activity is evidence that good faith doubt is lacking.

It is likewise absurd to conclude that such activity leaves the Board helpless to conduct a fair election. In the recent Longshoremen's strike the Board, with notable success, conducted elections as to the strike's termination. These uses of the secret ballot in this kind of heated labor dispute show that elections can be and are held even under very difficult circumstances. One agent of the Board boasted in a speech about the meticulous way in which election proceedings are handled when he said:

> "In holding these elections, the agency has posted election notices and has distributed voting ballots not only in the most isolated areas of this country, but has translated notices of elections and ballots into almost every language of the world, ranging from Spanish, Polish, German, Yugoslavian, Yiddish, Russian, Chinese, Japanese to Tagalog." [10]

The facts are moreover that with all the powers wielded by the Board today to throttle unfair labor practices, it is unrealistic to conclude that an employer can prevent a fair election. In fact, it is conceivable that an employer who took an exceedingly vigorous line of interference might bring such adverse employee reaction as to give the union a majority of votes cast in a secret ballot election.

The Board on occasion has even held elections by mail. *National Labor Relations Board* v. *Groendyke Transport, Inc.*, 372 F.2d 137 (C.A. 10), cert. den. 387 U.S. 932 (1967). It has also exercised the prerogative of using I.B.M. voting cards. *N.Y. Shipping Association*, 109 N.L.R.B. 310 (1954).

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[10] Speech by Stephen Gordon, Associate General Counsel of NLRB, April 1968, Labor Law Journal, pp. 201, 222.

The recital of Board decisions as detailed above indicate unfortunately that the Board views the order to bargain pursuant to signed authorization cards from a majority as the most effective remedy to counter unfair labor practices. Board reasoning seems to be that: (1) The bargaining order is something the recalcitrant employer deserves, being what he most abhors. (2) It is likely to deter other employers from engaging in similar unfair labor practices. The theory is that when the employer allegedly interferes with the election, as in *Bernel Foam Products Co.*, 146 NLRB 1277 (1964) or in the *General Steel* case here presented, the employer must not be allowed to benefit from his own misconduct. The Board fortifies this reasoning with the further reasoning that the employer's conduct shows a lack of good faith doubt of the union's majority.

The one test that should be applied to such reasoning is whether it protects employee freedom of choice. For the reasoning to stand scrutiny it must be unmistakeable that under the circumstances the cards are a better index of employee desires than an election for which they are a substitute.

The unreliability of cards has been referred to in some of the cases cited earlier.

That they are not a reliable bellweather of what an election might show is borne out by a study made in the Board's Atlanta Region in 1960. National Labor Relations Board Chairman Frank W. McCulloch, speaking before the Section of Labor Relations Law of the American Bar Association in 1962, referring to this study, stated:

> "In 58 elections, the unions presented authorization cards from 30 to 50 per cent of the employees; and they won 11, or 19% of them. In 87 elections, the unions presented authorization cards from 50 to 70 per cent of the employees; and they won 42

> or 52% of them. In 57 elections, the unions presented authorization cards from over 70% of the employees, and they won 42 or 74% of them." [11]

The unquestioned greater reliability of the secret ballot was thus attested by one court in 1968 which stated:

> "We do not say that the Board should never, in the absence of a secret ballot, determine that a majority of the employees in an appropriate unit have selected a particular labor organization as its bargaining representative. But we do point out that there is a vast difference between such a choice registered as a result of a secret ballot, and such a choice established by the introduction into evidence of signed cards, collected at the behest of the union organizer." [12]

Even the old Wagner Act Board recognized the greater efficacy of the election to resolve difficult majority claims.[13]

The use of unfair labor practice findings to determine lack of employer good faith as to a majority, it is emphasized, gives greater weight to punishing the employer than to implementing the employees' right to have a fully protected free choice.

Congress made it clear that it intended use of the secret ballot to be relied upon to determine majority representation.

Chief Judge Haynesworth, in *National Labor Relations Board* v. *Logan Packing Co.*,[14] made this point unmistaka-

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[11] Proceedings of Section of Labor Relations Law, American Bar Assn., 1962, pp. 14, 17.

[12] *National Labor Relations Board* v. *Hannaford Bros. Co.*, 261 F.2d 638 (C.A. 1 1958).

[13] *Cudahy Packing Co.* and *United Packing House Workers, Etc.*, 13 NLRB 526 (1939).

[14] 386 F.2d 562 (C.A. 4 1967), enforcing in part and denying in part 152 NLRB 421.

bly clear. He stated in referring to what the legislators did:

> "They specifically repealed that part of Sec. 9(c) which had authorized the Board to employ 'any other suitable method' of resolving such questions, leaving a secret election as the sole basis of a certification. They also extended to an employer the right to petition for an election after receipt of a bargaining demand, though only one union was involved.[15] It was made plain in the Committee reports,[16] however, that an employer, after receipt of a demand to bargain from a union claiming to represent a majority of the employees, need not petition for an election. He had the alternative of waiting for the union to invoke the Board's election processes. But he was assured of an election on his own petition if the union sought to obtain recognition by means other than an election. There was a minority report,[17] but it questioned none of this; it objected only to the absence of express authority in the Board to dismiss an employer's election petition if there were no doubt that an established, recognized union still represented a majority of the employees. The statute was enacted without language giving the Board the very limited discretion the minority thought it should have." [18]

Realistically, there could hardly have been any other reason to strike from the text of Section 9(c) the words, "or utilize any other suitable method," except to require reliance on the secret ballot. It is noted, as the opinion by

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[15] 29 U.S.C.A. #159(c)(1)(B).

[16] S.Rep. No. 105, 80th Cong. 1st Sess., Part 1, p. 25 (1947); H.Rep. No. 245, 80th Cong., 1st Sess. p. 35 (1947).

[17] S.Rep. No. 105, 80th Cong., 1st Sess. Part II, p. 11 (1947).

[18] See generally, Note, 75 Yale L.J. 805, 820, supra N. 17.

[Note: Footnote 15 through 18 are numbered 31 through 34 in Chief Judge Haynesworth's opinion. The reference back in footnote 18 is to an earlier footnote in the opinion.]

Chief Judge Haynesworth suggests, that both the majority and minority reports of Senator Taft's Committee show a purpose to grant the employer an absolute right to an election.[19] This change was made even though the minority urged it could be used by employers to work against unions.[20] The minority report, moreover, mentioned the elimination of cards in lieu of elections.[21]

Those who urge that the present use of cards is following the intent of Congress point out that in Section 9(a) there is reference to "Representatives designated or selected." Either the word "designated" or "selected," however, can refer to the secret ballot process. Moreover, the words could likewise refer to the "consent" card check or to an election or even to an agreement of the employer to bargain on the basis that his personal knowledge of the situation causes him to recognize the union. It is utterly absurd to say this language as left in Section 9(a) gave the Board a carte blanche to rely on cards in lieu of an election.

If the rule is to be changed from the clear intent of the 1947 amendments to require reliance on elections rather than authorization cards, then the change should come from Congress and not from the Board.

In the construction industry, the unions are exceedingly powerful and employees have no need of the very generous policy followed by the Board with respect to authorization cards. As a matter of fact, they pretty well controlled the construction industry in urban centers long before the Board asserted jurisdiction over it.[22] Eight of the big building and construction trade unions actually op-

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[19] See references in notes 16 and 17 supra.

[20] S.Rep. No. 105, 80th Cong. 1st Sess., Part 2, p. 11.

[21] Id. Part 2, p. 34.

[22] *American Labor Unions* by Florence Peterson (Harper Bros. 1945) p. 204.

posed the Board's somewhat belated decision to assert jurisdiction over the industry.[23]

Moreover, since that time these unions have received substantial favored treatment through approval in Section 8(f) of the 1947 amendments of pre-hire collective bargaining contracts with the so-called 7-day union shop proviso; also the favoritism in the proviso portion of Section 8(e) which in substance allows collective agreements to limit business to be done at the construction site to specific labor organizations.

These special privileges build up pressures which are brought to bear on employers in the construction industry, and the small employer is especially vulnerable to such pressures. Through reliance on authorization cards to establish a union's majority an additional pressure is brought to bear on construction industry employers. These employers have a vital interest in maintaining balance and fair play in labor relations. It is submitted that to pursue the intent of Congress through placing reliance on elections will help achieve such a result.

VIII. CONCLUSION

The Board's reliance on union authorization cards to establish majority representation is without merit. Its contention that employers who have committed unfair labor practices thereby may show themselves to be without good faith doubt as to the union's claimed majority is not based on sound reasoning. The rule assumes the reliability of such cards as proof of majority, moreover, whereas there are sound reasons to conclude that they are unreliable. The Board's imposition of an order to bargain in such cases may serve as a penalty on the em-

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[23] Labor Law Journal, Jan. 1952, pp. 7, 12. See *Plumbing Contractors Assn. of Baltimore, Md. Inc.*, 93 NLRB 1081 (1951); *Plumbing and Heating Contractors Assn. of Olean, N.Y.*, 93 NLRB 1099 (1951).

ployer, but it loses sight of the real purpose of giving union representation to the employees only if they want it. Congress undertook to protect the wishes of employees in the 1947 amendments when it provided that the Board should rely on the election, not "any other suitable method." If the Board wishes to change this rule it should obtain the change by persuasion of Congress, not by administrative fiat.

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March 10, 1969

APPENDIX

National Labor Relations Act (Wagner Act)

49 Stat. 449 (1935) Section 9(c)

> (c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

Relevant provisions of National Labor Relations Act, as amended, (1947) 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.

> 8(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

> 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting

of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

8(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area; Provided, That nothing in this subsection shall set aside the final proviso to section 8(a) (3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

Sec. 9(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of

all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect; Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Sec. 9(c) (3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Sec. 9(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a) (3) of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

Sec. 9(e) (2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

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No. 573

In the Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GISSEL PACKING COMPANY, INC. ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HECK'S, INC.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION OF GENERAL STEEL PRODUCTS, INC. AND CROWN FLEX OF NORTH CAROLINA, INC. FOR REHEARING AND FOR STAY OF MANDATE

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GENERAL STEEL PRODUCTS, INC. and CROWN FLEX OF NORTH CAROLINA, INC. respectfully petition the Court to grant a rehearing to reconsider this Court's Decision issued on June 16, 1969, based on the following grounds:

1. The Decision is predicated on a position taken by the National Labor Relations Board for the first time at oral argument in the instant case (Sl. Op., p. 14, 16). The Board's new position was one which the Petitioner could not and did not anticipate. It is a far different position from that which the Board urged before this Court in its brief and under which it had heretofore proceeded in this matter. Moreover, as is fully recognized in the Decision (Sl. Op., p. 16), the Board's new position also constitutes a virtual abandonment of a doctrine which the Board had applied without exception for the past twenty years.

In view of the Board's belated and surprising change of position, the Petitioner has had no opportunity to brief its views on the Board's new approach to this Court or to argue more than superficially the merits of this position at oral argument. Petitioner respectfully submits that, were it provided with such an opportunity, it could demonstrate that the Board's new position does not provide proper rationale for issuance of card-based bargaining orders.

2. By the present Decision, the Board is granted judicial approval for the use of three "categories" of cases with respect to issuance of bargaining orders as a remedy for unfair labor practices. These are to be classified on the basis of the character of the unfair labor practices involved - "exceptional", "less extraordinary", and "minor or less ex-

tensive" (Sl. Op. pp. 36-7). None of this was briefed. We respectfully submit that more is urgently needed in the way of guidelines for decision by the Board and review by the courts. We suggest that while the Court recognizes that an election is the preferred course for determining employee desires, and is to be omitted only where employer misconduct renders a fair election impossible, the language of the Decision (Sl. Op. pp. 36-38) leaves the guiding circumstances undefined and probably conflicting. The Opinion reads (Sl. Op. p. 36-7):

> "***In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue (see n. 32, supra)."

Again on p. 38 the Opinion reads:

> "In the [Fourth Circuit cases], on the other hand, the Board did not make a similar finding that a bargaining order would have been necessary in the absence of an unlawful refusal to bargain. Nor did it make a finding that, even though traditional remedies might be able to en-

sure a fair election, there was insufficient indication that an election (or a rerun in *General Steel*) would definitely be a more reliable test of the employees' desires than the card count taken before the unfair labor practices occurred***"

We respectfully suggest that these formulations of the test to be applied by the Board are not in harmony and need further clarification by this Court.* The parties had no opportunity to brief or to present their views to the Court on these rules.

Petitioner submits that, if the instant Petition were granted, the Court could clarify the standard which it intended to be applied by the Board and the court below on remand of the present case. In addition, the Court could alleviate the confusion and conflict which presently exists in this area by establishing as predictable and specific criteria as possible.

3. One of these "categories" of cases is almost entirely novel. This is the authorization to the Board to order bargaining in "exceptional" cases of "outrageous" and "pervasive" unfair labor practices *without inquiry into majority status.* (Sl. Op. p. 36) Such a power had been suggested, in dicta only, by the Fourth Circuit. *NLRB v. Logan Packing Co.*, 386 F. 2d 562, 570 (C.A. 4, 1967). But this power had never been claimed by the Board. True, the Board had previously ordered bargaining based on extensive Sec. 8(a)(1) violations in some cases, without any finding of unlawful

* Other statements of the Board's position are found at Sl. Op. pp. 16, 23-4, fn. 18, 32, 34.

refusal to bargain, but *always such orders rested upon a showing of a card majority.* (See cases cited in Sl. Op. p. 36) In the absence of proof of majority the Board had expressly rejected any such remedy as being contrary to the Act itself, which establishes majority rule as a basic principle. *J. P. Stevens Co. Inc.*, 157 NLRB 869 (1966): *Scotts, Inc.*, 159 NLRB No. 146 (1966); *Clanebach, Inc.*, 170 NLRB No. 35 (1968); *H. W. Elson Bottling Company*, 155 NLRB 714 (1965); mod. & enf. 379 F. 2d 223 (C.A. 6, 1967); see *Schwarzenbach-Huber Co. v. NLRB*, ...F. 2d ....., 70 LRRM 2805 (C.A. 2, 1969).

We suggest respectfully that this extreme departure deserves an opportunity for full briefing and argument.

4. The Decision approves the Board Trial Examiner's findings with respect to the validity of the specific authorzation cards involved herein, resolving the conflict among the circuits in favor of approving the Board's *Cumberland* rule [*Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), enf. 351 F. 2d 917 (C.A. 6, 1965] and determining that the instant findings "represent the limits of the *Cumberland* rule's application" (Sl. Op. pp. 6-7, 30-1).

The Board, however, in its Petition for Certiorari, expressly disavowed that this question was in any way before this Court noting that the Board's determination in this respect "apparently played no part in the court of appeals' refusal of enforcement" (Bd. Pet. for Cert. pp. 20-1, fn. 20).[1] The merits of the Board's determination in this respect,

1. The Board also noted that this Court had denied certiorari the previous term in three cases in which "the standard by which the Board determines the validity of challenged cards" was directly involved. *National Labor Relations Board v. Crawford Mfg. Co.*, 390 U. S. 1028; *Preston Prod. Co. v. National Labor Relations Board*, 392 U. S. 906; *Bryant Chucking Grinder Co. v. National Labor Relations Board*, 392 U. S. 908.

accordingly, were not fully discussed by the parties, and although briefed by this Petitioner, this was without any Board briefing to which to reply.

The Petitioner respectfully submits that, were it permitted to brief and argue fully the card validity issue, it could demonstrate the fallacies in the Board's approach and the lack of preciseness and predicability involved in the Cumberland standard.[2]

The Court would also be enabled to determine the significance of facts, such as the extreme illiteracy of the employees involved in the present case, which it has not previously had the opportunity to consider. (App III pp. 581-2) The grant of the instant Petition would thus permit this issue to be accorded the full significance it deserves and permit the articulation, if the Court should so desire, of a more meaningful guideline than that presently invoked by the Board.

For the foregoing reasons, respondents General Steel Products, Inc. and Crown Flex of North Carolina, Inc. respectfully request that this petition for rehearing be grant-

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2. As Judge Friendly observed with respect to the considerable litigation that evolved from the Board's *Cumberland* approach: "The extensive discussion of evidence in such cases [citing circuit court decisions] . . . was necessitated by the Board's use of the wrong standard and the courts' desire to avoid a time consuming remand; once the Board adopts the proper standard, judicial review. . . . should not be substantially more difficult than under the [present Board standard]." *Bryant Chucking Grinder Co. v. NLRB.* 389 F. 2d 565 (28nd Cir. 1967) (Concurring opinion).

ed. Respondents further move the Court to stay its Mandate in this case pending consideration of this Petition for Rehearing.

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CERTIFICATE OF COUNSEL

The undersigned counsel for General Steel Products, Inc. and Crown Flex of North Carolina, Inc. does hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for purpose of delay and respectfully requests that it be considered.

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No. 578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

OSBORN PACKING COMPANY, INC.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

HICKS, INC.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL STEEL PRODUCTS, INC. AND CROWN FENCE OF NORTH CAROLINA, INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Brief for the American Retail Federation as *Amicus Curiae* in Support of the Petition of General Steel Products, Inc. and Crown Fence of North Carolina, Inc. for Certiorari

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IN THE

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OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

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GENERAL STEEL PRODUCTS, INC., AND CROWN FLEX OF NORTH CAROLINA, INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief for the American Retail Federation as Amicus Curiae In Support of the Petition of General Steel Products, Inc., and Crown Flex of North Carolina, Inc. for Rehearing

INTEREST OF THE AMICUS CURIAE *

The American Retail Federation (hereinafter referred to as the "Federation") is an organization com-

* This brief is filed with the written consent of both counsel for General Steel Products, Inc. and Crown Flex of North Carolina, Inc., and the Solicitor General of the United States, pursuant to Rule 42(2) of this Court.

posed of 77 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The Federation previously presented its views on the issues involved herein to this Court by means of an *amicus curiae* brief in Case No. 585. These issues have long been a matter of vital concern to the Federation. Indeed, the Board's varying positions in this area may well have been the product of the Federation's public expressions of such concern. The propriety of card-based bargaining orders was initially called to the attention of Congress in the Federation's testimony before the 1965 House and Senate hearings on the proposed repeal of Section 14(b) of the Act.[1] After attempting to defend its position in these hearings,[2] the Board limited *Snow & Sons,* 134 N.L.R.B. 709 (1961) to its facts in *John P. Serpa, Inc.,* 155 N.L.R.B. 112 (1965) and significantly limited the

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[1] (*Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare,* Senate, 89th Cong., 1st Sess. (1965) S. 256, *To Repeal Section 14(b) of the National Labor Relations Act,* pp. 181-185, 195, 196-198 (Committee Print); *Hearings Before the Subcommittee on Labor of the Committee on Education and Labor,* House, 89th Cong., 1st Sess. (1965). H.R. 77, H.R. 4350 and Similar Bills, *To Repeal Section 14(b) of the National Labor Relations Act,* pp. 418, et seq. (Committee Print)).

[2] Statement of Secretary Willard Wirtz, *Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare,* Senate, 89th Cong., 1st Sess. (1965), S. 256, p. 5, *et seq.* (Committee Print)

Joy Silk doctrine in *Aaron Brothers*, 158 N.L.R.B. 1077 (1966). (See 37 L.W. 4536 at 4540)[3]

The present position of the Board,[4] announced for the first time during oral argument in the instant case, is quite similar in appearance to the "fair election impossible" test which the Federation had urged in its prior *amicus* brief, *with one critical difference.* The Federation had argued that such a position was of little substance without concomitant well-defined standards for its application. The Board, however, failed to propose such standards during its oral argument. As a result, the various positions which have been adopted by the Board all have in common a fatal deficiency which has been at the core of the Federation's con-

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[3] References to this citation contained herein are to *National Labor Relations Board* v. *Gissel Packing Co., Inc.* and *The Sinclair Company* v. *National Labor Relations Board*, Nos. 573, 691, and 585. October Term, 1968.

[4] We submit that this change of position was caused by the Board's realization of the validity of the "fair election impossible" test suggested by the Federation in its *amicus* brief in Case No. 585. That *amicus* brief urged upon this Court the need for standards so that the "fair election impossible" test, if properly held to replace the Board's "good faith doubt" test, would not be a mere re-phrasing of the Board's existing vacillations but rather would provide adequate uniform guidelines for the Board and the Courts of Appeals. The Federation's position in its earlier *amicus* brief amplified and restated the position taken by the Federation in testimony before the House in 1967 (*Hearings Before the Special Committee on Labor, Committee on Education and Labor*) *House*, 90th Cong., 1st Sess. (1967), H.R. 1175, *To Amend the National Labor Relations Act to Increase Effectiveness of Remedies*, pp. 383, 386-387, 393 (Committee Print)), and the Senate in 1968 (*Hearings Before the Subcommittee on the Separation of Powers of the Committee on the Judiciary*, Senate, 90th Cong., 2nd Sess., *Congressional Oversight of Administrative Agencies*, (NLRB), April 30, 1968.) See footnote 1 for reference to additional Federation testimony.

tinuing concern: They fail to establish clear, precise and reasonable guidelines by which the Federation's members, as well as other members of the public, can base their future behavior.

The interest of the Federation, in now urging that this Court grant a rehearing to reconsider its Decision of June 16, 1969 in the instant case, is predicated on the substantial and far-reaching consequences which will flow from disputed interpretations of the Court's Decision. The Federation respectfully submits that the Decision fails to resolve, and instead merely shifts to a different arena, the confusion and conflict which presently exist in the area of card-based Board bargaining orders. Such confusion and conflict will have a significant impact on labor relations in the retail industry. It is for this reason that the Federation believes it necessary to present its views before this Court in support of the Petition for Rehearing.

ARGUMENT

It is axiomatic that a regulatory agency, such as the National Labor Relations Board, must clearly delineate the specific standards by which it expects compliance from the public. The statutory mandate of any legislation is surely frustrated when the consequences of particular acts may vary substantially from day to day or are dependent on the unfettered discretion of changing tribunals.

In the area of card-based bargaining orders, past decisions of the Board have failed to abide by this fundamental precept. Frequently, critical rights of employees under the National Labor Relations Act have been determined by the shifting discretion of the

Board rather than by well-established guidelines. The public, to a great extent, has been left without adequate criteria upon which to base its conduct. Voluntary settlement of Board cases, without protracted hearings or litigation, has thus become greatly impaired[5] and appellate court calendars have become increasingly replete with card-based bargaining order cases.

The *amicus* respectfully submits that this Court's Decision fails to alleviate the present conflict and confusion in the card-based bargaining order area. It fails both because of the different, and even conflicting, standards which this Court enunciated in its Decision herein, and because the Board in its oral argument led the Court to believe it had changed its position by abandoning a doctrine which it had not only applied without exception for the past twenty years but also had argued herein in its brief.

Now, however, it appears that the Board is not following the position it represented to this Court. In *Clay City Beverages, Inc.*, 176 NLRB No. 91, (printed as Appendix A hereto) a decision made public June 19, 1969, over three months after oral argument, the Board continued to apply a "good-faith doubt" test in determining whether card-based bargaining orders should issue, and in doing so relied on *Joy Silk Mills, Inc.* v. *NLRB*, 185 F.2d 732 (C.A.D.C.), *cert. denied*, 341 U.S. 914. The Board's decision disregards its representation

[5] The Board's last published Annual Report, for the fiscal year ending June 30, 1967, indicated that 91.7 percent of unfair labor practice cases closed were disposed of at the regional office level without litigation. Clearly, continuation of this record is dependent on establishment of sufficient standards by which the parties to future cases may reasonably determine the consequences thereof.

that it had "virtually abandoned the *Joy Silk* doctrine altogether," as noted in this Court's opinion herein.

The Board's alleged new doctrine, the merits of which the *amicus* and other parties have not been afforded the opportunity to brief and fully argue, raises new and serious issues which require resolution by this Court. For example, is the "key to the issuance of a bargaining order . . . the commission of *serious* unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election"? (37 L.W. 4536 at 4540-1; emphasis supplied) Or is it, conversely, as stated by this Court in the very next sentence of its Decision, *any* employer "misconduct"? (37 L.W. 4536 at 4541) The results in a particular case, of course, may vary significantly if one, rather than the other, of these criteria constitutes the controlling law. Without a clear resolution by this Court the preciseness and predictability so necessary in this significant area of the law will still only be a mirage and parties to Board proceedings will once again be left to the shifting and conflicting opinions of the Board and the lower courts.

Similarly, this Court's Decision is subject to a variety of different, and even conflicting, interpretations which obfuscate, rather than clarify, the guidelines by which it may be determined when an employer's refusal to bargain, accompanied by interference with the election processes, warrants issuance of a card-based bargaining order. It may thus be legitimately argued that any one of the following standards was that actually intended by this Court:

(1) That a bargaining order is warranted, as urged by the Board in its new position, where the

employer commits "serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election" (37 L.W. 4536 at 4540-1);

(2) That a bargaining order is warranted, as this Court stated in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956) and reasserted in the Decision, where there is an "absence of any bona fide dispute as to the existence of the required majority of eligible employees" (37 L.W. 4536 at 4542);

(3) That a bargaining order is warranted, as this Court indicated in delineating the boundaries of its Decision, where, although *no* unfair labor practices may have been committed, the employer's conduct was nevertheless sufficient to demonstrate that "a fair election could probably not have been held, or where an election that was held was in fact set aside" (37 L.W. 4536 at 4543, fn. 18);

(4) That a bargaining order is warranted, as this Court noted in describing the issues involved herein, where the employer "has committed independent unfair labor practices which have made the holding of a fair election unlikely *or* which have in fact undermined a union's majority and caused an election to be set aside" (37 L.W. 4536 at 4545; emphasis supplied);

(5) That a bargaining order is warranted, as this Court observed in indicating when a cease-and-desist order may not be an appropriate remedy, where the employer has succeeded by his misconduct "in undermining a union's strength and destroying the laboratory conditions necessary for a fair election" (37 L.W. 4536 at 4546); or

(6) That a bargaining order is warranted, as the Court stated in its summation of its present holding, where "the Board finds that the possi-

> bility of insuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order" (37 L.W. 4536 at 4547).

The different results which would flow from one, rather than the other, of the above standards require, it is submitted, clarification by this Court.[6]

The Court's approval of authorization cards as a predicate for a bargaining order underscores the importance of the criteria by which the Board adjudicates the validity of such cards. The Board's *Cumberland* rule fails to establish adequately such criteria and the Decision on this issue, as the result in part of insufficient argument by parties who did not believe that this question was before the Court, also fails to establish such guidelines. What, for example, would constitute "an approach any more rigid than that in *General Steel*" or a "too easy mechanical application of the *Cumberland* rule"? (37 L.W. 4536 at 4545) These critical questions should not be left to future litigation and the potential of conflict such as that which presently exists between the Board and numerous appellate courts. If authorization cards are in fact to be a basis for bargaining orders then, surely, it should be clearly specified as to those conditions which are requisite to their validity.

It is respectfully submitted that the failure of this Court to prescribe standards will permit the Board to

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[6] See, e.g., the Court's utilization of, and reliance on, appropriate standards in the application of another provision of the Act in *Local 761, IUE* v. *NLRB*, 366 U.S. 667 (1961), where the Court articulated specific guidelines for determining the legality of reserved gate picketing under Section 8(b) 4(A) of the Act.

revert to its prior policy simply by changing labels. As an example, in *Nat Harrison Associates, Inc.*, 177 NLRB No. 24, (printed as Appendix B hereto) made public July 2, 1969, the Trial Examiner ordered card-based bargaining upon the employer's lack of "good-faith doubt." The Board in its decision, rather than sending the case back to the Trial Examiner for new findings consistent with this Court's decision, adopted pro forma the findings, conclusions and recommendations of the Trial Examiner and then simply dropped a footnote which rephrased the Trial Examiner's language to comport with the Court's decision herein and assumed findings neither considered nor found by the trial examiner.

CONCLUSION

For the foregoing reasons, the Federation respectfully requests that the Petition for Rehearing of General Steel Products, Inc. and Crown Flex of North Carolina, Inc. be granted.

Respectfully submitted,

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In

APPENDIX A

FOR RELEASE AFTERNOON PAPERS
JUNE 12, 1962

176 NLRB No. 91

D-7000
Zanesville, Ohio

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 8-CA-5100, 8-CA-5103

Chas. Levy Beverages, Inc.

and

International Molders & Allied Workers Union, AFL-CIO

APPENDIX

Decision and Order

On February 16, 1962, Trial Examiner Thomas S. Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

APPENDIX

APPENDIX A

FOR RELEASE AFTERNOON PAPERS
JUNE 19, 1969

176 NLRB No. 91

D-2000
Zanesville, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 8-CA-5100, 8-CA-5108

CLAY CITY BEVERAGES, INC.

and

INTERNATIONAL MOLDERS & ALLIED WORKERS UNION, AFL-CIO

Decision and Order

On February 10, 1969, Trial Examiner Thomas S. Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

The Facts

The Respondent operates a small plant in Zanesville, Ohio, where it bottles soft drinks for wholesale distribution throughout the immediate area. The majority of the stock of the Respondent is owned by Okey Johnson, but the actual operation of the plant and the distribution of its products is controlled by his sons, Richard and Bradley Johnson. The Respondent normally employs approximately 12 employees in its production operations, exclusive of supervisors, clerical employees and salesmen.[1]

In the middle of July 1968, following some talk concerning unionization among the Respondent's employees, Lloyd Paxton, a filler operator, obtained authorization cards from a representative of the Union. On the evening of July 19, 1968, 10 of the employees met in a vacant yard, and after some discussion Paxton distributed the authorization cards. All 10 of the employees signed the cards and returned them to Paxton, who in turn delivered the cards to a representative of the Union. On July 23, 1968, Paxton was discharged and on the following day the Union unsuccessfully requested recognition and bargaining with the Respondent on the basis of its status as the majority representative of the employees in an appropriate unit. On July 25, 1968, because of the discharge of Paxton and the Respondent's refusal to recognize and bargain with the Union, the employees went out on a strike, which continued until September 23, 1968.

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[1] We agree with the Trial Examiner's finding that the unit stipulated to by the parties, consisting of all production and maintenance employees employed at the Respondent's plant at Zanesville, Ohio, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, is a unit appropriate for the purposes of collective bargaining.

The 8(a)(1) Conduct

We agree with the Trial Examiner's findings that the Respondent violated Section 8(a)(1) of the Act by the interrogation of employee Roy Agin, and by the letter it directed to its employees engaged in an unfair labor practice strike threatening them with discharge unless they abandoned their strike and returned to work by August 5, 1968. As to the latter violation, the Trial Examiner inadvertently failed to make a conclusion of law, and we shall, accordingly, modify his Conclusions of Law and Recommended Order to this extent. We similarly find, in agreement with the Trial Examiner, that an additional violation of Section 8(a)(1) ensued from the remarks made by Okey Johnson to Union Organizer Kisner on August 14, 1968, to the effect that the strikers would be reinstated only if the Union abandoned its demand for recognition and bargaining, and that Paxton would not be reinstated at all because he was the "instigator" of the Union and the strike. At the time Okey Johnson made these remarks, the Respondent had already threatened the employees with discharge for failure to abandon the strike, and conditioning their right to further employment upon a total renunciation of their union activities and desires for collective bargaining constituted a further act of interference, restraint, and coercion.

For the reasons set forth herein, we also adopt the Trial Examiner's finding that the Respondent violated Section 8(a)(1) by failing to pay to the employees who participated in the strike the $10 bonus it paid to the employees who remained at work. Considering the evidence in the posture most favorable to the Respondent's contention that it had promised the employees a $10 bonus when production reached 4,000 cases a day, and that this production figure was reached on July 24, 1969, we find that the strikers were employed and working on the day the bonus was earned and accrued. Accordingly, the Respondent's payment of the bonus only to those who desisted from strike activity violated the Act.

The 8(a)(3) Conduct

Contrary to the contention of the Respondent, we find that the record adequately supports the Trial Examiner's findings that the Respondent was fully aware of the union activities of Lloyd Paxton and the extent of his participation in the organizing campaign, and that Paxton's union activities were the motivating and immediate cause for his discharge. During the course of the unlawful interrogation of Roy Agin by the Johnson brothers on the evening of July 22, 1968, Agin identified Paxton as the employee who had the authorization cards, and he also informed the Johnson brothers that all the employees had signed cards. When Paxton appeared at work on the following morning he was immediately called to the office and summarily discharged. At the meeting of August 14, 1968, Union organizer Kisner renewed the Union's request for recognition and bargaining, and he also requested that the Respondent reinstates Paxton. In response to the latter request Okey Johnson replied that the Respondent would never take Paxton back because he was the "instigator" of the Union and the strike, and Paxton was responsible for destroying a valuable piece of property.

The Respondent contends that Okey Johnson's reference to the destruction of property supports its contention that Paxton was discharged for unsatisfactory operation of the bottling machine. We agree with the Trial Examiner that there is no merit to this contention. Moreover, assuming that Okey Johnson's refusal to reinstate Paxton was based in part on grounds of his alleged unsatisfactory performance on the bottling machine, this fact would not justify a finding that his discharge was not unlawful where as here the discharge was motivated at least in substantial part by his union activities.[2]

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[2] *N.L.R.B.* v. *Great Eastern Color Lithographic Corp.*, 309 F.2d 352 (C.A. 2), enfg. 133 NLRB 911, cert. denied 373 U.S. 950.

The 8(a)(5) Conduct

We find, in accord with the Trial Examiner, that when the Union demanded recognition and bargaining on July 24, 1968, it represented an uncoerced majority of the employees in the stipulated appropriate unit, and that the Respondent's rejection of the demand was motivated, not by a good-faith doubt of the Union's majority, but by a rejection of the collective-bargaining principle and a desire to gain time to undermine the Union's majority.[3] The Respondent contends, nevertheless, that it was not obligated to recognize or bargain with the Union because Richard Sanders, who it contends is a supervisor, participated in the Union's organizing campaign.

Contrary to the Trial Examiner, we find that Sanders' change from a salaried to an hourly-paid position at or about the time Fred Tahyi was hired in February 1968, did not, without more, deprive him of his supervisory responsibilities and authority. Sanders testified, without contradiction, that his duties and responsibilities after his change to hourly-paid status were "about the same", and that he "still had the right to hire and fire and was over the boys." Every other witness who testified at the hearing, including the employees, stated that at all times Sanders had authority both to hire or fire and authority to direct the work of the employees. We find, accordingly, that Sanders was a supervisor at all times material to this case, and we shall exclude him from the bargaining unit.

Having found Sanders to be a supervisor, it does not necessarily follow, however, that his signing of an authorization card and limited participation in the organizing campaign is sufficient to taint the authorizations signed by the employees. The organizing campaign was of extremely limited duration, having begun in mid-July and

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[3] *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732 (C.A.D.C.), cert. denied, 341 U.S. 914.

culminating on July 19, 1968, when 10 employees attended a meeting in a vacant lot. Sanders engaged in some lunch-time conversations with employees about the Union. He attended the July 19 meeting, signed a card, and considering the evidence in the light most favorable to the Respondent's contention, Sanders also answered questions of an unspecified nature while present at the meeting. Nevertheless, Paxton obtained the cards from the Union, and he alone solicited the signatures. The authorization cards were returned to Paxton, and he made them available to the Union. In addition, Sanders was a low-level supervisor, and testimony indicated that the Respondent was in no way chargeable with Sanders participating in the campaign. Under these circumstances, and particularly as the record fails to show the nature of Sanders' statements during the lunch-time conversations and at the July 19 meeting, we find that Sanders' participation in the organizing campaign di not taint the cards of the employees,[4] and since the invalidation of his card alone does not reduce the number of valid cards below a majority, we shall adopt the Trial Examiner's findings and Recommended Order with respect to the refusal to bargain.

Amended Conclusions of Law

The following is substituted for the Trial Examiner's fourth Conclusion of Law:

4. By interrogating its employees regarding their union membership and activity, by refusing to pay to strikers the same $10 bonus for prestrike production achievement that was paid to nonstrikers, as an economic reprisal for engaging in a strike, and by threatening its employees engaged in an unfair labor practice strike with discharge in a letter dated August 2, 1968, the Respondent has engaged in interference, restraint and coercion in violation of Section 8(a)(1) of the Act.

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[4] *Aero Corp.* v. *N.L.R.B.*, 149 NLRB 1283, enfd. 363 F. 2d 702, cert. denied 385 U.S. 973.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that the Respondent, Clay City Beverages, Inc., Zanesville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete paragraph 1(c) of the Trial Examiner's Recommended Order and substitute therefor the following:

(c) Interrogating its employees with regard to their union membership and activity, threatening them with discharge unless they abandon protection activities, conditioning their reinstatement upon abandonment of protected activities, and refusing to pay a bonus to employees because they engaged in protected activities.

2. Add the following as paragraph 1(d) of the Trial Examiner's Recommended Order:

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

3. Add the following as paragraph 2(b), and reletter the following paragraphs accordingly:

(b) Notify the above-named employee, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

4. Add the following as paragraph 3:

3. All allegations in the complaint not specifically found herein are hereby dismissed.

5. Delete the fourth indented paragraph of the Appendix and substitute therefor the following:

> WE WILL NOT interrogate our employees with regard to their union membership and activity, threaten them with discharge unless they abandon protected activities, condition their reinstatement upon abandonment of protected activities, refuse to pay them a bonus because they engaged in protected activities, or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist International Molders & Allied Workers Union, AFL-CIO, or any other labor organization, to bargain collectively through a representative of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized by Section 8(a)(3) of the Act, as amended.

6. Add the following as the last indented paragraph of the Appendix:

> WE WILL notify the above-named employee, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

Dated, Washington, D.C.

FRANK W. MCCULLOCH,
Chairman

HOWARD JENKINS, JR.,
Member

SAM ZAGORIA,
Member

(SEAL) *National Labor Relations Board*

TXD—26—69
Zanesville, Ohio

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Cases 8-CA-5100, 8-CA-5108

CLAY CITY BEVERAGES, INC.

and

INTERNATIONAL MOLDERS & ALLIED WORKERS UNION, AFL-CIO

Charles Z. Adamson, Esq., for the General Counsel.

Charles D. Minor, George L. Jenkins, and *Jon M. Cassady, Esqs.*, of Columbus, Ohio, and Zanesville, Ohio, respectively, for the Respondent.

Mr. Clayton E. Kisner, of Marion, Ohio, for the Union.

Trial Examiner's Decision

Statement of the Case

THOMAS S. WILSON, Trial Examiner: Upon a charge in Case 8-CA-5100 duly filed on July 29, 1968, and a charge in Case 8-CA-5108 duly filed on August 2, 1968, and thereafter amended on August 21, 1968, by International Molders & Allied Workers Union, AFL-CIO, hereinafter called the Union or Charging Party, the General Counsel of the National Labor Relations Board, hereinafter referred to as the General Counsel[1] and the Board, respectively, by the Regional Director for Region 8, Cleveland, Ohio, issued its consolidated complaint dated September 20, 1968, against Clay City Beverages, Inc., hereinafter referred to as the Respondent.

[1] This term specifically includes the attorney appearing for the General Counsel at the hearing.

The complaint alleged that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Labor Management Relations Act, 1947, as amended, herein referred to as the Act.

Respondent duly filed its answer admitting certain allegations of the complaint but denying the commission of any unfair labor practices.

Pursuant to notice a hearing thereon was held before me in Zanesville, Ohio, on November 13, 1968. All parties appeared at the hearing, were represented by counsel, and were afforded full opportunity to be heard, to produce and cross-examine witnesses, and to introduce evidence material and pertinent to the issues. At the conclusion of the hearing, oral argument was waived. Briefs were received from Respondent and from General Counsel on December 23, 1968.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of Respondent

The complaint alleged, the answer admitted, and I find that: Clay City Beverages, Inc., is now, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Ohio, engaged in bottling and wholesale distribution of soft drinks at its Zanesville, Ohio, location. Annually, in the course and conduct of its business, Respondent receives at its place of business in Zanesville, Ohio, goods valued in excess of $50,000 directly from points located outside the State of Ohio.

Accordingly, I find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Union Involved

International Molders & Allied Workers Union, AFL-CIO, is a labor organization admitting to membership employees of Respondent.

III. The Unfair Labor Practices

A. *The Facts*

From the point of view of the employees this case begins about the middle of July 1968. From the point of view of Respondent the case supposedly begins before Thanksgiving 1967.

For some years Respondent's bottling works in Zanesville, Ohio, had been owned and operated by Okey Johnson (Okey) as Chairman of the Board and his sons, Richard Johnson (Richard) as president and general manager, and Bradley Johnson (Brad) as secretary and plant manager. According to the testimony of Richard, Okey held the controlling financial interest in the business of Respondent but had not participated in the management of the business for some years prior to the events here because of a problem with alcohol although he remained as Chairman of the Board of Respondent. Okey was not called as a witness here.

Exclusive of the Johnsons, Respondent's plant was operated by 11 production and maintenance employees and 1 transport driver. In accordance with the stipulation of the parties I find that these 11 production and maintenance employees and 1 transport driver constitute the appropriate unit herein.

Prior to some indefinite date in May 1968, Respondent's filler or bottling machine had been an old one of German make. As Richard Sanders, one of Respondent's senior employees in point of service and at the time of the hearing either Respondent's assistant plant manager or assistant

production manager,[2] described it, "the old machine was kind of hard to run anyway. It was not the best." Fred Tahyi, temporarily also a production manager, described the machine as "worn out." The infirmities of the machine were those not unknown to numerous bottling companies: partly filled bottles, caps askew, foreign objects in the bottle contents, and not infrequent machine breakdowns.

About Thanksgiving time in 1967 Brad Johnson took the problems to the manufacturer of the machine who, not unnaturally, assured Brad that the trouble was with the operator and not the machine. Despite this assurance, however, the manufacturer rebuilt the feeder head of the machine twice thereafter in the year 1967. Finally about February 1968 Respondent decided to replace that machine with a newly rebuilt one. The date the newly rebuilt machine actually replaced the old one was left highly indefinite in this record although the evidence indicates that it must have been sometime during the month of May 1968. Between February 1967 and July 23, 1968, Lloyd Paxton was the bottling machine operator following his promotion from the position of a transport driver.

In the latter part of February 1968, one Fred Tahyi sold the beverage business he conducted in Coshocton, Ohio, to Respondent and accepted a job thereafter with Respondent which, according to Tahyi and Johnson, was supposed to be that of production manager. Tahyi apparently replaced Richard Sanders as such assistant production manager, a salaried position which Sanders had been filling prior to the hiring of Tahyi. At or about the time of Tahyi's employment Sanders suddenly lost his salaried position and became an hourly paid employee. During this period Sanders was ordered to show Tahyi how to run Respondent's machinery. However about the end of April and

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[2] The Johnsons and Sanders used both titles indiscriminately to describe both the job Sanders held prior to April 1968 as well as the "new" job he received on July 23, 1968.

before the arrival of the new bottling machine Tahyi left Respondent's employ. Sanders remained a rank-and-file hourly paid employee until he was offered a "new" position of assistant plant manager or assistant production manager on a salary basis on the evening of July 22, 1968.

About the middle of July, following some talk of unionization among the employees, Lloyd Paxton secured some union authorization cards from a local union official employed in a nearby plant.

After work on Friday, July 19, through notice by word of mouth in the plant, 10 of Respondent's production and maintenance employees, including Richard Sanders, gathered at a vacant lot located at Fifth Street and Howard Avenue in Zanesville, 1½ blocks from Respondent's plant, where Paxton passed out the union authorization cards to the employees and with the help of Richard Sanders explained what they were. All 10 of the employees present signed and witnessed this signing of these unambiguous union authorization cards. Those employees attending and signing such authorization cards were employees Roy Agin, David Bonfield, James Dobbins, Terry Dobbins, Homer Keiffer, Dennis Moorehead, Lloyd Paxton, Richard Sanders, Robert Seenes, and David Vandenbark. The cards so executed were given to Paxton who thereafter delivered the signed cards to his friend, the union official.

As employee Roy Agin was about to get into his automobile parked across the street from the plant after work on the evening of Monday, July 22, Richard and Brad Johnson called him back across the street in front of the plant and asked him what he knew about the Union. At first Agin denied knowing anything about the Union. Richard then stated that he knew the employees "were trying to get a union in" and wanted "to know who all were involved in it." He also stated that a union would cause nothing but trouble in the plant. Agin then told the Johnsons that Lloyd Paxton was "the one that had the cards" and that

all the employees had signed them. Richard assured Agin that he, Richard, "would not say anything to anybody that he had had that conversation" with Agin and Agin agreed to say nothing about it either. The conversation ended on this note.

Later that same evening of Monday, July 22, the Johnsons telephone Richard Sanders at Sanders' home while he was bathing after work and asked him to return to the plant in order that they might talk to Sanders about "moving up a step." When Sanders returned to the plant Richard asked Sanders how Sanders "would like to become . . . Brad's assistant production manager" on a stated salary because they thought Sanders would be "the best" for the job with his knowledge of plant operations due to his long tenure in the plant. Sanders said that he would discuss the salary with his wife and would let the Johnsons know the next morning. During this discussion the Johnsons expressed the opinion that Lloyd Paxton "was not doing the job he should be doing" and that they thought they were going to let Paxton go. With that Sanders left the plant.

On July 23 when Paxton appeared for work as usual, Brad took him into the office and told him in front of Richard that "the bottles were going down the line with crowns not on properly; they were not properly capped; [Paxton] had been sitting around too much and [his] services were no longer needed." Brad then handed him a check for 45 hours' work so that Paxton could look for another job. He has not been reinstated since.

On July 24 Union Organizer Clayton E. Kisner appeared in Zanesville in response to a telephone call from Paxton notifying him of the signed authorization cards and his own discharge. At noon he and Paxton met the employees at lunch across the street from the plant.[3] Although the em-

[3] Sanders was not present at this or any other subsequent meeting of the employees.

ployees talked in favor of immediate strike because of the discharge of Paxton, Kisner requested time for him to talk to the Johnsons about recognition and reinstatement before any action was taken.

Although he was then in the immediate vicinity of the plant, Kisner chose to telephone Richard Johnson. Over the phone Kisner asked for recognition as he had signed union authorization cards for "a majority (10 out of 12) of the twelve employees" in the stipulated appropriate unit. After some talk as to how this majority could be verified, Richard said that he could do nothing because his lawyer was out of town.

That evening following this telephone call, Kisner and Paxton again met with eight employees at Putman Hill Park where Kisner reported to them his lack of success with Richard. The employees present decided to strike the plant the next morning.[4]

At 7 a.m. on July 25 employees Agin, Vandenbark, Bonifield, Terry Dobbins, and Jim Dobbins went out on strike and with Paxton began picketing the plant. The other employees returned to work apparently being bothered by the financial loss to them in engaging in such a strike.

On July 26, having been unable to reach Richard by telephone, Kisner telephoned Okey Johnson. Again Kisner explained that he represented a majority of the employees and requested recognition by Respondent and reinstatement of Paxton. Okey answered that he and "the boys" (Richard and Brad) would have a meeting the next Monday and would talk the matter over with Respondent's attorney who was in charge of the matter. That concluded the telephone call.

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[4] The employees present were Terry Dobbins, Dave Vandenbark, Paxton, James Dobbins, Robert Seenes, Homer Keiffer, Roy Agin, and David Bonifield.

Also on July 26, 1968, Respondent rewarded each of the employees then working in the plant with a $10 bonus.

On Monday evening, July 29, Kisner telephoned Richard at his home and asked him if Respondent had come to any decision on recognition and reinstatement. Richard indignantly refused to discuss business from his home, telling Kisner that he would only conduct business in his office, and hung up the telephone.

On August 1 Richard saw Agin, Vandenbark, Terry Dobbins, and Bonifield still on the picket line and invited them to return to work. They refused. On Friday, August 2, Respondent wrote each of them the following letter:

> We are asking you to return to your job Monday, August 5, 1968, at 7:00 A.M. This is the last date your job will be held for you.
>
> This renews our request of last Friday to return to work.
>
> If you fail to report for work on Monday morning, we will consider your employment terminated and all connection with our company ended.

None of the four remaining pickets returned to work.

Then on August 14 Kisner, through the intervention of one Cecil C. Fulton, a good friend of Okey's and a former retired official of the local union, met with Fulton and Okey in the plant office. Upon being asked for recognition and for the reinstatement of Paxton, Okey stated that Respondent would take the four remaining strikers back to work provided that Kisner forget the whole thing and went back to his base at Marion, Ohio. Kisner refused that offer. Okey also stated that Respondent would never take Paxton back even if they had to go to the highest court possible on the grounds that he was "the instigator" of the Union and of the strike and was responsible for destroying a very valuable piece of property.

Richard saw Okey driving himself to and from this meeting in his automobile. Both he and Brad knew that Okey was meeting with Kisner, the union organizer, in Respondent's office but, as Richard testified, " . . . I stayed out of the office especially." There is undenied testimony that Richard and Brad were invited to participate in the meeting but refused.

Under date of September 18, 1968, Respondent sent each of the four remaining pickets the following letter:

> We are asking you to return to your job Monday, September 23, 1968, at 7:00 A.M. *This offer is unconditional.*
>
> The company has continued to carry on your insurance program in your absence. You have lost no other benefits which you has acquired during the course of your employment with us.
>
> It is our sincere hope that you will accept this offer.

In response all four of these employees returned to work. Subsequently two of them voluntarily left Respondent's employ.

B. *Conclusions*

1. Discharge of Paxton

From February 1967 to July 23, 1968 Lloyd Paxton operated Respondent's bottling machine following his promotion from his former transport driver position. The Johnsons admit that his services on the filling machine for the first half of that period had been satisfactory. Moreover neither Johnson could recall ever having criticized his work to Paxton during that whole period.

Then on July 19, a Friday, by word of mouth Paxton gathered 9 of the other 11 production and maintenance employees in an open field 1½ blocks from the plant, explained

the Union and its authorization cards to the assembled employees, and succeeded in having all of them execute unambiguous cards authorizing the Union to bargain on their behalf. Richard Sanders was one of the employees executing such authorization cards at this meeting.

On Monday evening, July 22, employee Roy Agin testifield that Richard and Brad asked him about the Union and who were involved and that he informed them that Paxton had brought the union cards and had signed up all the employees. Both Agin and Richard agreed that the conversation would be kept secret.[5] The next morning, July 23, Paxton was precipitously discharged allegedly for poor workmanship.

Subsequently on August 14, Okey Johnson, Respondent's Chairman of the Board, rather vehemently refused the Union's request for the reinstatement of Paxton on the grounds that he was "the instigator" of the Union and of the strike and the destroyer of valuable property.[6]

With the above evidence General Counsel has proved a strong *prima facie* case of a typical type of discriminatory discharge. The weak spot in the case, if any, appears to be the question of Respondent's knowledge of Paxton's union activity prior to his discharge. This, of course, is amply supplied by the Agin-Richard and Bradley conversation on the evening of July 22 to the effect that Paxton was the instigator of the union effort and the strike and by the admission on August 14 that Paxton had been fired because he was such instigator. The trouble, if any, as to these pieces of evidence arises because both Richard and Bradley denied flatly that they had had any conversation on July

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[5] Both Johnsons subsequently flatly denied that any such conversation occurred.

[6] This last must have been a reference to Respondent's business because there is no evidence in this record to the effect that Paxton destroyed or injured any machinery.

22 with Agin and also claimed that Okey was a chronic alcoholic and on August 14 was "completely inebriated". This testimony naturally creates a credibility question as to both the above pieces of evidence.

In addition to the credibility problems thus raised, Respondent in its brief argues that the refusal-to-bargain allegations must be dismissed with the following argument:

> It is submitted, however, that whether or not the company had a good faith doubt as to the Union's majority status, there is no violation of Section 8(a)(5) of the Act for another reason. Due to the active participation and leadership of Richard Sanders in its organization campaign, the Union, on July 24, did not represent a majority of the employees within the bargaining unit. As is stated in *ATI Warehouse,* 169 NLRB No. 75, 67 LRRM 1256 (1968):
>
> > It is well settled that cards obtained with the direct and open assistance of a supervisor are invalid for such purposes. (For the purpose of a bargaining request.)

However, if this argument be sound, the problem of Respondent's knowledge of Paxton's union activities is likewise solved because, as a supervisor, Sanders' admitted knowledge of Paxton's union activities would be imputed to Respondent as a supervisor's knowledge is that of the employer.

Despite the brief's claim "there is no question as to Richard Sanders' supervisory position," the only trouble with this theory of imputed knowledge is that the above fact so stated by Respondent is incorrect in that for several months prior to receiving his "step up" to assistant plant or assistant production manager on July 23, Sanders had been reduced to the status of an ordinary hourly paid employee without supervisory authority which during his

employment by Respondent had passed to Fred Tahyi. In fact it was this reduction to an hourly paid status which caused Sanders to become interested in the Union. As such ordinary rank-and-file employee the Act guaranteed Sanders the right to engage in union activities as of that time.

However, Sanders testified that he never told the Johnsons of this union organizational activity because, as he put it, "I wasn't going to tell Richard or Brad because I figured they would find out for themselves and all in due time." Regardless of the fact that Sanders testified that he had never informed the Johnsons of his attendance at the July 19 meeting until the very day Respondent called him as a witness at the hearing, I find no reason to disbelieve Sanders on that point although doubting the last part of his testimony.

Sanders' testimony, however, strongly suggests that due to the smallness of the plant with only 12 production and maintenance employees the Johnsons were bound to learn quickly of any and all union activities therein. I must agree. In a plant of this size it is, of course, possible, but highly improbable, that Respondent would not become aware almost immediately of the existence of union activity therein. Miracles do happen—but infrequently.

Leaving for the moment this disputed question of knowledge, the Johnsons also contended that for the last half of his tenure on the bottling machine, the complaints of Paxton's work "increased progressively" so that as early as November 1967, Richard and Brad began serious consideration of dismissing Paxton for poor workmanship.

According to both the Johnsons, they became convinced that the troubles in bottling were those of Paxton and not those of the old German machine when its manufacturer, without having seen the machine, so informed them. Despite this alleged conviction that the trouble was Paxton's, the facts disclose that thereafter the machine manufacturer rebuilt the feeder head on the machine—not one but indeed

twice—and still the trouble continued. Thus the facts justify Tahyi's appraisal that the machine was "worn out" and Sanders' that the machine "was not the best." In fact the Johnsons themselves decided in February a new machine was necessary. This history is quite sufficient proof that the problem Respondent here attempts to blame upon Paxton was that of the machine and not of the operator.

The Johnsons' contention that the volume of complaints "increased progressively" right up to the end of Paxton's employment is at odds with the testimony of Respondent's own sales manager, Richard Glaub, who testified that "normal complaints" continued throughout Paxton's employment but that he knew of "no increase" therein. It is noteworthy that Glaub was not asked and therefore did not testify about the sale meeting supposedly held on July 22 where the increase in the complaints, according to the Johnsons, finally caused them to decide to discharge Paxton. If anyone would know of complaints about the merchandise sold, it would be the sales manager.

Because of the disparity between the testimony of Glaub and the Johnsons, I have grave doubts that the sales meeting of July 22 ever took place and that the complaints "progressively increased."

The Johnsons further testified that they began searching for an experienced operator of bottling machines to replace Paxton as early as November 1967. This search was finally consummated on July 29, 1 week after Paxton had been discharged, when Respondent hired a returned serviceman with absolutely no experience on a bottling machine, although the Johnsons testified that such experience was a necessity.

Respondent attempts to explain its delay in hiring a replacement for the allegedly inefficient Paxton on the fortuitous fact that in February 1968, it bought out Tahyi's

bottling business in Coshocton and employed Tahyi with alleged plans to make Tahyi assistant production manager replacing Sanders who in turn would replace Paxton. Tahyi, in effect, collaborated this testimony by the Johnsons albeit, in this Trial Examiner's opinion, with some embarrassment.

Be that as it may, this so-called plan was never implemented beyond the fact that Sanders was promptly reduced to a rank-and-file hourly employee upon the employment of Tahyi. Paxton continued to be the bottling machine operator without change despite the employment of Tahyi. No one except the Johnsons and, perhaps, Tahyi ever heard of this alleged plan. Its implementation was nil. As a matter of fact neither Johnson could recall an instance where Paxton's work during this whole period had ever been criticized to Paxton himself. Thus it seems that Paxton continued to operate even the newly installed machine without criticism from the Johnson at least until the evening of July 22.

The Johnsons maintained that Respondent had "hired" Patric McDaniel, the returned serviceman, who ultimately replaced Paxton as bottling machine operator, before it discharged Paxton. This contention is contrary to the testimony of McDaniel. McDaniel's testimony proved that sometime early in July he had, by chance, run into Brad in the vicinity of their respective homes and that Brad had suggested that Respondent might have employment for him if he were interested. At that time McDaniel was not interested because he had just been released from service and preferred to "free lance." McDaniel, in fact, continued to vacation until July 26 when he went to an employment agency where he found only two possible jobs listed, one of which was the job with Respondent. On that same day McDaniel went to the Respondent's plant, asked Brad for the job, and got it. But Paxton had been discharged at least 3 days before. Thus Respondent's alleged long

search for a filling machine operator begun in November 1967 ended. This long "search" has all the appearance of being the figment of someone's imagination.

According to Brad, "one of the main things [causing the decision to discharge Paxton] was that a sales meeting is held at the plant every Monday morning. There were so many complaints at that time [July 22]" that the Johnsons determined to discharge Paxton. Brad testified that the final decision to discharge Paxton was made between 7:30 and 8 a.m. July 22. On this Richard disagreed testifying that the decision was made, after a day long discussion, during the evening of July 22. The importance of the July 22 sales meeting in the making of the decision is greatly diminished by Brad's other testimony that he had begun looking for a replacement as early as November 1967, by his claim that he had hired McDaniel on July 19, and by Glaub's testimony. The promotion of Sanders during the evening of July 22 tends to confirm Richard's testimony that the decision on Paxton also occurred during that same personnel meeting. Of course, if Richard is correct in this as it seems he was, the decision to discharge Paxton occurred after the Johnsons' conversation with Agin.

In any event it is clear that the decision to discharge Paxton was a precipitous, hurried, and on-the-spur-of-the-moment decision for the reason that it was made without there being a replacement in sight. There seems no question but that the decision was made on the spur of the moment and as a result of some momentous event such as the discovery that Paxton was the instigator of the Union.

Richard also maintained that Zanesville suffered a very severe storm on July 22 which caused the loss of three trees on the theory, apparently, that an outside conversation such as Agin described would be impossible in such weather. Strangely only Richard mentioned this storm. Richard further testified that on July 22 he made two trips to Newark, Ohio, but even the times he gave in regard to these trips would have gotten him back to Zanesville in time

to hold the Agin conversation at the time Agin said it happened.

In sum, the above has caused this Trial Examiner to view the testimony of both Johnsons with skepticism. Accordingly, as Agin gave all appearances of a witness telling the truth, I credit his testimony that the Johnsons asked him about 4-4:30 p.m. on July 22 what he knew about the Union and were told that Paxton had obtained the union authorization cards and gotten all the employees to sign them. I, therefore, discredit the Johnsons' flat denials thereof.

In the light of the Johnsons' subsequent treatment of the Union's request for recognition, the Agin conversation was just such an event as would have triggered the sudden discharge of Paxton.

Richard and Brad attempted to discredit Okey's admission that Paxton was discharged by Respondent because he was the "instigator" of the Union and of the strike by testimony, no doubt true, that Okey was an admitted alcoholic and that on August 14 was "completely inebriated." If this last were true, then Richard's action in permitting Okey to drive his Cadillac in that known condition away from the plant, at least, verged upon actionable negligence. However the fact remains that even inebriates can and do tell the truth. On this occasion this Trial Examiner is convinced that on August 14 Okey was in fact telling the truth.

Under all the facts here this Trial Examiner is convinced, and therefore finds, that Respondent discharged Lloyd Paxton because of his known membership in and activities on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act.

2. Interference, restraint, and coercion

There is no question but the action of Okey Johnson on August 14 in conditioning the reinstatement of the employees still engaging in an unfair labor practice strike

against Respondent caused by Respondent's unfair labor practices and in discriminating against Lloyd Paxton because of his union activities upon the agreement of the union representative to return to his base in Marion, Ohio, and "forgetting the whole thing" amounted to interference with, and restraint and coercion of Respondent's employees in violation of Section 8(a)(1) of the Act. The Trial Examiner so finds.

Nor can there be any doubt but that Respondent's letter to the strikers dated August 2, 1968, threatening, as it did, the strikers with loss of employment unless they abandoned their unfair labor practice strike by the following Monday also constituted a violation of Section 8(a)(1) of the Act. The Trial Examiner so finds.

It was stipulated that on July 26, 1968, the day after the strike began, Respondent paid each of its employees then working in the plant after having crossed the picket line the sum of $10.

Respondent maintained that at some indefinite date in the past Brade had promised the employees a $10 bonus whenever production reached 4,000 cases cases per day and that on July 24 production did in fact reach 4,000 cases for the first and only time in Respondent's history. As Respondent was working shorthanded on July 24, following the discharge of Paxton, it is somewhat hard to believe that this absolutely unique production record was set that day. It is also hard to believe that such a record was not memorialized in Respondent's business records and that such records would not be produced at the hearing to corroborate the oral testimony of the Johnsons. No corroboration of this type was offered. I am inclined to believe that the $10 paid was paid by Respondent as a bonus to those employees who were working behind the picket line. If in fact a record was established by the production of July 24, then by failing to pay that same bonus to employees, then on the picket line but who had participated in the

setting of that record, Respondent obviously engaged in economic reprisals against them because of their engaging in the strike. In either event Respondent's action amounted to interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

In order, therefore, to restore the status quo this Trial Examiner is going to order Respondent to pay the employees on the picket line on July 25 who had worked in the plant when the alleged production record was set on July 24 the sum of $10 each.

3. The refusal to bargain

a. *Appropriate unit and majority*

The parties stipulated that the unit appropriate for the purposes of collective bargaining at Respondent's plant consisted of the following:

> All production and maintenance employees employed at Respondent's Zanesville, Ohio bottling plant, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The parties agreed also that there were 12 production and maintenance employees employed in the above-found appropriate unit.[7]

On July 19, 10 of Respondent's employees in the appropriate unit, at that time including Richard Sanders, voluntarily signed authorization cards reading in full as follows:

> I hereby authorize the INTERNATIONAL MOLDERS and ALLIED WORKERS UNION, A.F.L. - C.I.O. to represent me and, in my behalf, to negotiate all agreements or contracts in regard to wages, hours and working conditions.

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[7] The parties did disagree as to the inclusion of an employee named Fox in that appropriate unit. Under the facts of this case it is immaterial whether or not Fox was or was not included therein.

Consequently at the time the Union made its request of Respondent for recognition on July 24, the Union represented a large majority of all Respondent's employees in the appropriate unit. The inclusion of employee Fox and the subsequent exclusion of Richard Sanders do not affect the Union's majority status at any time.

Consequently on July 19, 1968, and at all times thereafter, the Union was the duly authorized bargaining agent of a majority of the Respondent's employees in the stipulated appropriate unit and entitled to recognition and the right to bargain with Respondent on behalf of the employees in that unit.

b. *The refusal*

Respondent's refusal to bargain with the Union is crystal clear. Respondent never intended to bargain and succeeded in not doing so through its own deliberate actions. When first asked to grant recognition, Respondent through Richard stalled on the ground that Respondent's attorney was out of town. Once having used this excuse, it became incumbent upon Respondent to make up its mind and notify the Union of its decision. This Respondent did not do. Respondent stalled again when Okey told Kisner that Respondent was having a meeting the following Monday when it would consult with its attorney and make up its mind. Again it became incumbent upon Respondent to notify the Union of its decision, if any. Again Respondent refused to do so. Then Kisner telephoned Richard at home in the evening to find out what decision, if any, Respondent had reached at that alleged Monday meeting. This time Richard arrogantly refused to discuss Respondent's business at his home. Finally Respondent's Chairman of the Board on August 14 offered to reinstate the remaining strikers conditioned upon the Union's getting out of town and "forgetting the whole thing." These are not the actions of a party willing to engage in collective bargaining with the exclusive representative of a majority of its employees in

an appropriate unit. These actions, individually or collectively, amount to a refusal to bargain.

As for the instance of August 14 Respondent is estopped to make its usual excuse for the actions of Okey because the facts show that both Richard and Brad knew that its Chairman of the Board was engaged with the Union obviously on matters concerning collective bargaining and yet Richard, at least, "especially" stayed out of the conference, even though invited, thereby deliberately misleading the Union into believing that it was dealing with a responsible official of the Respondent. This is at least as reprehensible as Richard's permitting a "completely inebriated man," as Richard described him, to drive his automobile from the plant onto the public highways as Richard allowed him to do.

Respondent claims "a reasonable doubt" as to the Union's majority status. This contention, like the others, is mere verbiage under the facts here because Respondent was offered a full and fair opportunity to determine through the cards that status and deliberately chose not to avail itself thereof. Self-imposed deception or delusion does not amount to "a reasonable doubt." Respondent had no one but itself to blame for any doubt. Respondent attempts to profit by its own wrongdoing. Respondent had nothing concrete or tangible upon which to base a "reasonable doubt" other than its own deliberate refusal to accept a reasonable means for satisfying itself as to the Union's majority status.

Accordingly this Trial Examiner must, and hereby does, find that on July 24, 1968, and at all times thereafter, Respondent refused to bargain collectively with the Union as the exclusive representative of Respondent's employees in the above-found appropriate unit in violation of Section 8(a)(1) and (5) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminated in regard to the hire and tenure of employment of Lloyd Paxton by discharging him on July 23, 1968, because of his known membership and activities on behalf of the Union, I shall recommend that Respondent offer him immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole for any loss of pay he may have suffered by reason of said discrimination against him by payment to him a sum of money equal to that which he would have earned from the date of the discrimination against him to the date of his reinstatement, less his net earnings during such period, in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at 6 percent per annum.

Having found that $10 paid by Respondent on July 26, allegedly as a bonus for record plant production on July 24, to those employees then working behind the picket line but not paid to those employees then engaging in the strike amounted either to a benefit to those employees then at work for not engaging in the strike or else a detriment to

those then striking for engaging in said strike, I will order that Respondent pay each of the employees engaging in the strike who had worked on July 24, the day of the alleged record production, the sum of $10.

Having found that Respondent refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, I will recommend that, upon request, Respondent recognize and bargain collectively with the Union as the exclusive representative of all its employees in the appropriate unit below with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All production and maintenance employees at Respondent's Zanesville, Ohio bottling plant, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Because of the character and scope of the unfair labor practices found to have been engaged in by Respondent, I will recommend that Respondent cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

Upon the foregoing findings and conclusions of law and upon the entire record, I hereby make the following:

Conclusions of Law

1. International Molders & Allied Workers Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Lloyd Paxton by discharging him on July 23, 1968, because of his membership in and activities on behalf of the Union, Respondent has engaged in and is

engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. By refusing on July 25, 1968, and at all times thereafter to bargain collectively with the Union as the exclusive representative of all Respondent's employees in the appropriate unit below, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. The appropriate is:

> All production and maintenance employees employed at Respondent's Zanesville, Ohio bottling plant, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By interrogating its employees regarding their union membership and activity, by paying its employees for working behind the picket line the sum of $10 or refusing to pay strikers the same $10 as an economic reprisal for engaging in a strike, Respondent has engaged in interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, I recommend that Clay City Beverages, Inc., Zanesville, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating in regard to the hire or tenure of employment or of any term or condition of employment of its employees because of their membership in or activities on behalf of International Molders & Allied Workers Union, AFL-CIO, or any other labor organization of their choice.

(b) Refusing to recognize and bargain with said Union as the exclusive representative of Respondent's employees in the above-mentioned appropriate unit.

(c) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed the employees by the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Lloyd Paxton immediate and unconditional reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, in the manner set forth in the section hereof entitled "The Remedy," with interest thereon at 6 percent per annum.

(b) Pay the sum of $10 to each of the employees who went out on strike on July 25, 1968 and who had worked in the plant on July 24 when allegedly the plant production record was set.

(c) Upon request, recognize and bargain in good faith with International Molders & Allied Workers Union, AFL-CIO, as the exclusive bargaining representative of all Respondent's employees in the above-found appropriate unit and, if agreement is reached, embody said agreement in a written signed agreement.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(e) Post at its plant in Zanesville, Ohio, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to the employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[9]

IT IS FURTHER RECOMMENDED that, unless Respondent notifies said Regional Director within 20 days from the receipt hereof it will take the action here recommended, the Board issue an order directing Respondent to take the action here recommended.

Dated at Washington, D. C.

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[8] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[9] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 8, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

Notice to All Employees

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in or activities on behalf of International Molders & Allied Workers Union, AFL-CIO, or any other labor organization, by discharging or discriminating in regard to the hire, tenure, or other terms or conditions of employment of any of our employees.

We Will offer Lloyd Paxton his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and we will pay him for any loss of pay he may have suffered because of our discrimination against him together with interest thereon at 6 percent per annum.

We Will pay to each of the employees on strike on July 26, 1968, who had worked in the plant on July 24, 1968, the sum of $10.

We Will Not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist International Molders & Allied Workers Union, AFL-CIO, or any other labor organization, to bargain collectively through a representative or their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a)(2) of the Act, as amended.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of International Molders & Allied Workers Union, AFL-CIO, or any other labor organization, except to the extent that this right may be affected by an agreement executing and conforming with Section 8(a)(3) of the Act.

CLAY CITY BEVERAGES, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1695 Federal Office Building, 1240 East Ninth Street, Cleveland, Ohio 44199, Telephone 216-522-3715.

APPENDIX B

FOR RELEASE MORNING PAPERS
July 2, 1969

177 NLRB No. 24

D-3010
Ft. Lauderdale, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12-CA-4305 (1-2)

NAT HARRISON ASSOCIATES, INC.

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL No. 728, AFL-CIO

Decision and Order

On March 12, 1969, Trial Examiner Richard D. Taplitz issued his Decision in the above-entitled case, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and

hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Nat Harrison Associates, Inc., Ft. Lauderdale, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated Washington, D. C.

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] We agree with the Trial Examiner that the Respondent engaged in extensive violations of the Act including wholesale unlawful interrogation, threats to discharge employees because of their union activities, promises of benefits to employees to refrain from union activity, and the discharge of two employees because they joined the Union. Moreover, as concluded by the Trial Examiner, Respondent may not destroy the very conditions needed for a fair election, as we find occurred herein, and at the same time successfully maintain that an election is the sole means for determining the desires of the employees. Accordingly, as we conclude that the Respondent's massive unfair labor practices have made the holding of a fair election unlikely, we shall provide, as did the Trial Examiner, for an 8(a)(5) bargaining order. See *N.L.R.B. v. Gissel Packing Co., Inc.*, — U.S. — (decided June 16, 1969), 71 LRRM 2481.

TXD-105-69
Ft. Lauderdale, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case 12-CA-4305 (1-2)

NAT HARRISON ASSOCIATES, INC.

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL No. 728, AFL-CIO

Jack T. Brellis, Esq., of Miami, Fla., for the General Counsel.

Donald R. Holley, Esq., *Muller, Schenerlein & Bare*, of Miami, Fla., for the Respondent.

Willie Lee Henderson, of Ft. Lauderdale, Fla., for the Charging Party.

Trial Examiner's Decision

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Trial Examiner: This case was tried in Miami, Florida, on December 3, 4, 5, 6, and 9.[1] The issues litigated were framed by a complaint dated November 1, as amended at the hearing, alleging violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, and an answer, as amended at the hearing, filed by Nat Harrison Associates, Inc., herein called Respondent, which denies that Respondent violated the Act.

[1] All dates are in 1968 unless otherwise specified.

The complaint was based on a charge in Case 12-CA-4305 dated August 9, a charge in Case 12-CA-4305-2 dated August 26, and an amended charge in Case 12-CA-4305 (1-2) dated October 23, all filed by the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO, herein called the Union. All parties appeared at the hearing and were given full opportunity to participate, to adduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. A brief which has been carefully considered was filed on behalf of the Respondent.

Issues

1. Whether Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their activities on behalf of the Union and by interfering with their right to engage in such activity by threatening them with reprisals if they were for the Union and promising them benefits if they were against the Union.

2. Whether Respondent violated Section 8(a)(3) and (1) of the Act by discharging James F. Aldridge and Willie L. Jeter in order to discourage membership in the Union.

3. Whether Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

Upon the entire record and from my observation of the demeanor of the witnesses while they were testifying under oath, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Florida corporation with its principal place of business at 5600 Northeast Fourth Avenue, Miami, Florida, is engaged in the construction business. Its primary work is electrical construction, such as the installation of electrical high lines, pipe cable, and satellite towers,

in various States of the United States and in foreign countries. This work is necessarily done at various construction sites in the field. Minor maintenance and repair of Respondent's machinery and equipment is done by mechanics in the field but for major maintenance and repair and for the dispatching of equipment to the various jobs Respondent maintains three maintenance and equipment yards. One is at Florence, New Jersey, one in Baton Rouge, Louisiana, and a third at 3615 Southwest 47th Avenue, Ft. Lauderdale, Florida. The Ft. Lauderdale yard is the situs of the alleged unfair labor practices in this proceeding.

During the 12 months immediately preceding the issuance of the complaint, Respondent purchased goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Florida.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Alleged Violation of Section 8(a)(1) of the Act*

Facts

1. The organizational activity and Respondent's knowledge thereof

In about May Elbert A. Pirkle, a mechanic-welder in Respondent's employ, began discussing the possibility of organizing Respondent's employees with the employee of an other employer in Respondent's industry. By July 18 Elbert A. Pirkle had received from the other employee and from the Union blank application cards for membership in

the Union. On that date he passed out about 20 cards to employees of Respondent at the Ft. Lauderdale yard. Groups of cards were given to some of the employees and they in turn passed them out to other employees. On July 31 the Union held a meeting which was attended by many of Respondent's employees. At this meeting W. L. Henderson, the Union business manager, told the employees that they would be processed through the Local and that they would be represented by the Local Union. At that time Pirkle turned in a number of cards and other employees turned in the cards that they had signed.

Woodrow E. Maddy is Respondent's equipment superintendent and an admitted supervisor within the meaning of the Act. Though John Flora, Respondent's shop foreman and yard supervisor for the Ft. Lauderdale yard, is ordinarily in charge of that yard, Maddy who is over Flora in Respondent's supervisory hierarchy was given Flora's duties from July 28 through August 5 while Flora was absent from the yard. Maddy testified that on August 1 he saw an unidentified stranger in the yard and that he spoke about it to Ora (Bud) M. Paul, a truckdriver and equipment mover in Respondent's employ. At that time Ora Paul told Maddy that there was union activity going on and that some of the employees, including Ora Paul's brother, Maxwell (Boots) L. Paul, were passing out cards.

2. The individual conversations

After learning about the union activity at the Ft. Lauderdale yard, Maddy engaged in wholesale interrogation of the employees concerning their union activities. Maddy's testimony leaves the dates of these interrogations somewhat in doubt but it is clear that it all occurred between July 28 and August 5 as that was the only period of time that Maddy was at the Ft. Lauderdale yard. Though Maddy's recollection of the exact date kept changing, his best recollection was that he spoke to employee Pirkle and the other employees on August 1 which was the date that he allegedly

noticed the stranger in the yard. Maddy admitted that he spoke to 15 employees.[2] Respondent has approximately 32 employees at the yard. Maddy testified that he asked each of these employees whether they had signed a union card. He also admitted that he asked most of them what they knew about the Union or whether they had heard anything about the Union. Maddy spoke to each one individually at various places in the Ft. Lauderdale yard.

William Crane, Respondent's export manager and also an admitted supervisor under the Act, testified that he also engaged in interrogation. He admitted that on August 2, in his office at the yard in the presence of Maxwell Paul and Maddy, he asked Willie L. Jeter whether Jeter had signed the union card. Jeter answered that he had.[3] Crane also admitted that at the same meeting he asked Maxwell Paul whether Paul had signed for the Union.[4]

A number of employees testified that Respondent did not stop with interrogating them concerning whether they signed for the Union or what they heard about the Union. E. Pirkle testified that, in the same conversation in which Maddy asked him whether he had signed a card and what he had heard about the Union, Maddy bragged about firing employees at the Baton Rouge, Louisiana, yard because the employees were trying to get the Union in and that Maddy said he could understand it if it was a Teamsters or Operating Engineers who were trying to organize the Ft. Lauderdale yard but he could not understand the drive by Local 728. Employee J. McGlamory testified that when Maddy asked him whether he signed a card Maddy also asked if he

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[2] E. Pirkle, E. Tatum, J. McGlamory, J. Mandeville, G. Ashcraft, J. Callender, R. Cuthbertson, L. Ellis, A. Fusco, D. Dasher, D. Keith, R. Marchman, L. Brown, R. Sorrells, and J. Aldridge.

[3] Jeter was discharged on August 7, allegedly in violation of Section 8(a)(3) of the Act.

[4] Maxwell Paul's status as an employee or supervisor is discussed *infra*.

went to the union meeting. Employee J. Mandeville testified that, when Maddy asked him whether he signed a card or heard anything about the Union, Maddy also told him that the ones who stayed out of the Union would be better off and get better benefits and specifically that he (Mandeville) would be better off if he didn't sign. Employee J. Callender testified that, in addition to asking him whether he had signed a card and what he knew about the Union, Maddy told him not to sign a union card. Employee R. Cuthbertson testified that Maddy not only asked him whether he signed a card but told him that, if employees did not sign cards, they would get uniforms and a pay raise and that he, Cuthbertson, would be all right as long as he did not sign a card. Employee L. Ellis testified that, in addition to Maddy's asking him whether he signed a card, Maddy told him that he would not be sorry if he did not sign. Employee A. Fusco, Jr., testified that Maddy called him into his office and asked him what he knew about the union meeting the other night. When Fusco equivocated Maddy told him not to lie because he would find the answer anyway. Maddy asked him whether he had been at the meeting and Fusco answered that he was. Maddy asked him if he had signed a card and he answered that he had. Maddy then said "Well, now you know what's liable to happen to you don't you?" Employee J. Baughman testified that, in addition to being asked whether he had signed a card or knew anything about the Union, Maddy told him not to let anyone talk to him into signing a card. Employee D. Dasher testified that Maddy asked him if he knew anything about the Union and that he answered that he had just heard rumors. Maddy asked if Dasher had signed and Dasher answered that he had not. Maddy then told him not to sign because it could only get him in trouble and that if anyone did sign that person would be terminated as soon as he could find out who it was. Employee D. Keith testified that Maddy asked him whether he had signed. He answered that he had not since he was on that job and Maddy

told him to keep it that way. Employee L. Brown testified that, in addition to being asked whether he signed a card and what he knew about the Union, Maddy told him not to sign because there would probably be a skelton crew around and they would be in the money. Brown also testified that about the same time he asked Supervisor John Flora for a raise and Flora told him that there would not be any increase as long as people kept running around signing papers.[5] Employee Clarence Paul testified that his conversation with Maddy occurred in the yard with no one else present. Maddy asked if Paul had signed a card and said that he would get Paul more money if Paul did not sign. Clarence Paul answered that he had signed and that his brother had given him the card.[6] Maddy told Clarence Paul to get the card back, and C. Paul answered that he would if he could but he believed it had been sent in. Maddy then told him that he could fire any instigators who passed out the cards and that he could fire any man who joined the Union. Later in the same day there was a second conversation in which Maddy told C. Paul that he (Maddy) could fire anybody in the yard even if he had to use a safety reason and that if the Union came into the yard Respondent would close the gates. Maddy also said that he would fire the instigators if he could catch them and that he was going to fire any man who signed a union card. James F. Aldridge, who is also alleged as a discriminatee under Section 8(a)(3) of the Act, testified that Maddy asked him whether

[5] Flora admitted telling Brown that the way things looked there wouldn't be any raises for some time and that Brown answered that he wished he hadn't signed for the Union. However, the complaint does not allege that Flora engaged in any activity in violation of Section 8(a)(1) of the Act and, therefore, no finding will be made with regard to this incident.

[6] Clarence Paul credibly testified that in fact Pirkle had given him the card but that he (C. Paul) told Maddy that it was his brother because he was trying to protect Pirkle and he knew that Ora Paul had already told Maddy that Maxwell Paul was involved with the Union.

he signed a card and he answered that he did. Maddy replied that he had been associated with the Union and "I can fix any of those smart boys. I know all about the union, they can't touch the State of Florida."

Maddy specifically responded to the testimony of each of the employees set forth about and categorically denied that he had made any of the statements attributed to him except to the extent that he asked employees whether they had signed for the Union and what they knew about the Union.[7] I am unable to credit Maddy in regard to these denials. After observing the demeanor of the employees as they testified under oath and considering the fact that the tenor of the testimony of the employees is mutually corroborative, I credit that testimony. Maddy did not impress me with his candor and where a conflict in testimony appears between him and the employees I credit the employees.[8]

3. The lunchroom meeting with Maddy

On August 1 Supervisor Maddy was having a conversation with Ora Paul in the lunchroom at the Ft. Lauderdale yard when Maxwell Paul entered the room. Maxwell Paul credibly testified as follows: Maddy asked what Maxwell Paul knew about the Union's coming in and Maxwell Paul answered that he didn't know anything much. Maddy asked Maxwell Paul if he signed a card to join the Union and Maxwell Paul answered that he did. Maddy asked if he could get his card back and he answered that it had already been turned in and he would not get it back. Maddy then said, "Well, I will personally have your pink slip of termination in the morning." Maddy asked Maxwell Paul if

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[7] Maddy denied having any conversation with J. Baughman.

[8] All the employees who could recall the date of the conversation with Maddy with accuracy placed the conversation as occurring between August 1 and August 5, with the bulk of the conversations on August 1. I so find.

anyone else signed a card and Maxwell Paul answered that he didn't know but as far as he did know everybody had signed. Maddy asked if Jeter had signed and Maxwell Paul answered that he didn't know. Maddy then said "Well, if he has, I have his pink slip, too, and anybody—anyone else who has signed a card." Maddy asked who the instigator was and Maxwell Paul answered that he could not tell him. As Maxwell Paul was leaving the room he saw employee Jim Bowen come into the lunchroom and heard Maddy ask him if the had signed a card. Bowen answered that he had. He also heard Maddy speak to Dasher, the night watchman, and heard Maddy ask Dasher whether he had signed a card. Dasher answered that he didn't know what Maddy was talking about and Maddy replied that he had better not sign.

Maddy recalled the conversation in the lunchroom but he denied the substance of Maxwell Paul's testimony. Maddy testified as follows: Maddy was talking to Bud Paul when Maxwell Paul entered the lunchroom. Maddy asked Maxwell Paul what he knew about the Union and then Bud and Maxwell Paul got into a heated discussion about the merits of unionization. Maddy said that, if something didn't happen and they didn't start getting work done, he would get a whole handful of pink slips. Sometime during the conversation Clarence Paul walked into the room. Maddy specifically denied that he asked Maxwell Paul whether he had signed a union card and stated instead that Bud Paul had asked that question. In a like vein Maddy denied that he questioned Maxwell Paul about who the instigator was.

Ora Paul's version of the conversation is somewhere between that of Maxwell Paul and Maddy. Ora Paul testified as follows: It was Maddy who asked Maxwell Paul if he signed a union card and Maddy asked Maxwell Paul who was creating all the disturbance. Maddy said that the men were slowing down and creating a disturbance and were getting dissatisfied with their Employer and he would like to find out who those men were who were causing the

disturbance because he would give them their pink slips to terminate them. After this conversation Clarence Paul came into the room.

Employee Dasher testified that he was outside the lunchroom and overheard part of the conversation and that he heard something about the Union not doing any good and causing loss of jobs.

I credit Maxwell Paul's testimony with regard to this conversation. On significant details such the question of who asked Maxwell Paul whether he had signed a union card, Maddy and Ora Paul differed in their testimony. My observation of both Maddy and Ora Paul as they testified leads me to the conclusion that both are less than reliable in their testimony. On the other hand Maxwell Paul was very convincing.

4. The conversation in Crane's office

As set forth above, Crane admitted that in the presence of Maxwell Paul and Maddy he asked Willie Jeter and Maxwell Paul whether they had signed union cards. Maddy's testimony was substantially the same. Maxwell Paul credibly testified that more was said in this conversation, as follows: Before Jeter came into Crane's office Crane asked Maxwell Paul whether he signed a union card. Paul answered that he had. Crane asked if he was the instigator and Paul answered that he was not. Crane then asked if Jeter had signed a card or if Bowen, Jack Carr, or Jim Aldridge had signed. Paul answered that he didn't know. Crane then asked Paul to go out and get Bill Jeter. Paul went into the yard and returned with Jeter. Crane interrogated Jeter asking why he didn't come to the Company first. At that point Maddy said that the same thing had happened before and they had gotten rid of the instigators and they could do it again.

Willie Jeter in his testimony concerning this conversation did not remember Maddy's remark about getting rid of

instigators but he did testify that Maddy asked him whether he signed a card and he answered he had, that he was asked who else joined and he answered he did not know, and that Maddy said that that was all right because he, Maddy, would find out who they were.

I credit Maxwell Paul's version of this conversation. The testimony of both Crane and Maddy where it differed from Maxwell Paul's was unconvincing. My observation of Jeter leads me to the conclusion that he was an honest witness telling all that he recalled but that Maxwell Paul had a fresher recollection of exactly what happened at the meeting.

5. The employee status of Maxwell Paul

Maxwell Paul testified as follows: He was hired in 1962 and worked until August 7 when he was discharged.[9] Some time prior to his discharge he worked in the overseas shipping and receiving department where he received, crated and shipped materials for overseas jobs. While he spent 10 to 20 percent of his time ordering parts, his work consisted primarily of manual labor. He was a leadman in a 4-man department. He sometimes showed new men how to crate materials but he worked with the other men doing the same jobs. Bill Crane who was his supervisor never told him that he (Paul) was a supervisor. He was hourly rated at $2.50 an hour, punched a timeclock, and had no special privileges. Though he relayed messages and orders from Crane, he never attended supervisory meetings. He never hired, fired, or recommended the hire or fire of any employee, had no authority to grant time off on his own, and never reprimanded or disciplined any employee. With regard to the granting of time off, he would ask Crane and relay Crane's decision. On occasions Crane would ask him how a new man was doing. With

[9] The complaint does not allege that Maxwell Paul was discharged in violation of the Act and therefore that question was not litigated.

regard to the ordering of parts, he was given the orders which were already written up and okayed. Crane decided what overtime work was needed and named who was to work.

Supervisor William Crane testified as follows: New employees were told to report to Maxwell Paul and Paul would tell them what to do. Four or five employees generally worked in Paul's department and at times there were extras so that there were eight or nine employees in all. A normal procedure was for Crane to give the shipping schedules to Paul and tell him to get the materials crated. Paul handled the entire shipment from purchases through final recordings. Paul picked men for overtime work at his discretion. In January, while Crane was away from the yard, Paul handled Crane's affairs. In December 1967, after Crane had been sick for 5 days, he came back and found things in good order. Paul interviewed employees and recommended their hire. One of these employees was Urbano Matos who was interviewed and hired in July. Another employee interviewed by Paul was hired by Flora. Paul recommended the discharge of employee Rip Miller in or about December 1967 and the recommendation was followed.[10] Paul got 40 cents an hour more than the next highest paid employee in his department.

Where a conflict in testimony exists between Maxwell Paul and Crane, I credit Paul. Based on this credited evidence, I find that Maxwell Paul was not vested with the type of independent discretion in the performance of his duties with relation to other employees so as to warrant the finding that he was a supervisor. Though he was

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[10] Maxwell Paul specifically denied that he had recommended the discharge of Miller and testified that he had an argument with Miller as a coemployee because he, Paul, didn't think that Miller was holding up his end of the work and that Miller walked off the job and didn't return, but that he never recommended that Miller be discharged.

clearly a key man as well as a strawboss, he did not have the authority, with the use of independent judgment, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibly direct them or adjust their grievances, or effectively recommend such action. I find, therefore, that Maxwell Paul was not a supervisor within the meaning of Section 2(11) of the Act.

6. Conclusions as to the alleged violations of Section 8(a)(1)

Based on the credited testimony set forth above, I find that Respondent violated Section 8(a)(1) of the Act by the activities of its supervisor, Maddy, who between August 1 and 5:

(1) Interrogated 20 of the approximately 32 employees at the Ft. Lauderdale yard concerning whether they signed a card for the Union, interrogated most of those 20 employees concerning what they knew about the Union, and interrogated employees McGlamory and Fusco about the union meeting.

(2) Implied that employees would be discharged if they joined the Union by telling employee E. Pirkle that Respondent had discharged employees for union activity in Louisana, and by telling employee Fusco that he knew what was liable to happen to him if he signed.

(3) Directly threatened to discharge employees because of their union activities in statements to employees Dasher, Clarence Paul, and Maxwell Paul.

(4) Promised benefits to employees for not joining the Union as expressed to employees Mandeville, Cuthbertson, and Brown.

(5) Threatened to close the plant if the Union came in as expressed to Clarence Paul.

(6) Instructed employees Callender, Baughman, Keith, and Dasher not to sign Union cards.

In addition I find that Respondent violated Section 8(a)(1) of the Act by the activities of its Supervisor Crane who on August 2 interrogated Maxwell Paul and Willie Jeter concerning whether they signed cars for the Union.

B. *The Discharge of James F. Aldridge.*

James F. Aldridge worked for Respondent as an engine rebuilder and automotive machinist from January 2, 1967, to August 5, 1968, when he was discharged. On Friday, August 2, in the engineroom at the Ft. Lauderdale yard Aldridge had a conversation with Supervisor Maddy. Maddy asked him if he had signed a card for the Union, and he answered that he had.[11] Maddy asked why he signed and Aldridge answered that the cost of living was going up but that the wages didn't. Maddy told him that that was not the way to do it, that he (Maddy) had been associated with the Union and "I can fix any of those smart boys. I know all about the union, and they can't touch the State of Florida." About 5 o'clock the following Monday, August 5, Supervisor Flora summarily discharged Aldridge and told him to turn in his keys and get his tools out. When Aldridge asked what he had done wrong, Flora answered that there was a warped camshaft in the Reo motor that Aldridge had worked on.

The decision to discharge Aldridge was made solely by Supervisor Maddy. During the time that Maddy was filling in for Flora at the Ft. Lauderdale yard, two engines which had been rebuilt by Aldridge were put on the test stand and did not perform properly. One was a Reo engine

[11] Maddy admitted that he asked Aldridge whether he signed a card but denies that Aldridge answered in the affirmative. Instead Maddy testified that Aldridge told him that he had not signed but that he thought it might be a good idea. Maddy denies that there was any further conversation.

which had a warped camshaft that had to be replaced. The other was a Waukesha engine which also needed some additional work. Both motors were delayed in shipment because of the needed repairs. Maddy testified that he thought Aldridge had fouled up both engines and as a result, when Flora returned to the yard, Maddy told him that something would have to be done about the situation or somebody else would be doing Flora's job. Flora confirms the fact that it was solely Maddy's decision to discharge Aldridge by testifying that, when he returned to the yard on August 5, Maddy told him that Aldridge had messed up some engines and that he, Flora, had either to let Aldridge go or that he, Flora, would be let go.[12]

As noted above, Aldridge worked for Respondent for over a year and a half. He was hired at $2.50 an hour and during his period of employment he received three 10-cent-per-hour raises, the last about June 15. While employed he rebuilt approximately 80 engines. During the entire period of his employment no one from Respondent ever complained to Aldridge about his work. About June Flora did mention to Maddy that he had received a phone call from Louisiana and was told that a couple of Reo engines had the rods in backwards. However, Aldridge answered that in that particular model engine the rods did go in in an opposite direction from most engines and he then took some oil pans off similar engines to show Flora that they

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[12] It is apparent from the testimony of both Flora and Maddy that Flora had nothing to do with the decision to terminate Aldridge. It follows that Flora's testimony about his father-son type of conversations with Aldridge about Aldridge's drinking, about Aldridge being inefficient in the ordering of parts, and about his feeling that they were going to have to do something with Aldridge was irrelevant with regard to the reason for Aldridge's discharge. Even if this were not the case Flora admits that he knew when Aldridge was hired that he drank and he never told Aldridge that he had to stop drinking. He never reprimanded Aldridge with regard to the ordering of parts or with regard to his work generally.

did go in the way he said. Nothing else was said of this incident. No supervisor ever made any comment to Aldridge about any other motor or engine that he worked on. With regard to the two engines that didn't properly work on the test stand shortly before his discharge, Aldridge credibly testified as follows: In putting in the camshaft when the engine was rebuilt he checked it as best he could with the equipment available. However, it didn't appear until the motor was tested on the test stand that the camshaft was warped. He then replaced the camshaft. He never had a similar problem in the yard. With the Waukesha engine that wasn't working properly on the test stand, he took out the camshaft and replaced it with another camshaft but found that there was nothing wrong with the original camshaft and there was a vacuum leak instead.

2. Conclusions as to the discharge of Aldridge

Aldridge engaged in an activity that is protected under Section 7 of the Act when he signed the union card. Respondent obtained knowledge of this protected activity when it unlawfully interrogated Aldridge on Friday, August 2. Aldridge was discharged on Monday, August 5. The facts found in section A, above, establish that Respondent bore a virulent animosity toward the Union as shown by the commission of many violations of Section 8(a)(1) of the Act. Included in these violations was the direct threat to employees that they would be discharged if they engaged in union activity.[13]

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[13] Of the 20 employees that Respondent unlawfully interrogated concerning the signing of union cards, 14 answered that they had not signed cards and 6 answered that they had. The six who had admitted signing cards were Fusco, Clarence Paul, Maxwell Paul, Jim Bowen, J. Aldridge, and Jeter. The two alleged discriminatees, J. Aldridge and Jeter, were both among the group of six that had indicated they had signed cards. Maxwell Paul was also discharged about this time but as he is not allowed as a discriminatee in the complaint no inference will be drawn from his termination.

The General Counsel has established a *prima facie* case against which the Respondent's defense must be evaluated. Supervisor Maddy does not contend that he considered anything other than the allegedly poor work by Aldridge on two particular engines before coming to the decision to discharge Aldridge. As Maddy's decision was a sole and final one with regard to the discharge, any doubts Flora may have had as to the caliber of Aldridge's work, which doubts were buried in the bottom of Flora's mind and unexpressed to either Maddy or Aldridge, have no bearing on the instant case. The mere fact that Maddy gave an ultimatum to Flora in directing Flora either to fire Aldridge or be fired himself indicates that Aldridge's discharge was not based on run-of-the-mill business considerations as Respondent contends. Aldridge had worked for over a year and a half and during that time Respondent considered that work to be of sufficient worth to warrant three increases in pay. During the entire time he was never reprimanded for poor work. Maddy, who had very little contact with Aldridge's work, as he was just filling in for Flora for a limited time, never bothered to even ask Flora what kind of worker Aldridge was but instead on the basis of an extremely limited observation summarily decided to discharge him.

I find that Respondent's alleged reason for discharging Aldridge was a transparent pretext to shield the real reason, which was Aldridge's protected activity in signing a union card. I therefore find that Aldridge was discharged in violation of Section 8(a)(3) and (1) of the Act.

C. *The Discharge of Willie L. Jeter*

Facts

Willie L. Jeter worked for Respondent from his date of hire in the latter part of 1961 until his discharge on August 7. He worked in the freight and shipping department at the Ft. Lauderdale yard where he received, packed, crated,

and hauled freight. Though he was not a regular driver in the freight department, he did make three or four local trips a week as well as an average of one out-of-State trip a month.

On July 31 he signed a union card. As is more fully set out in the section above entitled "The conversation in Crane's office," Respondent learned that Jeter had signed a card for the Union after unlawfully interrogating him. August 2 was on a Friday. The following Wednesday, August 7, Supervisor Crane called Jeter into his office in the middle of the day, paid him till the end of the day, and summarily discharged him, telling him that he hated to do it but that it was out of his hands. Crane told Jeter that he was being let go because he did not operate the forklift and because the day before he had left at 4:30 without saying anything to Crane.[14]

Respondent contends that Jeter was discharged because he was unable to complete reports on over-the-road trips by himself, he left work at 4:30 p.m. on August 6 without checking with Crane, and he was unable to drive a fork-lift truck.

Jeter was in Respondent's employ approximately 7 years. He was hired at $1.00 an hour and during his employment he received increases raising his pay to $2.10 an hour. The last wage increase was 10 cents an hour in or about May. Neither Crane nor any other supervisor had ever complained to him about his work. Crane admitted that Jeter was able to do the work with regard to the physical driving of that truck.

Respondent contends that Jeter's inability to fill out the forms relating to over-the road truck driving became a

[14] Crane testified that the reason he gave Jeter for the discharge was that Jeter could not make out the fuel reports and that he failed to report before leaving the yard on August 6. Crane also testified that he might have said something about Jeter's not driving the forklift. I credit Jeter.

problem on August 6 because Maxwell Paul who had previously helped Jeter in filling out the forms was discharged on that date. However, Jeter's testimony that Maxwell Paul helped him prepare the documents simply because it was quicker for the two of them to do it was never questioned by Respondent and no one ever told Jeter that he should make out the forms by himself. As the forms only had to be made out for out-of-State trips and Jeter only took about one such trip a month, the completion of the forms must have been a very minor part of his duties.

Respondent contends that Jeter's leaving work at 4:30 on August 6 was a serious matter because Maxwell Paul was absent and as second senior man Jeter knew that, when Maxwell Paul was not there, he was in charge. However, Crane admits that he never told Jeter that he (Jeter) was going to be boss. As 4:30 p.m. was the normal quitting time, no one told Jeter that he was supposed to work overtime, he was never told to check with Crane before punching out, and he was never told that he was in charge of the other employees, this defense cannot be taken seriously.

The third item raised by Respondent is that Jeter did not drive the forklift. However, about a year and a half before the discharge, Crane told Jeter to let the younger men drive the forklift and Jeter hadn't operated it since. It is difficult to see why this duty which was apparently a matter of minor concern for a year and a half before the discharge became suddenly important as a reason for discharging Jeter.

The General Counsel has established a *prima facie* case by evidence that Jeter engaged in protected activity within the meaning of Section 7 of the Act in the signing of a card, that Respondent gained knowledge of this activity through its unlawful interrogation on August 2, that Respondent demonstrated its virulent animosity toward the Union by engaging in the severe pattern of 8(a)(1) conduct

described above in section A which included the threat to discharge employees who joined the Union and the specific threat to fire Jeter if he signed for the Union, and that Respondent discharged Jeter on August 7, just 5 days after it learned of Jeter's protected activity. Respondent's asserted reasons for discharging Jeter are so patently frivolous that I can only conclude that they are a pretext to disguise the real reason for Jeter's discharge, namely his protected activity in signing a union card. I therefore find that Jeter was discharged in violation of Section 8(a) (3) and (1) of the Act.

D. *The Alleged Violations of Section 8(a)(5) of the Act*

1. The facts

a. *The appropriate unit*

The complaint, as amended, alleges and the answer, as amended, admits that:

> All employees employed by the Respondent at its Broward County equipment yard,[15] excluding office clerical employees, guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act.

b. *The Union's demand for recognition*

On August 2 W. L. Henderson, the Union's business manager, sent a letter to Dan Stoneberger, Respondent's vice president and a supervisor within the meaning of the Act, which read as follows:

> This is to inform you that we now represent a majority of your Equipment Mechanic employees in this jurisdiction, namely, Broward County.

[15] Referred to herein as the Ft. Lauderdale yard.

> We would like recognition as their collective bargaining agent and will be happy to discuss this with you at your earliest convenience.

On August 5 Stoneberger called Henderson's office and in Henderson's absence spoke to Frank E. Harper, the Union's assistant business amnager. Stoneberger asked Harper if he had ever heard of the IBEW representing Respondent's kind of employees. When Harper started answering, Stoneberger told him not to bother because he would talk to Henderson. The following day, August 6, Stoneberger called again and did speak to Henderson. Stoneberger said that he received the letter but that he didn't think that the IBEW could represent his employees. Stoneberger also said that he didn't think that the Union represented a majority of employees at the Ft. Lauderdale yard. Henderson replied that the Union could represent the employes and that they did represent a majority.

On the same date, August 6, Henderson wrote a second letter to Stoneberger as follows:

> We have been advised that on August 5, 1968 you discharged two (2) employees because of their membership or activities in behalf of this Labor Union. Be advised that we shall seek relief for this discriminatory practice by filing a charge with the National Labor Relations Board, unless these employees are immediately reinstated with back pay.
>
> In my letter to you of August 2nd I specifically advised you that we represent a majority of your employees performing repair work on equipment and are employed by you as Equipment Mechanics. I can only assume by your discharge of James Aldridge and Jack Carr that you are refusing to recognize and negotiate with us. If we are mistaken, that is, if you are willing to recognize our majority representative capacity, please advise us of that fact immediately and we can arrange to prove that we represent the majority of

your employees by any fair and impartial means. We are anxious to commence negotiations covering wages, hours and conditions of employment for the employees we represent, and therefore we request that you take prompt action to accept us as the collective bargaining agent for the employees in the Unit described above. I shall await your response.

On August 9 Stoneberger wrote to Henderson as follows:

> Thank you for your letter of August 2, 1968 and August 6, 1968.
>
> Please be advised that we sincerely doubt that you represent a majority of our employees at our Broward County equipment yard, and therefore, do not recognize you as their bargaining representative at this time.
>
> Accordingly we respectfully invite you to use such procedures [sic] as are available to you under applicable Federal law.

On September 30 Henderson sent the following telegram to Stoneberger:

> PLEASE REFER TO MY LETTERS OF AUGUST 2 AND 6. IN FURTHER CLARIFICATION OF THE UNIT OF YOUR EMPLOYEES WHICH WE CONTEND WE REPRESENT. BE ADVISED THAT WE REPRESENT A MAJORITY OF YOUR EMPLOYEES AT YOUR BROWARD COUNTY EQUIPMENT YARD. WE DEMAND RECOGNITION AND ASK FOR IMMEDIATE NEGOTIATIONS AND WE ARE WILLING TO PROVE OUR REPRESENTATIVE CAPACITY BY A CROSS CHECK OF OUR AUTHORIZATION CARDS OR ANY OTHER FAIR AND IMPARTIAL MEANS OF PROVING OUR MAJORITY STATUS. PLEASE ADVISE

c. *The number of employees in the bargaining unit and the Union's majority*

As noted above, the Union demanded recognition by letter dated August 2 and Respondent through Stoneberger responded to their demand in a telephone conversation to Henderson on August 6. In that conversation Stoneberger questioned the propriety of an IBEW local representing

Respondent's employees and the Union's majority status, and in doing so he, in effect, on that date refused the Union's demand to bargain. As this refusal to bargain first occurred on August 6, the Union's majority status on that date must be considered.

General Counsel's Exhibit 2(b) is a list of 30 employees. It was stipulated that these 30 were all employees in the appropriate unit on August 6. It was further stipulated that the parties could introduce additional evidence concerning employees who should or should not be on the list. Evidence was so introduced with respect to four individuals: Maxwell Paul, Billy Harris, O. Natali, and W. Jeter. As I have found that W. Jeter was discharged in violation of Section 8(a)(3) of the Act and will therefore be entitled to full reinstatement, his name must be added to the list. As I have found that Maxwell Paul, for the reason set forth in detail above, was an employee and not a supervisor within the meaning of the Act, his name should also be included because he was still employed for at least part of the day on August 6.[16] The General Counsel contends that Billy Harris and O. Natali should also be included on the list. Harris and Natali both testified that they are field mechanics who receive no supervision from the Ft. Lauderdale yard and whose job is to maintain equipment while it is in the field. It is clear from their testimony that any connection they have with the Ft. Lauderdale yard is a casual one and that they are not employed *at* the Ft. Lauderdale yard so as to be included within the appropriate unit. They therefore cannot be added to the list.

I find that the total employee complement in the appropriate unit on August 6 was 32 employees. Of these 32 employees 20 signed cards for the Union. The cards were

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[16] Paul testified that he worked until about August 7. Crane testified that Paul had been terminated on August 6.

all dated between July 18 and August 1, were all properly authenticated, and were admitted in evidence.[17] At the time the August 2 demand for recognition was written the Union had all 20 cards in its possession.

[17]

Employee	Date Card Signed	Classification
1. Wilson, F.	July 31	Machinist
2. Marchman, R.	July 19	Mechanic
3. Callender, J.	July 18	Mechanic
4. Pirkle, E.	July 18	Mechanic
5. Ellis, L.	July 29	Mechanic
6. Keith. D.	July 30	Mechanic
7. Brown, L.	July 20	Mechanic
8. Fusco, T.	July 22	Mechanic
9, Mandeville, J.	July 29	Mechanic
10. Pirkle, T.	July 19	Mechanic Helper
11. Tatum, E.	July 24	Welder
12. Ashcraft, G.	July 29	Welder
13. Sorrells, R.	July 29	Welder
14. Paul, C.	Aug. 1	Painter
15. Dominguez, E.		Painter
16. Hernandez, R.		Painter
17. Jeter, W.	July 31	Warehouse Man
18. Andrix, E.		Warehouse Man
19. Matos, V.		Warehouse Man
20. Dominguez, H.		Laborer
21. Forte, P.		Laborer
22. Robledo, A.		Laborer
23. McGlamory, J.	July 31	Truck Driver
24. Romich, C.		Truck Driver
25. Paul, O.		Truck Driver
26. Gessner, B.		Clerk Parts Purchasing
27. Butler, J.		Parts Pickup Man
28. Baughman, J.	Aug. 1	Parts Storekeeper
29. Cuthbertson, R.	July 31	Lubeman
30. Bowen, J.		Messenger
31. Aldridge, A.	July 22	Engine Rebuilder
32. Paul, M.	July 31	Warehouse Man

On the list "Wilson" has the initial "F.", while the card is signed "Wiley F. Wilson." The list also shows "T. Fusco" while the card is signed "Anthony Fusco, Jr." As both card signers credibly testified that they were employed during the time period that included August 6, I conclude that they are the "Wilson" and "Fusco" named in the list.

2. The Respondent's defenses

In substance Respondent contends that no violation of Section 8(a)(5) should be found because:

a. The Union's demands for recognition dated August 2 and August 6 related solely to a unit of equipment mechanics and that such a unit differed so substantially from the stipulated appropriate unit that no obligation on the Respondent's part could arise to bargain in the appropriate unit.

b. The employees who signed cards for the Union were merely applying for membership in the Union and were not authorizing the Union to represent them for the purpose of collective bargaining. Therefore, the Union was never authorized to represent the employees in the bargaining unit.

c. The Union would not fairly represent two employees whose national origin was Cuban and one negro employee in the bargaining unit.

d. Respondent had a good-faith doubt that the Union represented a majority of the employees in the bargaining unit.[18]

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[18] As to the Respondent's good-faith doubt that the Union represented a majority of its employees, Respondent in its brief states that the doubt was based on the fact that only three employees and one supervisor had admitted signing a card, that one employee had been coerced because he refused to sign, and because a supervisor (Maxwell Paul) had purportedly been soliciting for the Union.

Ora Paul testified that employees Cuthbertson and McGlamory told him that he would have to join the Union or get out. He also testified that employee Marchman made the same threat. Cuthbertson, McGlamory, and Marchman alll denied that they told Ora Paul he would have to leave the job if he didn't join the Union. I credited the three denials.

For the reasons set forth above I have found that Maxwell Paul was not a supervisor within the meaning of the Act. Even if he were, the record does not establish that he solicited the employees, upon whom the Union's majority status rests, to join the Union.

3. The facts with regard to the fair representation issue

With regard to the Respondent's allegations concerning the Union's discrimination in membership policy, the facts are as follows:

Joseph Butler is the only negro employed by Respondent at the Ft. Lauderdale yard. Though he was employed since September 1967, he was unaware that the employees were joining the Union and no one ever asked him to apply for membership. Butler is a parts pickup man and therefore is in the bargaining unit. W. L. Henderson, the Union's business manager, testified without contradiction that he was unaware that any Negro was employed at the Ft. Lauderdale yard, that at the present time the Union has no Negro member, and that the Union has had negro members in the past and is now processing one Negro for membership. He further testified that the Union does not discriminate against any minority group on the basis of race, creed, national origin, or color.

Two employees of Cuban origin, Eneldo Dominguez and Pedro Alberto, did sign union cards. These cards were dated July 29 and August 1 respectively. Employee Elbert Pirkle took these cards together with the $10 initiation fee for each employee and kept them in his truck until December 9. Pirkle testified that he intended to give the cards to the Union when they were given to him but that he spoke to employee Clarence Paul who told him to hang on to the cards until things cooled off because they did not want to get Dominguez and Alberto fired. Pirkle further testified that he forgot he had them in his truck until Thursday, December 5 (during the course of this trial). Union Business Manager Henderson testified that he heard for the first time about the cards of Dominguez and Alberto during the trial on December 5 and he called Pirkle that evening. Henderson asked Pirkle for the cards and took them on December 9. Henderson testified that the cards would be processed.

I find Pirkle's allegation that he kept possession of the Dominguez and Alberto cards to protect those employees and later because he forgot about them simply incredible. However, I do credit Henderson's assertion that he found out about those cards during the trial and then took possession of them. There is no evidence in the record, other than set forth above, to be evaluated in determining whether in fact the Union does discriminate because of color or national origin.[19]

4. Analysis as to the alleged violation of Section 8(a)(5)

a. *The fair representation issue*

It can well be argued that a labor organization whose membership policies invidiously discriminate against employees on the basis of race or national origin inherently is incapable of fairly representing such employees. It can furth[illegible] be argued that such inability to fairly represent should be a defense against an 8(a)(5) allegation where members of the discriminated against group are part of the bargaining unit. Cf. *United Packinghouse, Food and Allied Workers International Union, AFL-CIO* v. *N.L.R.B.*, .. F.2d .. (C.A.D.C.) 70 LRRM 2489. However, a legal analysis of these propositions would only be warranted in a case where the evidence on the record establishes that the Union does so discriminate.

I have found that the reasons given by Pirkle for his retaining the union cards of Dominguez and Alberto were

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[19] In footnote 7 of its Brief Respondent suggests that it was not allowed to fully explore this issue. During the trial Respondent offered to prove that if Ora Paul were permitted to testify he would testify that several employees told him that they did not approach Joe Butler because they didn't want him in the Union. I ruled that such testimony would be hearsay unless Respondent made and supported the contention that the employees were acting as agents of the Union. No such contention was made.

not credible. In the absence of any other explanation I believe that a fair inference can be made that Pirkle held the cards because of the national origin of those two employees. From the evidence on the record it is more difficult to infer that Joseph Butler was not asked to sign a union card because he was Negro. However, even if such an inference can be made, it must be noted that all of the solicitation of cards at the Ft. Lauderdale yard were made by employees. The Union did not seek out Pirkle and designate him as its agent in the solicitation of cards. Rather, Pirkle who Respondent in its brief describes as "the self-appointed employee organizer" received cards from an employee in another shop and other cards from the Union. He distributed some and gave some to other employees to distribute. There is absolutely no evidence in the record that the Union had knowledge that there was any discrimination based on race or national origin prior to the date of the trial. Shortly after becoming aware of the problem the Union took possession of the cards signed by Dominguez and Alberto and Henderson has testified they will be processed. In no sense can it be said that the Union ratified the conduct of the employees who solicited cards. I therefore find that the failure to solicit a card from Butler and the withholding of the cards of Dominguez and Alberto can not be attributed to any membership policy of the Union. The admission by Business Manager Henderson that at the present time there are no Negro members in the Union indeed raises a suspicion. However, standing alone it does not prove that the Union had discriminatory membership policies, particularly where Negroes have been members in the past and the application of a Negro is now pending. As the evidence does not establish that the Union's membership policies discriminate on the grounds of race or national origin a legal analysis of the propositions of law mentioned above is not in order.

b. *The unit and the demand*

The appropriate unit as stipulated to at the hearing consists of all Respondent's employees at the Ft. Lauderdale yard with the usual exclusions (office clericals, guards, professionals and supervisors). Of the 32 employees in this unit on August 6, 8 were mechanics, 1 a mechanics' helper, 1 an engine rebuilder, 1 a machinist, and the balance welders, painters, warehousemen, laborers, truck drivers, and other nonmechanics. The Union's demand for recognition dated August 2 states that the Union represents a majority of equipment mechanics. The letter of August 6 states that the Union represents a majority of employees performing repair work on equipment and who are employed as equipment mechanics. Not until the September 30 telegram did the Union specifically tell Respondent that the Union sought representation in an all-employee unit.

The question presented is whether the Union's demand of August 2 sufficiently identified the unit in which bargaining was sought to provide a foundation for a finding that Respondent refused to bargain in an all-employee unit. In determining whether the parties understood that an "all employee" unit was the subject matter of the Union's demand, the wording of the demand in itself is important. However, all the surrounding circumstances must be considered, as no magic words are needed in this field of law. *Benson Wholesale Company, Inc.*, 164 NLRB No. 75. The important question is whether the Employer knows he is being asked to bargain with the Union as a representative of a certain group of employees. The Union's August 2 letter did mention equipment mechanics. However, Respondent, through its unlawful interrogation, did ascertain that a mechanic, a painter, two warehousemen, a messenger, and an engine rebuilder had signed cards for the Union.[20] On August 6 when Respondent's vice presi-

[20] Fusco, C. Paul, M. Paul, Jeter, and Aldridge. In addition Ora Paul, a truck driver, told Respondent that he had been solicited to join the Union.

dent, Stoneberger, called Union Business Manager Henderson, Stoneberger said that he doubted that the Union represented a majority of the employees at the Ft. Lauderdale yard. Henderson replied that he did represent the majority. There was no mention of mechanics as such and both the Union and Respondent appeared to have an all-employee unit in mind. Certainly Respondent did not question the size of the unit nor indicate that it thought the Union was seeking a mechanics only unit. Respondent's stated reasons for not recognizing the Union were that Respondent did not think the IBEW could represent its employees and that Respondent doubted that the Union represented a majority of employees at the Ft. Lauderdale yard. The refusal was not based on the scope of the Union's demand. In its followup demand of August 6 the Union's letter also contained the phrase "equipment mechanics." However, in its reply of August 9 Respondent wrote that it doubted the Union represented a majority of "our employees at our Broward County equipment yard" and therefore refused to bargain. The language of Respondent's August 9 letter makes it clear that Respondent was interpreting the Union's demand as one which encompassed an all-employee unit. As Respondent understood the Union's demand to be in an all-employee unit and as Respondent made no objection to the narrow language of the Union's letter of August 2 and did not base its refusal to bargain on such language, I find that the Union did make a proper demand for bargaining in the appropriate unit.

c. *Majority status*

On August 6, the date of Respondent's refusal to bargain with the Union, 20 out of the 32 employees in the bargaining unit had signed cards for the Union. These cards were not the ordinary authorization cards but were applications for membership in the Union. The Board, with court approval, has long held that signing of an

application for membership in a labor organization in itself authorizes that labor organization to bargain for the card signer. *Blade-Tribune Publishing Company,* 161 NLRB 1512; *Delaware-New Jersey Ferry Company,* 30 NLRB 820, enfd. in pert. part 128 F.2d 130 (C.A. 3); *N.L.R.B.* v. *Somerset Shoe Company,* 111 F.2d 681 (C.A. 1). I find that on August 6 the Union was authorized by a majority of the employees in the appropriate bargaining unit to represent them in collective bargaining with Respondent.

d. *The alleged good-faith doubt*

The criteria for determining whether an employer is acting in good or bad faith in questioning the Union's majority is set forth in *Hammond & Irving, Incorporated,* 154 NLRB 1071, where the Board held:

> The Board has long held that an employer may insist upon a Board election as proof of a union's majority if it has a reasonable basis for a bona fide doubt as to the union's representative status in an appropriate unit. If, however, the employer has no such good-faith doubt, but refuses to bargain with the majority representative of its employees because it rejects the collective-bargaining principle or desires to gain time within which to undermine the union and dissipate its majority, such conduct constitutes a violation of Section 8(a)(5) of the Act. (*Joy Silk Mills, Inc.,* 85 NLRB 1263, enfd. as modified on other grounds 185 F.2d 732 (C.A.D.C.), cert. denied 341 U.S. 914.) In determining whether the employer's action was taken to achieve either of the said invalid purposes, the Board considers all the surrounding circumstances as well as direct evidence of motivation. Absent such direct evidence, where extensive violations of the Act accompany the refusal to grant recognition, they evidence the employer's unlawful motive and an inference of bad faith is justified.

In applying these criteria the Board has held that the commission of narrow violations of Section 8(a)(1) of the Act do not necessarily indicate a rejection of the collective-bargaining principle. *Fashion Fair, Inc.*, 173 NLRB No. 28; *Grafton Boat Co., Inc.*, 173 NLRB No. 150; *J. C. Penney Company, Inc.*, 172 NLRB No. 82. However, the Board has consistently held that substantial violations of Section 8(a)(1) and (3) of the Act do warrant a conclusion that an employer does not have good faith in questioning a union's majority status. In the instant case Respondent engaged in extensive violations including wholesale unlawful interrogation, threats to discharge employees because of their union activities, promises of benefits to employees to refrain from union activity, and the discharge of two employees because they joined the Union. This conduct on the part of the Respondent evidenced its complete rejection of the collective-bargaining principle rather than any good-faith doubt that the Union had a majority. Respondent may not destroy the very conditions needed for a fair election and at the same time successfully maintain that an election is the sole means for determining the desires of the employees. Respondent's unlawful coercive conduct began on August 1 immediately after it learned that its employees were engaging in union activities and culminated with the discharge of Jeter on August 7, the day after it notified the Union that it would not bargain. The Respondent's conduct both before and after the demand for recognition is part of the same pattern which clearly establishes Respondent's rejection of the collective-bargaining principle. *Gibson Products Company of Washington Parish, La., Inc.*, 172 NLRB No. 243. Such conduct violates Section 8(a)(5) of the Act. *Jerome T. Kane d/b/a Kane Bag Supply Company*, 173 NLRB No. 180; *Rish Equipment Company*, 173 NLRB No. 136; *Bauman Chevrolet, Inc.*, 173 NLRB No. 78; *Heck's Inc.*, 172 NLRB No. 255; *Beaver Bros. Baking Co., Inc. d/b/a American*

Beauty Baking Co., 171 NLRB No. 98.[21] Violations of the Act both before and after a demand for recognition may show bad faith. *San Angelo Packing Company*, 163 NLRB No. 118; *Boot-Ster Manufacturing Company, Inc.*, 149 NLRB 933, enfd. 361 F.2d 325 (C.A. 6).

Respondent's attitude toward collective bargaining was well summed up in Supervisor's Maddy's remark to employee Aldridge: "I can fix any of those smart boys. I know all about the union, they can't touch the State of Florida."

I therefore find that Respondent on August 6 did not have a good-faith doubt that the Union represented a mapority of employees in the appropriate unit.

e. *Conclusion as to the 8(a)(5) allegation*

Having found that the Union made a demand for recognition in an appropriate unit, that the Union was authorized by a majority of the employees in said unit to represent them, that the Respondent refused to bargain with the Union, and that the Respondent did not have a good-faith doubt that the Union represented the majority of the employees in the unit but instead sought by unlawful means to undermine the Union, I find that the Respondent violated Section 8(a)(5) and (1) of the Act.

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[21] In reaching this conclusion I am not relying on the testimony of employee Dasher who testifies that Maddy admitted to him that the Union had 51 percent of the employees. Though Dasher was honestly trying to recall the entire incident, he was obviously confused as to whether Maddy said that the Union claimed to represent the employers or whether Maddy said the Union did represent the employees. In addition he was very uncertain as to when the conversation occurred. Under these circumstances I do not believe that Dasher's testimony in this regard has probative weight.

f. *The unilateral change—facts and conclusion*

For several years the regular hours of employment at the Ft. Lauderdale yard were from 7 a.m. to 4:30 p.m. on weekdays and 7 a.m. to 12 noon on Saturdays. The number of hours worked per week varied from time to time depending on the workload but the usual workweek was as stated. On December 2 Respondent posted a notice on its bulletin board stating that the workday on December 2 would be 7 a.m. to 3:30 p.m. and that in December 3 and thereafter it would be 8 a.m. to 4:30 p.m. There was no mention of Saturday work. This was the first time such a notice had been posted. The new hours were thereafter observed. During the hearing the General Counsel amended the complaint to allege this change in hours as a violation of Section 8(a)(5) and (1) of the Act. The General Counsel made clear that he was not alleging that the change in hours was a discrimination because of union activity and he did not argue that the change had other than economic motivation. His theory simply was that a unilateral change was made at the time when Respondent had a duty to bargain with the Union. Respondent did not bargain with the Union about the change. I find that the change was a unilateral modification of existing working conditions and as I have already found that the Respondent had a duty to bargain with the Union, the change is an additional violation of Section 8(a)(5) and (1) of the Act. I will therefore recommend that the Respondent be ordered to cease and desist from making such unilateral changes. However, in the circumstances of this case where the underlying duty to bargain is being litigated, I do not believe that any additional remedy for the unilateral change would be warranted. Cf. *Donna Lee Sportswear*, 174 NLRB No. 54.

IV. The Effects of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantnal relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it cease and desist therefrom and upon request bargain collectively with the Union as the exclusive representative of all employees in the unit set forth above and, if an understanding is reached, embody such understanding in a signed agreement.[22]

Having found that Respondent discharged and failed to reinstate James F. Aldridge and Willie L. Jeter in violation of Section 8(a)(3) and (1) of the Act, I shall further recommend that Respondent offer reinstatement to said employees and make them whole for any loss of pay resulting from their discharge from the date of their discharge to the date on which they are offered reinstatement, less their net earnings during that period. Such backpay

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[22] In view of the Respondent's numerous and serious violations of Section 8(a)(1) and (3) of the Act, I would recommend a bargaining order as a remedy to those violations even if no violation of Section 8(a)(5) were found. *Irving Air Chute Company, Inc.*, 149 NLRB 627; *Frito-Lay*, 169 NLRB No. 115; *Heck's Inc.*, 172 NLRB No. 255.

shall be computed on a quarterly basis in a manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and shall include interest at 6 percent as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(a) of the Act:

> All employees employed by Respondent at its Broward County equipment yard, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

4. At all times since August 2 the Union has been the exclusive representative of the employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By refusing on August 6 and thereafter to bargain with the Union as the exclusive representative of the employees in the said appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By discharging and refusing to reinstate James F. Aldridge and Willie L. Jeter because of their activity on behalf of the Union, thereby discouraging membership in the Union, Respondent has violated Section 8(a)(3) of the Act.

7. By the foregoing conduct and by interrogating its employees about their union activities, by threatening them with discharge if they engaged in such activity and by promising them benefits if they refrained from such activity, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed to them by Section 7 of the Act and thereby has violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I recommend that Respondent, Nat Harrison Associates, Inc., shall:

1. Cease and desist from:

(a) Interrogating its employees about their union activities.

(b) Threatening its employees with loss of jobs or economic benefits if they become members of or assist the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO.

(c) Promising its employees economic benefits if they refrain from becoming a member of or assisting that labor organization.

(d) Discriminating against its employees by discharging them in order to discourage membership in that labor organization.

(e) Refusing to recognize and bargain with the International Bortherhood of Electrical Workers, Local No. 728, AFL-CIO, as the exclusive representative of its employees in the following unit:

All employees employed by Nat Harrison Associates, Inc., at its Broward County equipment yard, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

(f) Unilaterally changing the terms and conditions of employment of its employees in said unit without bargaining with said labor organization as the exclusive representative of the employees in that unit.

(g) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer to James F. Aldridge and Willie L. Jeter reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges.

(b) Make whole the above-named employees for any loss of pay they may have suffered by reason of the discrimination against them by payment to each of them of a sum of money equal to the amount he normally would have earned as wages from the date of the discharge to the date of the offer of reinstatement, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Upon request bargain collectively with the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO, as the exclusive representative of all the employees in the appropriate unit described above, and, if an

understanding is reached, embody such understanding in a signed agreement.

(e) Post at its Fort Lauderdale, Florida, yard, copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 12, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[24]

Dated at Washington, D. C.

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[23] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" and in the first paragraph of the notice the words "a Trial Examiner of" shall be deleted. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[24] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 12, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

Notice To All Employees

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

After a Trial at which all sides had the chance to give evidence, a Trial Examiner of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this Notice.

The Act gives all employees these rights:

To engage in self organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other mutual aid or protection

To refrain from any and all of these things

We Will Not do anything that interferes with these rights. More specifically,

We Will Not ask you whether you are a member of or are helping the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO.

We Will Not threaten you with loss of your job or any benefits you now enjoy if you become a member or help that Union.

We Will Not promise to reward you in any way if you refrain from becoming a member of or helping that Union.

We Will Not discharge any employee to discourage membership in that Union.

WE WILL immediately offer to reinstate James F. Aldridge and Willie L. Jeter to their former or substantially equivalent positions without any change in seniority or other privileges they enjoyed before we discharged them and we will pay to them any money they lost as a result of the discrimination against them with interest at 6 percent.

WE WILL notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL recognize International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO, as the only collective-bargaining representative of our employees in the bargaining unit which is:

> All employees employed by us at our Broward County equipment yard, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

WE WILL bargain on request with the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO, on wages, hours and conditions of employment and any agreement we reach will be put in writing and signed.

WE WILL NOT change your hours or other conditions of employment without bargaining with the International Brotherhood of Electrical Workers, Local No. 728, AFL-CIO.

NAT HARRISON ASSOCIATES, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida 33602, Telephone 813-228-7711, Ext. 227.

SUPREME COURT OF THE UNITED STATES

Nos. 573, 691, AND 585.—OCTOBER TERM, 1968.

National Labor Relations Board, Petitioner, v. Gissel Packing Co., Inc., et al.	On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit.
573	
Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, Petitioner, v. Gissel Packing Co., Inc.	
691	
The Sinclair Company, Petitioner, v. National Labor Relations Board,	On Writ of Certiorari to the United States Court of Appeals for the First Circuit.
585	

[June 16, 1969.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases involve the extent of an employer's duty under the National Labor Relations Act to recognize a union that bases its claim to representative status solely on the possession of union authorization cards, and the steps an employer may take, particularly with regard to the scope and content of statements he may make, in legitimately resisting such card-based recognition. The specific questions facing us here are whether the duty to bargain can arise without a Board election under the Act; whether union authorization cards, if obtained from a majority of employees without misrepresentation or

coercion, are reliable enough generally to provide a valid, alternate route to majority status; whether a bargaining order is an appropriate and authorized remedy where an employer rejects a card majority while at the same time committing unfair labor practices that tend to undermine the union's majority and make a fair election an unlikely possibility; and whether certain specific statements made by an employer to his employees constituted such an election-voiding unfair labor practice and thus fell outside the protection of the First Amendment and § 8 (c) of the Act. For reasons given below, we answer each of these questions in the affirmative.

I.

Of the four cases before us, three—*Gissel Packing Co., Heck's Inc.*, and *General Steel Products, Inc.*—were consolidated following separate decisions in the Court of Appeals for the Fourth Circuit and brought here by the National Labor Relations Board in No. 573. Food Store Employees Union, Local No. 347, the petitioning Union in *Heck's*, brought that case here in a separate petition in No. 691. All three cases present the same legal issues in similar, uncomplicated factual settings that can be briefly described together. The fourth case, No. 585 (*Sinclair Company*), brought here from the Court of Appeals for the First Circuit and argued separately, presents many of the same questions and will thus be disposed of in this opinion; but because the validity of some of the Board's factual findings are under attack on First Amendment grounds, detailed attention must be paid to the factual setting of that case.

Nos. 573 and 691.

In each of the cases from the Fourth Circuit, the course of action followed by the Union and the employer and the Board's response were similar. In each case, the

union waged an organizational campaign, obtained authorization cards from a majority of employees in the appropriate bargaining unit, and then on the basis of the cards, demanded recognition by the employer. All three employers refused to bargain on the ground that authorization cards were inherently unreliable indicators of employee desires; and they either embarked on, or continued, vigorous antiunion campaigns that gave rise to numerous unfair labor practice charges. In *Gissel*, where the employer's campaign began almost at the outset of the Union's organizational drive, the Union (petitioner in No. 691), did not seek an election, but instead filed three unfair labor practice charges against the employer, for refusing to bargain in violation of § 8 (a)(5), for coercion and intimidation of employees in violation of § 8 (a)(1), and for discharge of union adherents in violation of § 8 (a)(3).[1] In *Heck's* an election sought by the Union was never held because of nearly identical unfair labor practice charges later filed

[1] At the outset of the Union campaign, the Company vice president informed two employees, later discharged, that if they were caught talking to union men, "you God-damned things will go." Subsequently, the Union presented oral and written demands for recognition, claiming possession of authorization cards from 31 of the 47 employees in the appropriate unit. Rejecting the bargaining demand, the Company began to interrogate employees as to their union activities; to promise them better benefits than the Union could offer; and to warn them that if the "union got in, [the vice president] would just take his money and let the union run the place," that the Union was not going to get in; and that it would have to "fight" the Company first. Further, when the Company learned of an impending Union meeting, it arranged, so the Board later found, to have an agent present to report the identity of the Union's adherents. On the first day following the meeting, the vice president told the two employees referred to above that he knew they had gone to the meeting and that their work hours were henceforth reduced to half a day. Three hours later, the two employees were discharged.

by the Union as a result of the employer's antiunion campaign, initiated after the Union's recognition demand.[2] And in *General Steel*, an election petitioned for by the

[2] The organizing drive was initiated by the employees themselves at Heck's Charleston warehouses. The Union first demanded recognition on the basis of 13 cards from 26 employees of the Company's three Charleston warehouses. After responding "No comment" to the Union's repeated requests for recognition, the president assembled the employees and told them of his shock at their selection of the Union; he singled out one of the employees to ask if he had signed an authorization card. The next day the Union obtained the additional card necessary to establish a majority. That same day, the leading union supporter (the employee who had first established contacts with the Union and had solicited a large number of the cards) was discharged, and another employee was interrogated as to his union activities, encouraged to withdraw his authorization, and warned that a union victory could result in reduced hours, fewer raises, and withdrawal of bonuses. A second demand for recognition was made two days later, and thereafter the president summoned two known union supporters to his office and offered them new jobs at higher pay if they would use their influence to "break up the union."

The same pattern was repeated a year later at the Company's Ashland, Kentucky, store, where the Union obtained cards from 21 of the 38 employees by October 5, 1965. The next day, the assistant store manager told an employee that he knew that the Union had acquired majority status. When the Union requested recognition on October 8, however, the Company refused on the ground that it was not sure whether department heads were included in the bargaining unit—even though the cards represented a majority with or without the department heads. After a second request for recognition and an offer to submit the cards to the employer for verification, respondent again refused, on grounds of uncertainty about the definition of the unit and because a poll taken by the Company showed that a majority of the employees did not want union representation. Meanwhile, the Company told the employees that an employee of another company store had been fired on the spot for signing a card, warned employees that the Company knew which ones had signed cards, and polled employees about their desire for union representation without giving them assurances against reprisals.

Union and won by the employer was set aside by the Board because of the unfair labor practices committed by the employer in the pre-election period.[3]

In each case, the Board's primary response was an order to bargain directed at the employers, despite the absence of an election in *Gissel* and *Heck's* and the employer's victory in *General Steel*. More specifically, the Board found in each case that (1) the union had obtained valid authorization cards[4] from a majority of the employees in the bargaining unit and was thus entitled to represent the employees for collective bargaining purposes; and (2) that the employers' refusal to bargain with the unions in violation of § 8 (a)(5) was motivated

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[3] Throughout the Union's six-month organizational campaign—both before and after its demand for recognition based on possession of cards from 120 of the 207 employees in the appropriate unit—the Company's foremen and supervisors interrogated employees about their union involvement; threatened them with discharge for engaging in union activities or voting for the union; suggested that unionization might hurt business and make new jobs more difficult to obtain; warned that strikes and other dire economic consequences would result (a supervisor informed a group of employees that if the union came in, "a nigger would be the head of it," and that when the Company put in 10 new machines, "the niggers would be the operators of them"); and asserted that, although it would have to negotiate with the Union, it could negotiate endlessly and would not have to sign anything.

[4] The cards used in all four campaigns in Nos. 573 and 691 and in the one drive in No. 585 unambiguously authorized the Union to represent the signing employee for collective bargaining purposes; there was no reference to elections. Typical of the cards was the one used in the Charleston campaign in *Heck's*, and it stated in relevant part:

"Desiring to become a member of the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, I hereby make application for admission to membership. I hereby authorize you, or your agents or representatives to act for me as collective bargaining agent on all matters pertaining to rates of pay, hours or any other condition of employment."

not by a "good faith" doubt of the unions' majority status, but by a desire to gain time to dissipate that status. The Board based its conclusion as to the lack of good faith doubt on the fact that the employers had committed substantial unfair labor practices during their antiunion campaign efforts to resist recognition. Thus, the Board found that all three employers had engaged in restraint and coercion of employees in violation of § 8 (a)(1)—in *Gissel*, for coercively interrogating employees about union activities, threatening them with discharge and promising them benefits; in *Heck's*, for coercively interrogating employees, threatening reprisals, creating the appearance of surveillance, and offering benefits for opposing the Union; and in *General Steel*, for coercive interrogation and threats of reprisals, including discharge. In addition, the Board found that the employers in *Gissel* and *Heck's* had wrongfully discharged employees for engaging in union activities in violation of § 8 (a)(3). And, because the employers had rejected the card-based bargaining demand in bad faith, the Board found that all three had refused to recognize the unions in violation of § 8 (a)(5).

Only in *General Steel* was there any objection by an employer to the validity of the cards and the manner in which they had been solicited, and the doubt raised by the evidence was resolved in the following manner. The customary approach of the Board in dealing with allegations of misrepresentation by the union and misunderstanding by the employees of the purpose for which the cards were being solicited has been set out in *Cumberland Shoe Corp.*, 144 N. L. R. B. 1268 (1964), and reaffirmed in *Levi Strauss & Co.*, 172 N. L. R. B. No. 57, 68 L. R. R. M. 1338 (1968). Under the *Cumberland Shoe* doctrine, if the card itself is unambiguous (*i. e.*, states on its face that the signer authorizes the union to represent the employee for collective bargaining purposes

and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election. In *General Steel*, the trial examiner considered the allegations of misrepresentation at length and, applying the Board's customery analysis, rejected the claims with findings that were adopted by the Board and are reprinted in the margin.[5]

Consequently, the Board ordered the companies to cease and desist from their unfair labor practices, to offer reinstatement and back pay to the employees who had been discriminatorily discharged, to bargain with the Union on request, and to post the appropriate notices.

On appeal, the Court of Appeals for the Fourth Circuit, in *per curiam* opinions in each of the three cases (398 F. 2d 336, 337, 339), sustained the Board's findings as to the §§ 8 (a)(1) and (3) violations, but rejected the Board's findings that the employers' refusal to bargain violated § 8 (a)(5) and declined to enforce those portions of the Board's orders directing the respondent companies to bargain in good faith. The court based its § 8 (a)(5) rulings on its 1967 decisions raising the

[5] "Accordingly, I reject respondent's contention that if a man is told that his card will be secret, or will be shown only to the Labor Board for the purpose of obtaining election, that this is the absolute equivalent of telling him that it will be used 'only' for the purpose of obtaining an election.

"With respect to the 97 employees named in the attached Appendix B Respondent in its brief contends, in substance, that their cards should be rejected because each of these employees was told *one or more* of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face."

same fundamental issues, *Crawford Mfg. Co.* v. *NLRB*, 386 F. 2d 367 (C. A. 4th Cir. 1967), cert. denied, 390 U. S. 1028 (1968); *NLRB* v. *Logan Packing Co.*, 386 F. 2d 562 (C. A. 4th Cir. 1967); *NLRB* v. *Sehon Stevenson & Co., Inc.*, 386 F. 2d 551 (C. A. 4th Cir. 1967). The court in those cases held that the 1947 Taft-Hartley amendments to the Act, which permitted the Board to resolve representation disputes by certification under § 9 (c) only by secret ballot election, withdrew from the Board the authority to order an employer to bargain under § 8 (a)(5) on the basis of cards, in the absence of NLRB certification, unless the employer knows independently of the cards that there is in fact no representation dispute. The court held that the cards themselves were so inherently unreliable that their use gave an employer virtually an automatic, good faith claim that such a dispute existed, for which a secret election was necessary. Thus, these rulings established that a company could not be ordered to bargain unless (1) there was no question about a union's majority status (either because the employer agreed the cards were valid or had conducted his own poll so indicating), or (2) the employer's §§ 8 (a)(1) and (3) unfair labor practices committed during the representation campaign were so extensive and pervasive that a bargaining order was the only available Board remedy irrespective of a card majority.

Thus based on the earlier decisions, the court's reasoning in these cases was brief, as indicated by the representative holding in *Heck's:*

> "We have recently discussed the unreliability of the cards, in the usual case, in determining whether or not a union has attained a majority status and have concluded that an employer is justified in entertaining a good faith doubt of the union's claims when confronted with a demand for recognition

based solely upon authorization cards. We have also noted that the National Labor Relations Act after the Taft-Hartley amendments provides for an election as the sole basis of a certification and restricts the Board to the use of secret ballots for the resolution of representation questions. This is not one of those extraordinary cases in which a bargaining order might be an appropriate remedy for pervasive violations of § 8 (a)(1). It is controlled by our recent decisions and their reasoning. . . . There was not substantial evidence to support the findings of the Board that Heck's, Inc., had no good faith doubt of the unions' claims of majorities." 398 F. 2d, at 338.

No. 585.

In No. 585, the factual pattern was quite similar. The petitioner, a producer of mill rolls, wire, and related products at two plants in Holyoke, Massachusetts, was shut down for some three months in 1952 as the result of a strike over contract negotiations with the American Wire Weavers Protective Association (AWWPA), the representative of petitioner's journeymen and apprentice wire weavers from 1933 to 1952. The Company subsequently reopened without a union contract, and its employees remained unrepresented through 1964, when the Company was acquired by an Ohio corporation, with the Company's former president continuing as head of the Holyoke, Massachusetts, division. In July 1965, the International Brotherhood of Teamsters, Local Union No. 404, began an organizing campaign among petitioner's Holyoke employees and by the end of the summer had obtained authorization cards from 11 of the Company's 14 journeymen wire weavers choosing the Union as their bargaining agent. On September 20, the Union notified petitioner that it represented a majority of its wire weavers, requested that the Company bargain with

it, and offered to submit the signed cards to a neutral third party for authentication. After petitioner's president declined the Union's request a week later, claiming, *inter alia*, that he had a good faith doubt of majority status because of the cards' inherent unreliability, the Union petitioned, on November 8, for an election that was ultimately set for December 8.

When petitioner's president first learned of the Union's drive in July, he talked with all of his employees in an effort to dissuade them from joining a union. He particularly emphasized the results of the long 1952 strike, which he claimed "almost put our company out of business," and expressed worry that the employees were forgetting the "lessons of the past." He emphasized secondly that the Company was still on "thin ice" financially, that the Union's "only weapon is to strike," and that a strike "could lead to closing the plant," since the parent company had ample manufacturing facilities elsewhere. He noted thirdly that because of their age and the limited usefulness of their skills outside their craft, the employees might not be able to find re-employment if they lost their jobs as a result of a strike. Finally, he warned those who did not believe that the plant could go out of business to "look around Holyoke and see a lot of them out of business." The president sent letters to the same effect to the employees in early November, emphasizing that the parent company had no reason to stay in Massachusetts if profits went down.

During the two or three weeks immediately prior to the election on December 9, the president sent the employees a pamphlet captioned "Do you want another 13-week strike?" stating, *inter alia*, that "We have no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike. We have no hopes that the Teamsters Union bosses will not call a strike. . . . The Teamsters Union is a strike happy outfit." Similar communications followed in late

November, including one stressing the Teamsters' "hoodlum control." Two days before the election, the Company sent out another pamphlet that was entitled "Let's Look at the Record," and that purported to be an obituary of companies in the Holyoke-Springfield, Massachusetts, area that had allegedly gone out of business because of union demands, eliminating some 3,500 jobs; the first page carried a large cartoon showing the preparation of a grave for the Sinclair Company and other headstones containing the names of other plants allegedly victimized by the unions. Finally, on the day before the election, the president made another personal appeal to his employees to reject the Union. He repeated that the Company's financial condition was precarious; that a possible strike would jeopardize the continued operation of the plant; and that age and lack of education would make re-employment difficult. The Union lost the election 7–6, and then filed both objections to the election and unfair labor practice charges which were consolidated for hearing before the trial examiner.

The Board agreed with the trial examiner that the president's communications with his employees, when considered as a whole, "reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers." Thus, the Board found that under the "totality of the circumstances" petitioner's activities constituted a violation of § 8 (a)(1) of the Act. The Board further agreed with the trial examiner that petitioner's activities, because they "also interfered with the exercise of a free and untrammeled choice in the election," and "tended to foreclose the possibility" of holding a fair election, required that the election be set aside. The Board also found that the Union had a valid card majority (the unambiguous cards, see n. 4,

supra, went unchallenged) when it demanded recognition initially and that the Company declined recognition, not because of a good faith doubt as to the majority status, but, as the § 8 (a)(1) violations indicated, in order to gain time to dissipate that status—in violation of § 8 (a)(5). Consequently, the Board set the election aside, entered a cease-and-desist order, and ordered the Company to bargain on request.

On appeal, the Court of Appeals for the First Circuit sustained the Board's findings and conclusions and enforced its order in full. 397 F. 2d 157. The court rejected the Company's proposition that the inherent unreliability of authorization cards entitled an employer automatically to insist on an election, noting that the representative status of a union may be shown by means other than an election; the court thus reaffirmed its stance among those circuits disavowing the Fourth Circuit's approach to authorization cards.[6] Because of the

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[6] See, *e. g.*, *Joy Silk Mills, Inc.* v. *NLRB*, 87 U. S. App. D. C. 360, 185 F. 2d 732 (C. A. D. C. Cir.), cert. denied, 341 U. S. 914 (1951); *NLRB* v. *Gotham Shoe Mfg. Co., Inc.*, 359 F. 2d 684 (C. A. 2d Cir. 1964); *NLRB* v. *Quality Markets, Inc.*, 387 F. 2d 20 (C. A. 3d Cir. 1967); *NLRB* v. *Phil-Modes, Inc.*, 396 F. 2d 131 (C. A. 5th Cir. 1968); *Atlas Engine Works, Inc.* v. *NLRB*, 396 F. 2d 775 (C. A. 6th Cir. 1968), petition for certiorari pending; *NLRB* v. *Clark Products, Inc.*, 385 F. 2d 396 (C. A. 7th Cir. 1967); *NLRB* v. *Ralph Printing and Lithographing Co.*, 379 F. 2d 687 (C. A. 8th Cir. 1967); *NLRB* v. *Luisi Truck Lines*, 384 F. 2d 842 (C. A. 9th Cir. 1967); *Furr's, Inc.* v. *NLRB*, 381 F. 2d 562 (C. A. 10th Cir. 1967), cert. denied, 389 U. S. 840 (1968).

In addition to the First Circuit below, four courts of appeals have subsequently considered the Fourth Circuit's view of the cards and specifically rejected it. *NLRB* v. *United Mineral and Chemical Corp.*, 391 F. 2d 829, 836, n. 10 (C. A. 2d Cir. 1968); *NLRB* v. *Goodyear Tire and Rubber Co.*, 394 F. 2d 711, 712–713 (C. A. 5th Cir. 1968); *NLRB* v. *Atco Surgical-Supports*, 394 F. 2d 659, 660 (C. A. 6th Cir. 1968); *NLRB* v. *Ozark Motor Lines*, — F. 2d — (C. A. 8th Cir. 1969).

conflict among the circuits on the card issues and because of the alleged conflict between First Amendment freedoms and the restrictions placed on employer speech by § 8 (a)(1) in *Sinclair*, No. 585, we granted certiorari to consider both questions. 393 U. S. 997 (1968). For reasons given below, we reverse the decisions of the Court of Appeals for the Fourth Circuit and affirm the ruling of the Court of Appeals for the First Circuit.

II.

In urging us to reverse the Fourth Circuit and to affirm the First Circuit, the National Labor Relations Board contends that we should approve its interpretation and administration of the duties and obligations imposed by the Act in authorization card cases. The Board argues (1) that unions have never been limited under § 9 (c) of either the Wagner Act or the 1947 amendments to certified elections as the sole route to attaining representative status. Unions may, the Board contends, impose a duty to bargain on the employer under § 8 (a)(5) by reliance on other evidence of majority employee support, such as authorization cards. Contrary to the Fourth Circuit's holding, the Board asserts, the 1947 amendments did not eliminate the alternative routes to majority status. The Board contends (2) that the cards themselves, when solicited in accordance with Board standards which adequately insure against union misrepresentation, are sufficiently reliable indicators of employee desires to support a bargaining order against an employer who refuses to recognize a card majority in violation of § 8 (a)(5). The Board argues (3) that a bargaining order is the appropriate remedy for the § 8 (a)(5) violation, where the employer commits other unfair labor practices that tend to undermine union support and render a fair election improbable.

Relying on these three assertions, the Board asks us to approve its current practice, which is briefly as follows. When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, unless he has knowledge independently of the cards that the union has a majority, decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under § 9 (c)(1)(B). If, however, the employer commits independent and substantial unfair labor practices disruptive of election conditions, the Board may withhold the election or set it aside, and issue instead a bargaining order as a remedy for the various violations. A bargaining order will not issue, of course, if the union obtained the cards through misrepresentation or coercion or if the employer's unfair labor practices are unrelated generally to the representation campaign. Conversely, the employers in these cases urge us to adopt the views of the Fourth Circuit.

There is more at issue in these cases than the dispute outlined above between the Board and the four employers, however, for the Union, petitioner in No. 691, argues that we should accord a far greater role to cards in the bargaining area than the Board itself seeks in this litigation. In order to understand the differences between the Union and the Board, it is necessary to trace the evolution of the Board's approach to authorization cards from its early practice to the position it takes on oral argument before this Court. Such an analysis requires viewing the Board's treatment of authorization cards in three separate phases: (1) under the *Joy Silk* doctrine, (2) under the rules of the *Aaron Brothers* case, and (3) under the approach announced at oral argument before this Court.

The traditional approach utilized by the Board for many years has been known as the *Joy Silk* doctrine. *Joy Silk Mills, Inc.* v. *NLRB*, 85 N. L. R. B. 1263 (1949), enforced 87 U. S. App. D. C. 360, 185 F. 2d 732 (C. A. D. C. Cir. 1950). Under that rule, an employer could lawfully refuse to bargain with a union claiming representative status through possession of authorization cards if he had a "good faith doubt" as to the union's majority status; instead of bargaining, he could insist that the union seek an election in order to test out his doubts. The Board, then, could find a lack of good faith doubt and enter a bargaining order in one of two ways. It could find (1) that the employer's independent unfair labor practices were evidence of bad faith, showing that the employer was seeking time to dissipate the union's majority. Or the Board could find (2) that the employer had come forward with no reasons for entertaining any doubt and therefore that he must have rejected the bargaining demand in bad faith. An example of the second category was *Snow & Sons*, 134 N. L. R. B. 709 (1961), enforced 308 F. 2d 687 (C. A. 9th Cir. 1962), where the employer reneged on his agreement to bargain after a third party checked the validity of the card signatures and insisted on an election because he doubted that the employees truly desired representation. The Board entered a bargaining order with very broad language to the effect that an employer could not refuse a bargaining demand and seek an election instead "without valid ground therefor," 134 N. L. R. B. at 710–711. See also *Dixon Ford Shoe Co., Inc.*, 150 N. L. R. B. 861 (1965); *Kellogg Mills*, 147 N. L. R. B. 342, 346 (1964), enforced 347 F. 2d 219 (C. A. 9th Cir. 1965).

The leading case codifying modifications to the *Joy Silk* doctrine was *Aaron Brothers*, 158 N. L. R. B. 1077 (1966). There the Board made it clear that it had

shifted the burden to the General Counsel to show bad faith and that an employer "will not be held to have violated his bargaining obligation . . . simply because he refuses to rely on cards, rather than an election, as the method for determining the union's majority." 158 N. L. R. B., at 1078. Two significant consequences were emphasized. The Board noted (1) that not every unfair labor practice would automatically result in a finding of bad faith and therefore a bargaining order; the Board implied that it would find bad faith only if the unfair labor practice was serious enough to have the tendency to dissipate the union's majority. The Board noted (2) that an employer no longer needed to come forward with reasons for rejecting a bargaining demand. The Board pointed out, however, that a bargaining order would issue if it could prove that an employer's "course of conduct" gave indications as to the employer's bad faith. As examples of such a "course of conduct," the Board cited *Snow & Sons, supra; Dixon Ford Shoe Co., Inc., supra,* and *Kellogg Mills, supra,* thereby reaffirming *John P. Serpa, Inc.,* 155 N. L. R. B. No. 12 (1965), where the Board had limited *Snow & Sons* to its facts.

Although the Board's brief before this Court generally followed the approach as set out in *Aaron Brothers, supra,* the Board announced at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether. Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct; he need give no affirmative reasons for rejecting a recognition request, and he can demand an election with a simple "no com-

ment" to the union. The Board pointed out, however, (1) that an employer could not refuse to bargain if he *knew*, through a personal poll for instance, that a majority of his employees supported the union, and (2) that an employer could not refuse recognition initially because of questions as to the appropriateness of the unit and then later claim, as an afterthought, that he doubted the union's strength.

The union argues here that an employer's right to insist on an election in the absence of unfair labor practices should be more circumscribed, and a union's right to rely on cards correspondingly more expanded, than the Board would have us rule. The union's contention is that an employer, when confronted with a card-based bargaining demand, can insist on an election only by filing the election petition himself immediately under § 9 (c)(1)(B) and not by insisting that the union file the election petition, whereby the election can be subjected to considerable delay. If the employer does not himself petition for an election, the union argues, he must recognize the union regardless of his good or bad faith and regardless of his other unfair labor practices, and should be ordered to bargain if the cards were in fact validly obtained. And if this Court should continue to utilize the good faith doubt rule, the union contends that at the least we should put the burden on the employer to make an affirmative showing of his reasons for entertaining such doubt.

Because the employers' refusal to bargain in each of these cases was accompanied in each instance by independent unfair labor practices which tend to preclude the holding of a fair election, we need not decide whether a bargaining order is ever appropriate in cases where there is no interference with the election processes.

With the union's arguments aside, the points of difference between the employers and the Board will be

considered in the following manner. The validity of the cards under the Act, their intrinsic reliability, and the appropriateness of a bargaining order as a response to violations of § 8 (a)(5) as well as §§ 8 (a)(1) and (3) will be discussed in the next section. The nature of an employer's reaction to an organizational campaign, and particularly the Board's conclusion that the employer's statements in No. 585 contained threats of reprisal and thus constituted restraint and coercion in violation of § 8 (a)(1) and not protected speech, will be covered in the final section.

III.

A.

The first issue facing us is whether a union can establish a bargaining obligation by means other than a Board election and whether the validity of alternate routes to majority status, such as cards, was affected by the 1947 Taft-Hartley amendments. The most commonly traveled[7] route for a union to obtain recognition as the exclusive bargaining representative of an unorganized group of employees is through the Board's election and certification procedures under § 9 (c) of the Act (29 U. S. C. § 159 (c) (1964 ed.)); it is also, from the Board's point of view, the preferred route.[8] A union is not

[7] In 1967, for instance, the Board conducted 8,116 elections but issued only 157 bargaining orders based on a card majority. *Levi Strauss*, 172 N. L. R. B. No. 57, 68 L. R. R. M. 1338, 1342, n. 9 (1968). See also J. Sheinkman, Recognition of Unions Through Authorization Cards, 3 Ga. L. Rev. 319 (1969). The number of card cases that year, however, represents a rather dramatic increase over previous years, from 12 such cases in 1964, 24 in 1965, and about 117 in 1966. H. L. Browne, Obligation To Bargain on Basis of Card Majority, 3 Ga. L. Rev. 334, 347 (1969).

[8] See, *e. g.*, *Aaron Brothers*, 158 N. L. R. B. 1077 (1967); cf., *General Shoe Corp.*, 77 N. L. R. B. 124 (1948). An employer, of course, may not, even if he acts in good faith, recognize a minority union, *Garment Workers' Union* v. *NLRB* and *Bernard-Altmann Corp.*, 366 U. S. 731 (1961).

limited to a Board election, however, for, in addition to § 9, the present Act provides in § 8 (a)(5) (29 U. S. C. § 158 (a)(5) (1964 ed.)), as did the Wagner Act in § 8 (5), that "it shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)." Since § 9 (a), in both the Wagner Act and the present Act, refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support."[9] Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of § 8 (a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote,[10] or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.[11]

We have consistently accepted this interpretation of the Wagner Act and the present Act, particularly as to the use of authorization cards. See, *e. g.*, *NLRB* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 339–340 (1940); *Franks*

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[9] *NLRB* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757 (C. A. 2d Cir. 1940).

[10] See, *e. g.*, *Denver Auto Dealers Assn.*, 10 N. L. R. B. 1173 (1939); *Century Mills, Inc.*, 5 N. L. R. B. 807 (1938).

[11] The right of an employer lawfully to refuse to bargain if he had a good faith doubt as to the Union's majority status, even if in fact the Union did represent a majority, was recognized early in the administration of the Act, see *NLRB* v. *Remington Rand, Inc.*, 94 F. 2d 862, 868 (C. A. 2d Cir. 1938), cert. denied, 304 U. S. 576 (1938).

Bros. Co. v. *NLRB*, 321 U. S. 702 (1943); *United Mine Workers* v. *Arkansas Flooring Co.*, 351 U. S. 62 (1956). Thus, in *United Mine Workers, supra,* we noted that a "Board election is not the only method by which an employer may satisfy itself as to the union's majority status," 351 U. S., at 72, n. 8, since § 9 (a), "which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen," 351 U. S., at 71. We therefore pointed out in that case, where the union had obtained signed authorization cards from a majority of the employees, that "[i]n the absence of any bona fide dispute[12] as to the existence of the required majority of eligible employees, the employer's denial of recognition of the union would have violated § 8 (a)(5) of the Act." 351 U. S., at 69. We see no reason to reject this approach to bargaining obligations now, and we find unpersuasive the Fourth Circuit's view that the 1947 Taft-Hartley amendments, enacted some nine years before our decision in *United Mine Workers, supra,* require us to disregard that case. Indeed, the 1947 amendments weaken rather than strengthen the position taken by the employers here and the Fourth Circuit below. An early version of the bill in the House would have amended § 8 (5) of the Wagner Act to permit the Board to find a refusal to bargain violation only where an employer had failed to bargain with a union "currently recognized by the employer or certified as such [through an election] under section 9." Section 8 (a)(5) of H. R. 3020, 80th Cong., 1st Sess. (1947). The proposed change, which would have eliminated the use of cards, was rejected in Conference (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 41 (1947)), however, and we cannot make a similar change in the Act simply because, as the employers assert, Congress did not expressly ap-

[12] See n. 11, *supra.*

prove the use of cards in rejecting the House amendment. Nor can we accept the Fourth Circuit's conclusion that the change was wrought when Congress amended § 9 (c) to make election the sole basis for *certification* by eliminating the phrase "any other suitable method to ascertain such representatives," [13] under which the Board had occasionally used cards as a certification basis. A certified union has the benefit of numerous special privileges which are not accorded unions recognized voluntarily or under a bargaining order [14] and which, Congress could determine, should not be dispensed unless a union has survived the crucible of a secret ballot election.

The employers rely finally on the addition to § 9 (c) of subparagraph (B), which allows an employer to petition for an election whenever "one or more individuals or labor organizations have presented to him a claim [15] to

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[13] Section 9 (c) of the Wagner Act had provided:

"Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify . . . the name or names of the representatives that have been designated or selected. In any such investigation, the Board . . . may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

[14] *E. g.*, protection against the filing of new election petitions by rival unions or employees seeking decertification for 12 months (§ 9 (c) (3)), protection for a reasonable period, usually one year, against any disruption of the bargaining relationship because of claims that the union no longer represents a majority (see *Brooks* v. *NLRB*, 348 U. S. 96 (1954)), protection against recognitional picketing by rival unions (§ 8 (b) (4) (C)), and freedom from the restrictions placed in work assignments disputes by § 8 (b) (4) (D), and on recognitional and organizational picketing by § 8 (b) (7).

[15] Under the Wagner Act, which did not prescribe who would file election petitions, the Board had ruled that an employer could seek an election only when two unions presented conflicting bargaining requests on the ground that if he were given the same election petition rights as the union, he could interrupt union drives by demanding an election before the union had obtained majority status. The 1947 amendments resolved the difficulty by providing

be recognized as the representative defined in section 9 (a)." That provision was not added, as the employers assert, to give them an absolute right to an election at any time; rather, it was intended, as the legislative history indicates, to allow them, after asked to bargain, to test out their doubts as to a union's majority in a secret election which they would then presumably not cause to be set aside by illegal antiunion activity.[16] We agree with the Board's assertion here that there is no suggestion that Congress intended § 9 (c)(1)(B) to relieve any employer of his § 8 (a)(5) bargaining obligation where, without good faith, he engaged in unfair labor practices disruptive of the Board's election machinery. And we agree that the policies reflected in § 9 (c)(1)(B) fully support the Board's present administration of the Act (see p. 14, *ante*); for an employer can insist on a secret ballot election, unless, in the words of the Board, he engages "in contemporaneous unfair labor practices likely to destroy the union's majority and seriously impede the election." Brief for Petitioner 36.

In short, we hold that the 1947 amendments did not restrict an employer's duty to bargain under § 8 (a)(5)

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that an employer could seek an election only after he had been requested to bargain. See H. R. Rep. No. 245, 80th Cong., 1st Sess., 35 (1947).

[16] The Senate report stated that the "present Board rules . . . discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent the employees are really not the choice of the majority." S. Rep. No. 105, 80th Cong., 1st Sess., 10–11 (1947). Senator Taft stated during the debates:

"Today an employer is faced with this situation. A man comes into his office and says, 'I represent your employees. Sign this agreement or we strike tomorrow.' . . . The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board . . . and say, 'I want an election. I want to know who is the bargaining agent for my employees.'" 93 Cong. Rec. 3954 (1947).

solely to those unions whose representative status is certified after a Board election.[17]

B.

We next consider the question whether authorization cards are such inherently unreliable indicators of employee desires that whatever the validity of other alternate routes to representative status, the cards themselves may never be used to determine a union's majority and to support an order to bargain. In this context, the employers urge us to take the step the 1947 amendments and their legislative history indicate Congress did not take, namely, to rule out completely the use of cards in the bargaining arena. Even if we do not unhesitatingly accept the Fourth Circuit's view in the matter, the employers argue, at the very least we should overrule the *Cumberland Shoe* doctrine (see p. 6, *supra*) and establish stricter controls over the solicitation of the cards by union representatives.[18]

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[17] As aptly stated in H. Lesnick, Establishment of Bargaining Rights Without an Election, 65 Mich. L. Rev. 857, 861–862 (1967):

"Cards have been used under the Act for thirty years; [this] Court has repeatedly held that certification is not the only route to representative status; and the 1947 attempt in the House-passed Hartley bill to amend section 8(a)(5) . . . was rejected by the conference committee that produced the Taft-Hartley Act. No amount of drum-beating should be permitted to overcome, without legislation, this history."

[18] In dealing with the reliability of cards, we should re-emphasize what issues we are not confronting. As pointed out above, we are not here faced with a situation where an employer, with "good" or "bad" subjective motivation, has rejected a card-based bargaining request without good reason and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to disturb the "laboratory conditions" of that election. We thus need not decide whether, absent election interference by an employer's unfair labor practices, he may obtain an election only if he petitions for one himself; whether, if he does not, he must bargain with a card majority if the Union

The objections to the use of cards voiced by the employers and the Fourth Circuit boil down to two contentions:[19] (1) that, as contrasted with the election procedure,[20] the cards cannot accurately reflect an employee's wishes, either because an employer has not had a chance to present his views and thus a chance to insure that the employee choice was an informed one, or because the choice was the result of group pressures and not individual decision made in the privacy of a voting booth; and (2) that quite apart from the election comparison, the cards are too often obtained through misrepresentation and coercion which compound the cards' inherent inferiority to the election process. Neither contention is persuasive, and each proves too much. The Board itself has recognized, and continues to do so here, that secret elections are generally the

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chooses not to seek an election; and whether, in the latter situation, he is bound by the Board's ultimate determination of the card results regardless of his earlier good-faith doubts, or whether he can still insist on a Union-sought election if he makes an affirmative showing of his positive reasons for believing there is a representation dispute. In short, a union's right to rely on cards as a freely interchangeable substitute for elections where there has been no election interference is not put in issue here; we need only decide whether the cards are reliable enough to support a bargaining order where a fair election probably could not have been held, or where an election that was held was in fact set aside.

[19] The Board's reliance on authorization cards has provoked considerable scholarly controversy. Compare criticism of Board policy, particularly its treatment of ambiguous, dual-purpose cards, in H. L. Browne, *supra*, and Comment, Union Authorization Cards, 75 Yale L. J. 805 (1966), with defense of Board practice in H. Lesnick, *supra*; M. J. Welles, The Obligation To Bargain on the Basis of a Card Majority, 3 Ga. L. Rev. 349 (1969); and Comment, Union Authorization Cards: A Reliable Basis for an NLRB Order To Bargain?, 47 Tex. L. Rev. 87 (1968).

[20] For a comparison of the card procedure and the election process, see discussion in *NLRB* v. *Logan Packing Co.*, 386 F. 2d 562, 564–566 (C. A. 4th Cir. 1967).

most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.[21] The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice. As for misrepresentation, in any specific case of alleged irregularity in the solicitation of the cards, the proper course is to apply the Board's customary standards (to be discussed more fully below) and rule there was no majority if the standards were not satisfied. It does not follow that because there are some instances of irregularity, the cards can never be used; otherwise, an employer could put off his bargaining obligation indefinitely through continuing interference with elections.

That the cards, though admittedly inferior to the election process, can adequately reflect employee sentiment when that process has been impeded, needs no extended discussion, for the employers' contentions cannot withstand close examination. The employers argue that their employees cannot make an informed choice because the card drive will be over before the employer has had a chance to present his side of the unionization issues. Normally, however, the union will inform the employer of its organization drive early in order to subject the employer to the unfair labor practice provisions of the Act; the union must be able to show the employer's awareness of the drive in order to prove that his contemporaneous conduct constituted unfair labor practices on which a bargaining order can be based if the drive is ultimately successful. See, *e. g.*, *Hunt Oil Co.*, 157 N. L. R. B. 282 (1966); *Don Swart Trucking*

[21] See nn. 7–8, *supra*.

Co., 154 N. L. R. B. 1345 (1965). Thus, in all of the cases here but the Charleston campaign in *Heck's* the employer, whether informed by the union or not, was aware of the union's organizing drive almost at the outset and began his antiunion campaign at that time; and even in the *Heck's-Charleston* case, where the recognition demand came about a week after the solicitation began, the employer was able to deliver a speech before the union obtained a majority. Further, the employers argue that without a secret ballot an employee may, in a card drive, succumb to group pressures or sign simply to get the union "off his back" and then be unable to change his mind as he would be free to do once inside a voting booth. But the same pressures are likely to be equally present in an election, for election cases arise most often with small bargaining units[22] where virtually every voter's sentiments can be carefully and individually canvassed. And no voter, of course, can change his mind after casting a ballot in an election even though he may think better of his choice shortly thereafter.

The employers' second complaint, that the cards are too often obtained through misrepresentation and coercion, must be rejected also in view of the Board's present rules for controlling card solicitation, which we view as adequate to the task where the cards involved state their purpose clearly and unambiguously on their face. We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue. And we

[22] See Comment, Union Authorization Cards: A Reliable Basis for an NLRB Order To Bargain?, *supra*, at 94 and n. 32.

would be equally blind if we did not recognize that various courts of appeals and commentators[23] have differed significantly as to the effectiveness of the Board's *Cumberland Shoe* doctrine (see p. 6, *supra*) to cure such abuses.

Thus, even where the cards are unambiguous on their face, both the Second Circuit (*NLRB* v. *S. E. Nichols Co.*, 380 F. 2d 438 (C. A. 2d Cir. 1967)) and the Fifth Circuit (*Engineers & Fabricators, Inc.* v. *NLRB*, 376 F. 2d 482 (C. A. 5th Cir. 1967)) have joined the Fourth Circuit below in rejecting the Board's rule that the cards will be counted unless the solicitor's statements amounted under the circumstances to an assurrance that the cards would be used only for an election, or for no other purpose than an election. And even those circuits which have adopted the Board's approach have criticized the Board for tending too often to apply the *Cumberland* rule too mechanically, declining occasionally to uphold the Board's application of its own rule in a given case. See, *e. g.*, *NLRB* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851 (C. A. 1st Cir. 1967); *NLRB* v. *Sandy's Stores, Inc.*, 398 F. 2d 268 (C. A. 1st Cir. 1968); *NLRB* v. *Swan Super Cleaners, Inc.*, 384 F. 2d 609 (C. A. 6th Cir. 1967); *NLRB* v. *Dan Howard Mfg. Co.*, 390 F. 2d 304 (C. A. 7th Cir. 1968); *Furrs, Inc.* v. *NLRB*, 381 F. 2d 562 (C. A. 10th Cir. 1967); *UAW* v. *NLRB*, 392 F. 2d 801 (C. A. D. C. Cir. 1967). Among those who reject the *Cumberland* rule, the Fifth Circuit agrees with the Second Circuit (see *S. E. Nichols, supra*), that a card will be vitiated if an employee was left with the impression that he would be able to resolve any lingering doubts and make a final decision in an election, and further requires that the Board probe the subjective intent of each signer, an inquiry expressly avoided by *Cumberland*.

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[23] See n. 19, *supra*.

See *NLRB* v. *Southland Paint Co.*, 394 F. 2d 717, 728, 730 (C. A. 5th Cir. 1968); *Engineers & Fabricators, Inc.* v. *NLRB*, *supra*. Where the cards are ambiguous on their face, the Fifth Circuit, joined by the Eighth Circuit (see, *e. g.*, *NLRB* v. *Peterson Bros.*, 342 F. 2d 221 (C. A. 5th Cir. 1965), and *Bauer Welding & Metal Fabricators, Inc.* v. *NLRB*, 358 F. 2d 766 (C. A. 8th Cir. 1966)), departs still further from the Board rule. And there is a conflict among those courts which otherwise follow the Board as to single-purpose cards (compare *NLRB* v. *Lenz Co.*, 396 F. 2d 905, 908 (C. A. 6th Cir. 1968), with *NLRB* v. *C. J. Glasgow Co.*, 356 F. 2d 476, 478 (C. A. 7th Cir. 1966)).

We need make no decision as to the conflicting approaches used with regard to dual-purpose cards, for in each of the five organization campaigns in the four cases before us the cards used were single-purpose cards, stating clearly and unambiguously on their face that the signer designated the union as his representative. And even the view forcefully voiced by the Fourth Circuit below that unambiguous cards as well present too many opportunities for misrepresentation comes before us somewhat weakened in view of the fact that there were no allegations of irregularities in four of those five campaigns (*Gissel*, the two *Heck's* campaigns,[24] and *Sinclair*). Only in *General Steel* did the employer challenge the cards on the basis of misrepresentations. There, the trial examiner, after hearing testimony from over 100 employees and applying the traditional Board approach (see n. 5, *supra*), concluded that "all of these employees not only intended, but were fully aware that they were designating the union as their representative." Thus,

[24] In the Charleston campaign in *Heck's*, the employees handled the card drive themselves from beginning to end, contacting the union, obtaining the blank authorization cards, and soliciting their fellow employees on that basis; no union agents were involved in the card signing.

the sole question before us, raised in only one of the four cases here, is whether the *Cumberland Shoe* doctrine is an adequate rule under the Act for assuring employee free choice.

In resolving the conflict among the circuits in favor of approving the Board's *Cumberland* rule, we think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election. Elections have been, after all, and will continue to be, held in the vast majority of cases; the union will still have to have the signatures of 30% [25] of the employees when an employer rejects a bargaining demand and insists that the union seek an election. We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else. In addition to approving the use of cards, of course, Congress has expressly authorized reliance on employee signatures alone in other areas of labor relations, even where criminal sanctions hang in the balance,[26] and we should not

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[25] See 1969 CCH Guidebook to Labor Relations § 402.4.

[26] Criminal sanctions are imposed by § 302 (29 U. S. C. § 186) which makes it unlawful for an employer to pay to and for a union representative to receive "any money or other thing of value." Section 302 (c)(4) (29 U. S. C. § 186 (c)(4)) exempts payments by employers to union representatives of union dues, however, where an employee has executed a "written assignment" of the dues, *i. e.* a check-off authorization. Signatures are also relied on in § 9 (c)(1)(A) (29 U. S. C. § 159), which provides for Board processing of representation and decertification petitions when each

act hastily in disregarding congressional judgments that employees can be counted on to take responsibility for their acts.

We agree, however, with the Board's own warnings in *Levi Strauss*, 172 N. L. R. B. No. 57, 68 L. R. R. M. 1338, 1341, and n. 7 (1968), that in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the *Cumberland* rule.[27] We also accept the observation that employees are more likely than not, many months after a card drive and in

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is supported by a "substantial number of employees" (the basis for the 30% signature requirement, see n. 25, *supra*), and in § 9 (e) which specifically provides for 30% of the signatures in the bargaining unit to empower the Board to hold a union shop deauthorization election.

[27] In explaining and reaffirming the *Cumberland Shoe* doctrine in the context of unambiguous cards, the Board stated:

"Thus the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides in our view *insufficient* basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation. A different situation is presented, of course, where union organizers solicit cards on the explicit or indirectly expressed representation that they will use such cards *only* for an election and subsequently seek to use them for a different purpose . . . ."

The Board stated further in a footnote:

"The foregoing does not of course imply that a finding of misrepresentation is confined to situations where employees are expressly told in *haec verba* that the 'sole' or 'only' purpose of the cards is to obtain an election. The Board has never suggested such a mechanistic application of the foregoing principles, as some have contended. The Board looks to substance rather than to form. It is not the use or nonuse of certain key or 'magic' words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election." 172 N. L. R. B. No. 57, 68 L. R. R. M. 1338, 1341, and n. 7.

response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8 (a)(1).[28] We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry. We nevertheless feel that the trial examiner's findings in *General Steel* (see n. 5, *supra*) represent the limits of the *Cumberland* rule's application. We emphasize that the Board should be careful to guard against an approach any more rigid than that in *General Steel*. And we reiterate that nothing we say here indicates our approval of the *Cumberland Shoe* rule when applied to ambiguous, dual-purpose cards.

The employers argue as a final reason for rejecting the use of the cards that they are faced with a Hobson's choice[29] under current Board rules and will almost inevitably come out the loser. They contend that if they do not make an immediate, personal investigation into possible solicitation irregularities to determine whether in fact the union represents an uncoerced majority, they will have unlawfully refused to bargain for failure to have a good faith doubt of the union's majority; and if they do make such an investigation, their efforts at polling and interrogation will constitute an unfair labor practice in violation of § 8 (a)(1) and they will again be ordered to bargain. As we have pointed out, however, an employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status. See

[28] See J. Sheinkman, *supra*, at 332–333.

[29] See Judge Brown's "Scylla and Charybdis" analogy in *NLRB* v. *Dan River Mills*, 274 F. 2d 381, 388 (C. A. 5th Cir. 1957).

Aaron Brothers, 158 N. L. R. B. 1077, 1078. If he does make an investigation, the Board's recent cases indicate that reasonable polling in this regard will not always be termed violative of § 8 (a)(1) if conducted in accordance with the requirements set out in *Struksnes Construction Co.*, 165 N. L. R. B. No. 102 (1967). And even if an employer's limited interrogation is found violative of the Act, it might not be serious enough to call for a bargaining order. See *Aaron Brothers, supra; Hammond & Irving, Inc.*, 154 N. L. R. B. No. 84 (1965). As noted above, the Board has emphasized that not "any employer conduct found violative of section 8 (a)(1) of the Act, regardless of its nature or gravity, will necessarily support a refusal-to-bargain finding," *Aaron Brothers, supra*, at 1079.

C.

Remaining before us is the propriety of a bargaining order as a remedy for a § 8 (a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside. We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See *NLRB* v. *Katz*, 369 U. S. 736, 748, n. 16 (1962); *NLRB* v. *P. Lorillard Co.*, 314 U. S. 512 (1942). And we have held that the Board has the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *Franks Bros. Co.* v. *NLRB*, 321 U. S. 702 (1943). We see no reason now to withdraw this authority from the Board. If the Board could enter only a cease-and-desist order and direct an election

or a rerun, it would in effect be rewarding the employer and allowing him "to profit from [his] own wrongful refusal to bargain," *Franks Bros., supra,* at 704, while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain;[30] and any election held under these circumstances would not be likely to demonstrate the employees' true, undistorted desires.[31]

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[30] The Board indicates here that its records show that in the period between January and June 1968, the median time between the filing of an unfair labor practice charge and a Board decision in a contested case was 388 days. But the employer can do more than just put off his bargaining obligation by seeking to slow down the Board's administrative processes. He can also affect the outcome of a rerun election by delaying tactics, for figures show that the longer the time between a tainted election and a rerun, the lesser are the union's chances of reversing the outcome of the first election. See n. 31, *infra.*

[31] A study of 20,153 elections held between 1960 and 1962 shows that in over two-thirds of the cases, the party who caused the election to be set aside won in the rerun election. See D. Pollitt, NLRB Re-Run Elections: A Study, 41 N. C. L. Rev. 209, 212 (1963). The study shows further that certain unfair labor practices are more effective to destroy election conditions for a longer period of time than others. For instance, in cases involving threats to close or transfer plant operations, the union won the rerun only 29% of the time, while threats to eliminate benefits or refuse to deal with the union if elected seemed less irremediable with the union winning the rerun 75% of the time. *Id.,* at 215–216. Finally, time appears to be a factor. The figures suggest that if a rerun is held too soon after the election before the effects of the unfair labor practices have worn off, or too long after the election when interest in the union may have waned, the chances for a changed result occurring are not as good as they are if the rerun is held sometime in between those periods. Thus, the study showed that if the rerun is held within 30 days of the election or over nine months after, the chances that a different result will occur are only one in five; when the rerun is held within 30–60 days after the election, the chances for a changed result are two in five.

The employers argue that the Board has ample remedies, over and above the cease-and-desist order, to control employer misconduct. The Board can, they assert, direct the companies to mail notices to employees, to read notices to employees during plant time and to give the union access to employees during working time at the plant, or it can seek a court injunctive order under § 10 (j) (29 U. S. C. § 160 (j) (1964 ed.)) as a last resort. In view of the Board's power, they conclude, the bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' § 7 rights solely for the purpose of punishing or restraining an employer. Such an argument ignores that a bargaining order is designed as much to remedy past election damage [32] as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and purhaps the only fair way to effectuate employee rights is to re-establish the conditions as they

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[32] The employers argue that the Fourth Circuit correctly observed that, "in the great majority of cases, a cease and desist order with the posting of appropriate notices will eliminate any undue influences upon employees voting in the security of anonymity." *NLRB* v. *Logan Packing Co., supra,* at 570. It is for the Board and not the courts, however, to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10 (c) of the Act (29 U. S. C. § 160 (c) (1964 ed.)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. See *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U. S. 203 (1964). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." *Consolo* v. *FMC,* 383 U. S. 607, 621 (1966).

existed before the employer's unlawful campaign.[33] There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a decertification petition. For, as we pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may, . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." *Frank Bros., supra,* at 705–706.

Before considering whether the bargaining orders were appropriately entered in these cases, we should summarize the factors that go into such a determination. Despite our reversal of the Fourth Circuit below in Nos. 573 and 691 on all major issues, the actual area of disagreement between our position here and that of the

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[33] It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. See Lesnick, *supra,* at 862. Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." D. Bok, The Regulation of Campaign Tactics in Representative Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 135 (1964).

Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." *NLRB* v. *Logan Packing Co.*, 386 F. 2d 562, 570 (C. A. 4th Cir. 1967); see also *NLRB* v. *Heck's, supra,* 398 F. 2d, at 338. The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8 (a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices. See, *e. g., United Steelworkers of America* v. *NLRB,* 376 F. 2d 770 (C. A. D. C. Cir. 1967); *J. C. Penney Co., Inc.* v. *NLRB,* 384 F. 2d 479, 485–486 (C. A. 10th Cir. 1967).

The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehaviour. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms

of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue (see n. 32, *supra*).

We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order. There is, the Board says, no *per se* rule that the commission of any unfair practice will automatically result in a § 8 (a)(5) violation and the issuance of an order to bargain. See *Aaron Brothers*, *supra*.

With these considerations in mind, we turn to an examination of the orders in these cases. In *Sinclair*, No. 585, the Board made a finding, left undisturbed by the First Circuit, that the employer's threats of reprisal were so coercive that, even in the absence of a § 8 (a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats.[34] The Board therefore did not have to make the determination called for in the intermediate situation above that the risks that a fair rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards. The employer argues, however, that his communications to his employees were

[34] Under the doctrine of *Bernel Foam Products Co.*, 146 N. L. R. B. 1277 (1964), there is nothing inconsistent in the Union filing an election petition and thereby agreeing that a question of representation exists, and then filing a refusal-to-bargain charge after the election is lost because of the employer's unfair labor practices.

protected by the First Amendment and § 8 (c) of the Act (29 U. S. C. § 158 (c) (1964 ed.)), whatever the effect of those communications on the union's majority or the Board's ability to ensure a fair election; it is to that contention that we shall direct our final attention in the next section.

In the three cases in Nos. 573 and 691 from the Fourth Circuit, on the other hand, the Board did not make a similar finding that a bargaining order would have been necessary in the absence of an unlawful refusal to bargain. Nor did it make a finding that, even though traditional remedies might be able to ensure a fair election, there was insufficient indication that an election (or a rerun in *General Steel*) would definitely be a more reliable test of the employees' desires than the card count taken before the unfair labor practices occurred. The employees argue that such findings would not be warranted, and the court below ruled in *General Steel* that available remedies short of a bargaining order could guarantee a fair election. 398 F. 2d, at 340, n. 3. We think it possible that the requisite findings were implicit in the Board's decisions below to issue bargaining orders (and to set aside the election in *General Steel*); and we think it clearly inappropriate for the court below to make any contrary finding on its own (see n. 32, *supra*). Because the Board's current practice at the time required it to phrase its findings in terms of an employer's good- or bad-faith doubts (see Part II, *supra*), however, the precise analysis the Board now puts forth was not employed below, and we therefore remand these cases to the Board for proper findings.

IV.

We consider finally petitioner Sinclair's First Amendment challenge to the holding of the Board and the Court of Appeals for the First Circuit. At the outset

we note that the question raised here most often arises in the context of a nascent union organizational drive, where employers must be careful in waging their anti-union campaign. As to conduct generally, the above noted gradations of unfair labor practices, with their varying consequences, create certain hazards for employers when they seek to estimate or resist unionization efforts. But so long as the differences involve conduct easily avoided, such as discharge, surveillance, and coercive interrogation, we do not think that employers can complain that the distinctions are unreasonably difficult to follow. Where an employer's antiunion efforts consist of speech alone, however, the difficulties raised are not so easily resolved. The Board has eliminated some of the problem areas by no longer requiring an employer to show affirmative reasons for insisting on an election and by permitting him to make reasonable inquiries. We do not decide, of course, whether these allowances are mandatory. But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, § 8 (c) (29 U. S. C. § 158 (c) (1964 ed.)) merely implements the First Amendment by requiring that the expresssion of "any views, argument or opinion" shall not be "evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of benefit" in violation of § 8 (a)(1). Section 8 (a)(1), in turn, prohibits interference, restraint or coercion of employees in the exercise of their right to self-organization.

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8 (a)(1) and the proviso to § 8 (c). And

any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk. Compare *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

Within this framework, we must reject the Company's challenge to the decision below and the findings of the Board on which it was based. The standards used below for evaluating the impact of an employer's statements is not seriously questioned by petitioner and we see no need to tamper with it here. Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take

action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." 397 F. 2d, at 160. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *NLRB* v. *River Togs, Inc.*, 382 F. 2d 198, 202 (C. A. 2d Cir. 1967).

Equally valid was the finding by the court and the Board that petitioner's statements and communications were not cast as a prediction of "demonstrable economic consequences," 397 F. 2d, at 160, but rather as a threat of retaliatory action. The Board found that petitioner's speeches, pamphlets, leaflets, and letters conveyed the following message: that the company was in a precarious financial condition; that the "strike-happy" union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shut-down, as the past history of labor relations in the area indicated; and that the employees in such a case would have great difficulty finding employment elsewhere. In carrying out its duty to focus on the question "what did the speaker intend and the listener understand," Cox, Law and the National Labor Policy 44 (1960), the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably

cause the plant to close but to threaten to throw employees out of work regardless of the economic realities. In this connection, we need go no further than to point out (1) that petitioner had no support for his basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and that he admitted at the hearing that he had no basis for attributing other plant closings in the area to unionism; and (2) that the Board has often found that employees, who are particularly sensitive to rumors of plant closings,[35] take such hints as coercive threats rather than honest forecasts.[36]

Petitioner argues that the line between so-called permitted predictions and proscribed threats is too vague to stand up under traditional First Amendment analysis and that the Board's discretion to curtail free speech rights is correspondingly too uncontrolled. It is true that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship, see *NLRB* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479 (1941). But an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "'brinkmanship'" when it becomes all too easy to "overstep and tumble into the brink," *Wassau Steel Corp.* v. *NLRB*, 377 F. 2d 369, 372 (C. A. 7th Cir. 1967). At the least he can

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[35] See D. Bok, *supra*, at 77; n. 31, *supra*.

[36] See, *e. g.*, *Kolmar Laboratories, Inc.*, 159 N. L. R. B. 805, 807–810, and cases (relied on by the trial examiner here) cited in n. 3, enforced, 387 F. 2d 833 (C. A. 7th Cir. 1967); *Surprenant Mfg. Co.*, 144 N. L. R. B. 507, 510–511, enforced, 341 F. 2d 756, 761 (C. A. 6th Cir. 1965).

avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

For the foregoing reasons, we affirm the judgment of the Court of Appeals for the First Circuit in No. 585, and we reverse the judgments of the Court of Appeals for the Fourth Circuit in Nos. 573 and 691 insofar as they decline enforcement of the Board's orders to bargain and remand those cases to that court with directions to remand to the Board for further proceedings in conformity with this opinion.

It is so ordered.